JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103 OF 1994

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A

BETWEEN	**BARNETT LIMITED**	**DEFENDANT/APPELLANT**
A N D	**EMANUEL OLASEMO**	**PLAINTIFF/RESPONDENT**

Winston John Vassell, instructed by Dunn, Cox, Orrett & Ashenheim for the Appellant.

Maurice Frankson, instructed by Gaynair & Fraser for the Respondent.

June 12-14 and July 17, 1995

RATTRAY P.:

I have read the judgments of Downer J.A. and Wolfe J.A. and agree with their reasoning which led to our conclusion.

Langrin J. had before him the four documents which called for interpretation. He should have proceeded upon this exercise which would have resulted in a finding that no contract had come into being with respect to the sale of the

lots. He therefore should have refused the application for an Interlocutory Injunction.

The Affidavits relied upon by the respondent Mr. Olasemo to create an estoppel formed no part of the pleadings and made allegations which have no relevance to the Suit as pleaded. No facts could emerge from these Affidavits for consideration as to whether a contract existed or not.

Consequently, we allowed the appeal and set aside the Order of Langrin J. granting the Interlocutory Injunction. We further ordered that Caveat No. 738671 lodged by the respondent be removed by the Registrar of Titles and that an Enquiry be made by a Judge of the Supreme Court as to damages, if any, arising out of the undertaking given by the respondent on the grant of the Interlocutory Injunction. We awarded the costs of the appeal and the proceedings in the Court below to the appellant.

DOWNER J A

In this interlocutory appeal Barnett Limited, the appellant, has contended that they made no offer to Emanuel Olasemo, the respondent, but that even if they did he responded with a counter- offer. Therefore, they submitted on either view that there was no contract for sale of thirty-two lots comprising part of the Fairfield estate. On the other hand, Olasemo has contended that there was an offer which he accepted. So he averred that a contract was formed and he seeks the equitable remedy of specific performance. In the interim he seeks to have the interlocutory injunction awarded him by Langrin, J. upheld by this court. Langrin, J. had decided that Olasemo had an arguable case and awarded him injunctive relief pending the resolution of the issues at the trial.

Barnett's approach was correct. Negotiations commenced between Barnett and Olasemo and Barnett terminated the negotiations and returned the sum of $1M which Olasemo had forwarded to them as part payment. Since there was no offer, there could have been no acceptance, it followed there could have been no contract. In those circumstances, it was an error on the part of Langrin, J. to have acceded to Olasemo's request for injunctive relief. The case ought to have been disposed of on a preliminary point of law as disclosed by the pleadings. This was the course taken at the end of this hearing when Mr Frankson moved this court for leave to appeal to the Privy Council pursuant to section 110 (2)(a) of the Constitution. That section reads:

> "**110.**-(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public

> importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; " (Emphasis supplied)

That motion was adjourned before (Rattray P, Downer & Patterson JJA) pending the reasons for judgment. At the resumed hearing, consideration will have to be given to his prayer as there may be a good ground to grant leave to appeal in some instances where the decision in an interlocutory appeal will be conclusive of the action. See **Garden Cottege Foods v M M B** [1983] 2 All ER 770 at p. 773 (g). It is now necessary to set out the reasons which justified the dismissal of the appeal.

The negotiations from Barnett's standpoint

Here is the opening letter from Barnett Limited to Olasemo of 24th September, 1992:

> "Mr. Emanuel Olasemo
> 16 East Street
> 2nd Floor
> Montego Bay
>
> Dear Mr. Olasemo,
>
> Further to our meeting this morning, 24th September, 1992, we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of $1.2 Million. This means that you be given blank transfers and will be responsible for all transfer costs when the lots are sold to their eventual purchasers.
>
> With regard to the basic school situated behind the church, you will be responsible for dealing with them in whatever fashion the two of you find appropriate, however, further discussion with my father concerning their tenancy is recommended.
>
> Yours sincerely,
>
> MARK KERR-JARRETT
> MANAGER."

Two points are to be noted. Blank transfers were to be given to Olasemo who intended to sell the lots to his clients. These transfers would, of course, be pursuant to section 88 of the Registration of Titles Act and Form A of the Fourth Schedule of the Act. So although the contract was to be with Olasemo, it was possible that direct transfers could be made by Barnett Ltd to his clients by him. What was contemplated suggests a tax efficient scheme as regards transfer tax. Section 10 (1)(2)(3) of the Transfer Tax Act seems to have been in contemplation. Uncertain was the meaning of $1.2M, as the net price to be paid to the company. How was this net price determined? The authorities suggest that this stage is best described as the commencement of negotiations.

In ***Sandra Atlas-Bass & Robert S. Zabelle v. Avalon Investments Ltd.*** S.C.C.A. No. 8/91 delivered 8th July 1991 I reviewed the authorities and it is appropriate to reiterate what was said at page 24:

> "Harvey v Facey (1893) A.C. 552 a Jamaican case suggests the appropriate analysis. Here is how it is summarised in Cheshire and Fifoot, The Law of Contract 7th edition at page 30 -
>
> 'Thus in **Harvey v Facey**
>
> > "the plaintiffs telegraphed to the defendants, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' The defendants telegraphed in reply, 'Lowest price for Bumper Hall Pen, L900 .' The plaintiffs then telegraphed, 'We agree to buy Bumper Hall Pen for L900 asked by you. Please send us your title-deeds.' The rest was silence.
> >
> > It was held by the Judicial Committee of the Privy Council that there was no contract. The second telegram was not an offer, but only an indication of the minimum price if the

> defendants ultimately resolved to sell, and the third telegram was therefore not an acceptance."

On the same page there was a precis of Clifton v Palumbo (1947) 2 All E.R. 797 which reads thus -

> "So too, in Clifton v Palumbo, the plaintiff and the defendant were negotiating for the sale of a large, scattered estate. The plaintiff wrote to the defendant:-
>
> > 'I...am prepared to offer you or your nominee my Lytham estate for L600,000...I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of completion.'

The Court of Appeal held that this letter was not a definite offer to sell, but a preliminary statement as to price, which especially in a transaction of such magnitude was but one of the many questions to be considered. In the words of LORD GREENE -

> "There is nothing in the world to prevent an owner of an estate of this kind contracting to sell it to a purchaser, who is prepared to spend so large a sum of money, on terms written out on a half sheet of notepaper of the most informal description and even, if he likes, on unfavourable conditions. But I think it is legitimate, in approaching construction of a document of this kind, containing phrases and expressions of doubtful significance, to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description couched in such terms, is

> remote. If they have done it, they have done it, however unwise and however unbusinesslike it may be. The question is, Have they done it?"

There were also conversations between the parties, which was followed by a letter and a draft agreement of 8th October, 1992. Here is the letter:

> "Dear Mr. Olasemo,
>
> Re: Proposed Sale - Granville subdivision;
> Volume 1126 Folios 717-748
>
> Enclosed is a draft Agreement for Sale regarding the captioned matter for your perusal and comments.
>
> Yours sincerely,
> ..."

The words "draft agreement" and the request for comments make it plain that there was no definite offer capable of acceptance and when the document entitled "Agreement for Sale and Purchase" is examined it bears out the contention that there was no definite offer. The reality was that negotiations continued.

The terms of the proposals provide further evidence of the lack of precision at that stage of the negotiations. There is no date proposed when the contract would commence. The purchaser was Emanuel Olasemo so we would expect him to reply to this draft. The price was stated to be $1,200.000. There is no qualification on this part of the proposal that it was to be a net price.

The third clause of the draft is noteworthy and it is best to set it out:

> "3. HOW PAYABLE: A deposit of One Million Dollars shall be paid forthwith on the execution hereon by the Vendor. The balance of the purchase price shall be paid 7 days after the Vendor notifies the Purchaser that the said

> Certificates of Title are available for delivery to the Purchaser with a transfer of each lot (having [leaving?] the name of the Purchaser and the consideration for the transfer for the Purchaser to complete at his discretion)."

It was affirmed in ***Workers Trust & Merchant Bank Ltd. v. DoJap Investments Ltd.***, Privy Council Appeal 41/91 delivered 22nd February 1993, that the maximum deposit as a matter of law is 10% of the purchase price. The Privy Council recognised that a departure permitting a deposit of up to 17.5% is permissible because of the incidence of the Transfer Tax. So having regard to the purchase price $1M could not be the deposit as a matter of law. It must be regarded as part payment.

Also noteworthy was that on payment of the balance of the purchase price provision was made for transfers to be made to third parties, who would be purchasers from Olasemo and that the price at which those transfers would take place would be in Olasemo's discretion. Since there is a proposal for blank transfers, then presumably Olasemo would be in charge when he received the blank transfers. Another feature to clause 3, was that the blank transfers enabled Olasemo to make a direct transfer from Barnett Ltd to the ultimate purchaser although he did not nominate those purchasers to be parties to the contract with Barnett Ltd.

The fifth condition is significant. It states:

> "5. COST OF TAXES: The Purchaser shall pay the Vendor's Attorneys' costs of the Agreement and the transfers calculated in accordance with the scale laid down by the Jamaica Bar Association on the signing of this Agreement. The Purchaser will pay all Transfer Tax."

A notable omission is the name of the attorney-at-law who was to be entrusted with the carriage of sale. Then there is the phrase - the purchaser will pay the transfer tax.

That tax is computed at 7.5% of the purchase price. It is appropriate to quote the provision of The Transfer Tax Act as to who ought to pay the tax. Section 3(1) reads:

> "3(1) Subject to and in conformity with the provisions of this Act, tax shall be charged at the rate of seven and one-half *per centum* of the amount or value of such money or money's worth as is, or may be treated under this Act as being, the consideration for each transfer after the 3rd day of April 1984, of any property; and tax charged in respect of any such transfer shall be borne by the transferor."
>
> [Emphasis supplied]

Then section 10(1) deals specifically with contracts of transfer and suggests that there must be a written contract before a transfer. This reinforces the provisions of the Statute of Frauds pertaining to the sale of land. It provides that:

> "10(1) Where a contract of transfer, being a contract to transfer any property, whether or not in existence or ascertained at the time of the contract, is made, the contract shall be deemed to be the transfer of the property (for the consideration provided for by the contract, without prejudice to any requirement under this Act that consideration for such a transfer be otherwise assessed) for the purposes of this Act."

Then section 10(2) must be specifically mentioned as it deals with nominees of purchaser. It suggests that the incidence of transfer tax will be on the consideration which Olasemo is paid by his nominees. It is in the following terms:

> "10 (2)- Where any person, being a person for the transfer of property to whom, or to whose nominee, any such contract as mentioned in this section subsists, makes an assignment, or enters into a contract of assignment, to any other person of the right to the said transfer or enters into a contract of transfer, being a contract to cause the said property to be transferred to any other person pursuant to the subsisting contract, the assignment so made of (as the case may be) the contract so entered into shall be deemed to be the transfer of that property by the first-mentioned person to the other person

> (for the consideration for which the assignment is so made or the contract so entered into provides, as the case may be, including any undertaking in consideration thereof to assume or discharge obligations under the subsisting contract, without prejudice to any requirement under this Act that consideration for such a transfer be otherwise assessed) for the purposes of this Act."

Further section 10 (3) reads:

> " (3) Subject to the provisions of subsection (1) of section 16, the transfer of property pursuant to any contract previously made and by virtue of which the property is regarded, on any assumption introduced by the foregoing provisions of this section, as having been transferred shall not be deemed to be a transfer in respect of which tax is chargeable."

This suggests a refund of the original tax which would have been paid on the "contract" between Barnett Ltd and Olasemo if agreement was reached. Bear in mind, such a contract pursuant to section 10 (1) of the Transfer Tax Act was deemed to be a transfer, but the effective transfer would have been from Barnett Ltd to Olasemo's nominees.

While the tax must be borne by the transferor it must be paid by the transferee who is entitled to recover the amount from the transfer or by way of deduction "from any consideration for the transfer'. See section 18(1) which provides as follows:

> "18(1) Subject to the provisions of this Act, all tax imposed on a transferor in respect of any transfer shall be paid to the Commissioner by the transferee, who shall, notwithstanding anything to the contrary provided or agreed, be entitled to recover the amount of the tax by way of deduction from any consideration for the transfer, or by way of suit against the transferor as for a simple contract debt in the sum so paid, or by any other lawful means at the transferee's disposal after such payment by him. Every such suit as aforesaid for any sum whatsoever shall be cognizable in the Resident Magistrate's Court."

It is appropriate to cite section 18(4) relating to deposits. It reads:

> "18 (4) Every contract made after the 3rd day of April, 1984 and in respect of which tax is chargeable by virtue of subsection (1) of section 10, being a contract for the transfer by way of sale of property consisting of land, shall require a deposit of not less than seven and one-half per centum of such consideration for the transfer as may be payable under the contract, a requirement by the contract of a deposit of such percentage as aforesaid being implied in lieu of any requirement of a lesser deposit, or in default of requirement of a deposit, by express provision of the contract; and the transferee shall, towards discharge of his obligation to pay tax in respect of the transfer on the assumption thereof introduced by the said subsection, and in the exercise of his right of recovery by deduction from consideration, pay to the Commissioner at least so much of the deposit as is compulsory, by virtue of this subsection, for the contract to require."

This subsection demonstrates that in this jurisdiction the fiscal imperatives of the Transfer Tac Act makes it obligatory for a written contract to precede the transfer or conveyance of land. Further, section 18 (4A) provides:

> "18(4A) Any deduction allowable in the manner provided by section 12A in the case of any transfer to which that section relates shall be allowed in like manner for the purpose of determining, in keeping with the provisions of subsection (4), the consideration to be taken into account in reckoning the percentage specified in that subsection."

Then 18(5) provides for criminal sanction:

> "18(5) Every transferee who contravenes the requirement to make any payment under subsection (4) shall be guilty of an offence against this Act."

As for the gloss in ***Workers Trust & Merchant Bank Ltd. v. Dojap Investments Ltd.*** (supra) at p. 4, the following statement occurs in the opinion of Lord Browne Wilkinson:

> "As their Lordships understood from the submissions made in argument, formerly the normal practice in Jamaica was to require a deposit of 10%. This was changed by the introduction of a transfer tax by the Transfer Tax Act, 1971. Under that Act, a transfer tax of 7.5% is payable on a transfer of land on sale. Although the tax is ultimately payable by the transferor (section 3), under section 18 it is collected from the transferee, i.e. the purchaser. As from 3rd April 1984, any contract for the sale of land must contain a requirement for the payment of a deposit of at least 7.5% and the purchaser is required to pay this sum to the Commissioner of Stamp Duty and Transfer Tax: section 18(4). The purchaser is entitled to recover from the vendor the amount of the tax so paid either by way of deduction from the purchase price or by action: section 18(1)."

It is against the background that the figure of $1,200,000 looks odd in view of the statement of the beginning of the negotiation that the vendors were selling at a net price of $1.2M. Net of what? That is the question which springs to mind to demonstrate the lack of certainty at that stage of the negotiations.

Turning to the special conditions 7(b) and 7(c) are interesting:

> "7(b) If the Purchaser without default on the part of the Vendor fails to observe any term of this Agreement the Vendor may, without tendering a transfer, rescind this Agreement and retain the deposit without prejudice to the Vendor's rights of action hereunder."

Which deposit is being spoken of which can be retained? Then 7(c) states:

> "7(c) The Certificates of title shall be transferred to the Purchaser or his nominee."

To my mind, this document was the second stage of negotiation and could not in law amount to a definite offer.

The negotiations from the standpoint of Olasemo .

Although it is my firm conclusion that no definite offer was made by Barnett to Olasemo, because this case was fully argued, I will now deal with the alternative submission of Barnett. That submission was to the effect that even if there was a definite offer to Olasemo capable of acceptance, Olasemo made a counter offer which was not accepted so that precluded the formation of a contract. The authorities are clear on the point that a counter-offer rejects the original offer. This is admirably stated in Vol 1 **Chitty on Contracts** 25 edition 1983 at p. 35 thus:

> " **Effect of counter-offers.** A counter-offer by the offeree only fails as an acceptance. It also generally amounts to a rejection of the original offer, which therefore cannot subsequently be accepted. **O.T.M. Ltd v Hydranautics** [1981] 2 Lloyd's Rep. 211, 214; post & 92 Thus in **Hyde v Wrench** [1940] 3 Beav. 334 or XLIX E.R. 132 the defendant offered to sell the plaintiff a farm for L1,000. The plaintiff offered L950 which the defendant refused. The plaintiff then said that he would give L1,000 and sued for specific performance. It was held that no contract existed. The plaintiff had rejected and also destroyed the defendant's original offer by making a counter-offer and it was not open to him to revive the original offer by purporting later to accept it."

Mr Frankson contended on the authority of **Stevenson v McLean** [1880] 5 QBD 346 that Olasemo's reply was a request for further information. But the phrase "amendments (sic) draft agreement" could never be construed as a mere request for information.

The initial response to Barnett's negotiation stance is interesting. Olasemo replied on behalf of Jamaica Estate Company Limited and that reply is in the following terms:

"October 15, 1992

Barnett Limited
P.O. Box 876
Montego Bay.

Attention: Mr. P.F. Kerr-Jarret.

Dear Sirs,

RE: PROPOSED SALE, GRANVILLE SUB-DIVISION

I thank you for the proposed draft agreement sent to me for the above captioned, for my perusal and comments and tenancy agreement.

I enclosed (sic) herewith an amendment (sic) draft agreement for your perusal and comments and I trust this will be satisfactory.

I thank you for your cooperation and look forward for speedy completion of the above captioned matter.

May God bless you.

Sincerely yours,

EMMANUEL A. OLASEMO, CHAIRMAN."
[Emphasis supplied)

An interesting feature to note is that Olasemo is the holder of LL.B. (Hon.) London and that three of the executive directors are attorneys-at-law. This company is introduced for the first time and then is taken out of the picture. The following terms of his draft are noteworthy. There is no date on the agreement. Then the purchaser is noted to be Emanuel Olasemo or his nominee thus:

"PURCHASER: EMANUEL OLASEMO of 16 East Street, Montego Bay aforesaid, or his nominee.

PROPERTY SOLD: ALL THOSE PARCELS of land consisting of 32 lots and totalling 479,515,20 square feet part of Fairfield Estate in

> the Parish of Saint James and being the land comprised in Certificates of Title registered at Volume ..."

This description specifically mentions 32 lots but does not mention the Volume or Folio number in the Register Book of Titles in contrast to the proposal of Barnett which mentions Volume and Folio numbers, but does not mention the number of lots. It reads:

> HOW PAYABLE: The full amount of the purchase price shall be paid forthwith on the execution hereof by the vendor, in the exchange for Agreements for sale and instruments of Transfer for the said 32 lots duly executed by the Vendor, (having [leaving?] the name of the Purchaser and the consideration for the transfer for the Purchaser to complete at his discretion)."

No deposit is mentioned here and this differs markedly from the Barnett's negotiating document. This proposal also gives no indication of the attorney-at-law who has the carriage of sale although both proposals provide for "costs of Agreement and the transfers calculated in accordance with the scale laid down by the Jamaica Bar Association."

As for the special conditions, 7(b) is noteworthy. It also reads:

> " (b) The Certificates of Title shall be transferred to the Purchaser or his nominee."

To my mind the parties were still in a state of negotiation. Barnett did not reply to these proposals of Olasemo so he replied to the letter of 24th September 1992 from Mark Kerr-Jarrett which was the initial correspondence in the negotiations. Here is Olasemo's letter:

"

E. A. OLASEMO
2ND FLOOR VAN HAZE
BUILDING
16 EAST STREET
MONTEGO BAY

NOVEMBER 3, 1992

Barnett Limited
Montego Bay
St. James

Attn. Mr. Mark Kerr Jarrett

Dear Sirs,

RE: Granville Sub-Division

With reference to your offer to sell to me 32 Lots in the Granville Subdivision registered at Volume 1126 Folios 717-748 of the Registered (sic) Book of Titles for the price of 1.2 million dollars net, I hereby accept the said offer and in consideration therefor, I enclose Certified cheque in the sum of One Million Dollars drawn in your favour.

The conditions stipulated in your offer are entirely acceptable to me and I shall meet with you at your convenience to finalise the matter pertaining to possession, the payment of the balance of the purchase price (which is in hand) and all ancillary details.

I look forward to an early invitation in this regard

Yours faithfully

sg/ E.A. OLASEMO"

What is interesting is that even this letter relied on as an acceptance recognised that matters pertaining to possession, the payment of the balance of the purchase price and ancillary details were to be completed.

It is against this background that Barnett's Ltd letter of November 5 1992 must be assessed. It reads:

> "November 5, 1992
>
> Mr. Olasemo
> 16 East Street
> Montego Bay
>
> Dear Sir,
>
> Re: Sale of Granville Subdivision
>
> Thank you for your letter of 3rd instant, enclosing cheque for $1,000,000.00 which I return herewith.
>
> Our Manager's letter to you of 24th September 1992 has at no time been regarded either by Barnett or by you as an unqualified offer, and this is confirmed by our exchange of draft contracts. Accordingly, I do not regard your letter of 3rd instant as a memorandum of acceptance.
>
> In all the circumstances, Barnett will not have any further negotiation with you in this matter.
>
> Yours sincerely,
>
> sgd/ PETER F. KERR-JARRETT
> EXECUTIVE CHAIRMAN- BARNETT LIMITED"

Here is how Olasemo treats that letter in his affidavit:

> "10. That having delivered my letter dated the 15th day of October, 1992 on that date, I heard nothing from Defendant. (That was the letter from Jamaica Estates Co. Ltd)
>
> 11. That consequently on the 3rd day of November, 1992 I sent letter of even date which I exhibit hereto marked E.O. 2 enclosing Manager's cheque for $1 million dollars."

The preliminary point of law which arose on the pleadings and disposes of the sole issue in the case

The sole matter in dispute in this case was whether the correspondence discloses the formation of a contract as Olasemo avers. The basis of Olasemo's claim was averred in three paragraphs of his statement of claim. They are as follows:

> "2. On or about the 24th day of September, 1992, the Defendant by a letter signed by Mark Kerr Jarrett, its Manager, made an unqualified offer to the Plaintiff in unambiguous terms that "we agree to sell you the 32 lots in the Granville Subdivision for a net price to the Company of 1.2 million. This mean(s) that you be given blank transfers and will be responsible for all transfer costs when the lots are sold to their eventual purchasers.
>
> 3. By letter dated the 3rd November, 1992, the Plaintiff unconditionally accepted the Defendant's said offer and as consideration for the agreement enclosed a Manager's cheque in the sum of One Million Dollars issued in favour of the Defendant, which letter was delivered to the Defendant the same day.
>
> 4. On or about the 5th day of November, 1992, the Defendant in breach of its contract, returned the Plaintiff's cheque aforesaid and advised the Plaintiff that the Defendant will not have any further negotiation with him in the matter."

It has already been shown that neither the letter of the 24th September 1992 from Barnett Ltd nor the proposals in the draft agreement were capable of constituting an offer capable of acceptance. Paragraph 7 of the defence recognises that and stated the defence thus:

> "7. In the premises, the Defendant will state that in light of this correspondence and as a matter of law, no agreement for sale came into existence between the Plaintiff and the Defendant and the Defendant was entitled to return the cheque sent by the Plaintiff in purported acceptance of the 'offer'.

Why then did Langrin J grant an interlocutory injunction?

Here is how Langrin J saw the issue:

> " In the treatise by Spry 'The Principle of Equitable Remedies' at page 450 it was stated that if there is no conflict in the evidence as to matters of fact, then on an application for interlocutory injunction the Court can decide the questions of law just as a trial Judge can and therefore there is no need to go to a trial court. The question therefore arises as to whether there is before this Court all the evidence necessary to determine the issue in this matter. If the defendant's contention is correct then unless better reasons were presented before the Court, this Court could very well settle the questions of law presented based on the facts outlined in the affidavit evidence."

In this passage the learned judge mentioned the clue to this case, but misses its significance by stating further:

> " There are, however, conflicts on the affidavit evidence pertaining to the issues before me and I shall only mention a few of them:
>
> 1. What is meant by the letter of 24th September 1992 which states that we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of 1.2 million?
>
> 2. In the context of the situation, what is meant by a draft agreement and 'for your perusal and comments' sent on 8th October 1992.
>
> 3. The plaintiff's proposed draft agreement sent on 15th October, 1992 for your perusal and comments. Was this a counter-offer or mere request for information?"

Each of these issues required Langrin J to construe the relevant document and then he would have found that no contract was formed. The pleadings disclosed that the sole

issue to be resolved was whether a contract could be inferred from the correspondence. So such further conflict as the learned judge adverts to could form no meaningful part of this case. This approach which would have dismissed the summons on a preliminary point of law finds some support from the following passage in **Fellowes v Fisher** [1975] 2 All ER 829 at p. 836 Lord Denning MR said:

> " Where then is the reconciliation to be found? Only in this: the House did say in **The American Cyanamid** case [1975] 1 All ER at 511, [1975] 2 WLR at 324 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.' That sentence points the way. These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult and call for detailed consideration. Nevertheless, the need for immediate decision is such that the court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, the court may grant an injunction. If it is a weak case, or is met by a strong defence, the court may refuse an injunction. **Sometimes it means that the court virtually decides the case at that stage**. At other times it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further." (Emphasis supplied)

Then at p. 837 he said:

> " To which I may add many commercial cases where the granting of an interlocutory injunction virtually decides the action, as in **Bailey (Malta) Ltd v Bailey**{1963] 1 Lloyd's Rep 595; **Acrow (Automation) Ltd v Rex Chainbelt Inc** [1971] 3 All ER 1175, [1971] 1 WLR 1676; **Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd** [1971] 3 All ER 1226, [1972] 1 QB 318."

In the context of a summary judgment, but highly relevant to this issue is the observation of Lord Donaldson MR in **R G Carter Ltd v Clarke** [1990] 2 All ER 209 at p. 213:

> " As will be seen, I said: 'it is quite different if you are dealing with a triable issue which arises as a matter of law.' This aspect was considered, and the same conclusion reached, by this court in **European Asian Bank AG v Punjab and Sind Bank** [1983] 2 All ER 508 at 516, [1983] 1 WLR 642 at 654, the reasoning of Robert Goff LJ being quoted and followed in **Isreal Discount Bank of New York v Hadjipateras** [1983] 3 All ER 129 at 135, [1984] 1 WLR 137 at 145. I would not resile from this view, even if I could, but it is as well to bear in mind the reason for this exception. It is this. If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far better if he then and there decides it himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision. The parties are then free to take the matter straight to this court, if so advised. This was the situation in the classic case of **Cow v Casey** [1949] 1 All ER 197, [1949] 1 KB 474. But it is quite different if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the plaintiff's claim or of some of those issues, is of such a character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an (sic) a fortiori case if the answer to the question of law is in any way dependent on undecided issues of fact."

Conclusion

This was a clear and compelling case where in the court below the prayer for an interlocutory injunction ought to have been refused. There was no offer that could

have been accepted. They were negotiations and Barnett Ltd chose to terminate them. So Olasemo could never have been awarded the order for specific performance which he had sought. This is one of those cases where it could be said that the interlocutory judgment disposes of the single point of law to resolve the issue namely, that there was no contract which could be specifically performed. Consequently the appeal was allowed and the order below was set aside. Also costs were awarded to the appellant Barnett Ltd both here and below. Additionally,There was an order that the caveat 738671 be removed and it was further ordered that the matter be remitted to the Supreme Court to assess the damages, if any, sustained by Barnett Ltd as a result of the award of the interlocutory injunction to Olasemo.

WOLFE, J.A.:

At the conclusion of the arguments on June 14, 1995, we allowed the appeal herein and ordered as follows:

> "Judgment of court below set aside - interlocutory injunction discharged. Caveat No. 738671 lodged by the respondent ordered to be removed. Inquiry to be made in respect of undertaking as to damages on grant of the interlocutory injunction. Inquiry to be conducted by a judge of the Supreme Court. Costs here and below to the appellant to be taxed if not agreed."

At that time we promised to put our reasons in writing. I now proffer my reasons for concurring with my learned brothers in allowing the appeal.

Following negotiations between the appellant and the respondent, the appellant wrote to the respondent in the following terms:

> "24th September, 1992
>
> Mr. Emanuel Olassimo
> 16 East Street
> 2nd Floor
> Montego Bay
>
> Dear Mr. Olassimo,
>
> Further to our meeting this morning, 24th September, 1992, we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of $1.2 Million. This mean that you be given blank transfers and will be responsible for all transfer costs when the lots are sold to their eventual purchasers.
>
> With regards to the basic school situated behind the Church, you will be responsible for dealing with them in whatever fashion the two of you find appropriate, however, further

"discussion with my father concerning their tenancy is recommended.

Yours sincerely,

MARK KERR-JARRETT
MANAGER."

There was no response to this letter by the respondent. On October 8, 1992, the appellant wrote to the respondent as follows:

"Mr. Emanuel Olasemo
16 East Street
Montego Bay

Dear Mr. Olasemo,

Re: Proposed Sale - Granville subdivision;
Volume 1126 Folios 717-748

Enclosed is a draft Agreement for Sale regarding the captioned matter for your perusal and comments.

Yours sincerely,

PETER F. KERR-JARRETT
EXECUTIVE CHAIRMAN."

The draft agreement is set out herein:

"AGREEMENT FOR SALE AND PURCHASE

DATE: The day of One Thousand nine hundred and ninety-two

VENDOR: BARNETT LIMITED a Company registered under the Companies Act and having its registered office at the Barnett Estates, in the City of Montego Bay.

PURCHASER: EMANUEL OLASEMO of 16 East Street, Montego Bay aforesaid

"1. PROPERTY SOLD: ALL THOSE parcels of land containing 479,515.20 square feet part of Fairfield Estate in the Parish of Saint James and being the land comprised in Certificates of Title registered at Volume 1126 Folios 717-748 of the Register Book of Titles (hereinafter referred to as 'the Land Sold')

2. PRICE: The sum of ONE MILLION AND TWO HUNDRED THOUSAND DOLLARS ($1,200,000.00)

3. HOW PAYABLE: A deposit of One Million Dollars shall be paid forthwith on the execution hereof by the Vendor. The balance of the purchase price shall be paid 7 days after the Vendor notifies the Purchaser that the said Certificates of Title are available for delivery to the Purchaser with a transfer of each lot (having the name of the Purchaser and the consideration for the transfer for the Purchaser to complete at his discretion).

4. POSSESSION: The Vendor shall place the purchaser in possession on the payment of the purchase price in full and rates and taxes shall be apportioned then as if they accrued from day to day.

5. COSTS OF TAXES: The Purchaser shall pay the Vendor's Attorneys' costs of the Agreement and the transfers calculated in accordance with the scale laid down by the Jamaica Bar Association on the signing of this Agreement. The Purchaser will pay all Transfer Tax.

6. TIME: All reference herein as to time shall be deemed to be of the essence of the Contract.

7. SPECIAL CONDITIONS:

(a) The Vendor shall be deemed to have delivered possession to the Purchaser

"notwithstanding that Lot 2 (the land comprised in Volume 1126 Folio 718) is subject a tenancy agreement dated 12th August, 1971 made with S.O. and R.Z. Fisher

(b) If the Purchaser without default on the part of the Vendor fails to observe any term of this Agreement the Vendor may, without tendering a transfer, rescind this Agreement and retain the deposit without prejudice to the Vendor's rights of action hereunder

(c) The Certificates of Title shall be transferred to the Purchaser or his nominee

(d) The Purchaser agrees to observe and perform the conditions laid down by the Town and Country Planning Authority and the Parish Council for Saint James (S/89A/70 Folio 1907 dated 9th May, 1974) with reference to the Land Sold."

On October 15, 1992, the respondent wrote to the appellant and I set out below the contents of that letter as well as the draft agreement referred to therein:

"Barnett Limited
P.O. Box 876
Montego Bay.

Attention: Mr. P.F. Kerr-Jarrett

Dear Sirs,

RE: PROPOSED SALE, GRANVILLE SUB-DIVISION

I thank you for the proposed draft agreement sent to me for the above captioned, for my perusal and comments and tenancy agreement.

I enclosed herewith an amendment draft agreement for your perusal and comments and I trust this will be satisfactory.

"I thank you for your cooperation and look forward for speedy completion of the above captioned matter.

May God bless you.

Sincerely yours,

EMMANUEL A. OLASEMO, CHAIRMAN."

"AGREEMENT FOR SALE AND PURCHASE

DATE: The day of One Thousand nine hundred and ninety-two

VENDOR: BARNETT LIMITED a Company registered under the Companies Act and having its registered office at the Barnett Estates, in the City of Montego Bay.

PURCHASER: EMMANUEL OLASEMO of 16 East Street, Montego Bay aforesaid, or his nominee.

1. PROPERTY SOLD: ALL THOSE PARCELS of land consisting of 32 lots and totalling 479,515,20 square feet part of Fairfield Estate in the Parish of Saint James and being the land comprised in Certificates of Title registered at Volume ... of the Registered Book of Titles (hereinafter referred to as 'the Land Sold').

2. The sum of ONE MILLION AND TWO HUNDRED THOUSAND DOLLARS ($1,200,000.00).

3. HOW PAYABLE: The full amount of the purchase price shall be paid forthwith on the execution hereof by the vendor, in the exchange for Agreements for sale and instruments of Transfer for the said 32 lots duly executed by the Vendor, (having the name of the Purchaser and the consideration for the

"transfer for the Purchaser to complete at his discretion).

4. POSSESSION: The Vendor shall place the purchaser in possession on the payment of the purchase price in full and rates and taxes shall be apportioned to the date of possession, then as if they accrued from day to day.

5. COST OF TITLE: The Purchaser shall pay all the costs of this Agreement and the transfers calculated in accordance with the scale laid down by the Jamaica Bar Association on the signing of this Agreement.

6. TIME: All reference herein as to time shall be deemed to be the essence of the contract.

7. SPECIAL CONDITIONS:

(a) The Vendor shall be deemed to have delivered possession to the Purchaser notwithstanding that Lot 2 (the land comprised in Volume 1126 Folio 718) is subject to tenancy agreement dated 12th August, 1971 made with S.O. and R.Z. Fisher

(b) The Certificates of Title shall be transferred to the Purchaser or his nominee

(c) The Purchaser agrees to observe and perform the conditions laid down by the Town and Country Planning Authority and the Parish Council for Saint James (S/89A/70 Folio 1907 dated 9th May, 1974) with reference to the Land Sold."

The communications referred to above attracted no response from the appellant and on November 3, 1992, the respondent in writing purported to

accept the alleged offer contained in the letter dated September 24, 1992, as well as in the Draft Agreement referred to in the letter dated October 8, 1992, and which has already been set out in this judgment.

The response to this attempt to accept the so-called offer was quick and decisive. It is contained in a letter dated November 5, 1992, which is set out below:

> "Mr. Olasemo
> 16 East Street
> Montego Bay
>
> Dear Sir,
>
> Re: Sale of Granville Subdivision
>
> Thank you for your letter of 3rd instant, enclosing cheque for $1,000,000.00 which I return herewith.
>
> Our Manager's letter to you of 24th September 1992 has at no time been regarded either by Barnett or by you as an unqualified offer, and this is confirmed by our exchange of draft contracts. Accordingly, I do not regard your letter of 3rd instant as a memorandum of acceptance.
>
> On all the circumstances, Barnett will not have any further negotiation with you in this matter.
>
> Yours sincerely,
>
> PETER F. KERR-JARRETT
> EXECUTIVE CHAIRMAN -
> BARNETT LIMITED."

The next bit of communication touching upon the matter is a letter dated November 4, 1992, under the hand of W. B. Frankson, Q.C. acting on behalf of the respondent:

> "Barnett Limited
> P.O. Box 876
> Montego Bay
> St. James
>
> Dear Sirs,
>
> Re: Granville Sub-division
>
> We act on behalf of Mr. Emmanuel Olasemo who has entered into a contract with you to purchase the above property for the price of $1.2m net.
>
> We are instructed that your offer to sell the property was made by letter and that our Client's acceptance was also by the same medium.
>
> We are further instructed that our Client has tendered to you $1m by way of a Certified Cheque, as a consideration for the sale leaving a balance of $200,000.00, which sum will be paid to you in exchange for the Certificates of Title, the transfers of which will be processed by Mr. Olasemo at his expense.
>
> In this connection, we are instructed to request that you forward the documents to us on our undertaking to pay to you the balance due and owing upon your signing the relevant transfers.
>
> We look forward to hearing from you at an early date.
>
> Yours faithfully,
> GAYNAIR & FRASER
>
> W. B. FRANKSON, Q.C."

The Statement of Claim dated November 30, 1992, at paragraphs 2 and 3 sets out the basis of the agreement between the parties. From the Statement of Claim the respondent relies on two documents, (1) the letter dated September 1992 and (2) the letter dated November 3, 1992. Paragraphs 2 and 3 of the Statement of Claim are set out below:

> "2. On or about the 24th day of September, 1992, the Defendant by a letter signed by Mark Kerr Jarrett, its Manager, made an unqualified offer to the Plaintiff in unambiguous terms that 'we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of 1.2 million. This mean that you be given blank transfers and will be responsible for all transfer costs when the lots are sold to their eventual purchasers.'
>
> 3. By letter dated the 3rd November, 1992, the Plaintiff unconditionally accepted the Defendant's said offer and as consideration for the agreement enclosed a Manager's cheque in the sum of One Million Dollars issued in favour of the Defendant, which letter was delivered to the Defendant the same day."

By way of defence, the appellant denied that there was an agreement for sale between the parties. There are four documents referred to in the pleadings. At the time of hearing of the interlocutory injunction, the pleadings were closed. It is, therefore, quite obvious that the action would be determined on the basis of the four documents referred to in the pleadings. The sole question for determination was whether on the basis of the documents there was a binding agreement between the parties. It was plainly a matter of interpretation.

Before Langrin, J., Mr. Vassell for the appellants submitted that the court could at that stage decide the issues between the parties since, firstly, the issues raised a question of law and, secondly, all the pleadings were before the court. That being so, he submitted, the court would be in just as good a position as the trial judge to settle the question to be determined, consequently, the court should decide the question of law then and there. ***Fellows v. Fisher*** [1975] 2 All E.R. 829 and S.C.C.A. 74/87 ***George Johnson v. Edris Myers*** (unreported), delivered February 18, 1988, were relied on for these propositions.

Langrin, J., citing "The Principle of Equitable Remedies" by Spry at page 450, held that where there is no conflict in the evidence as to matters of fact, the court can on an application for interlocutory injunction decide the questions of law just as a trial judge can and, therefore, there is no need to go to a trial court. Having so concluded, the learned judge posited this question:

> "The question therefore arises as to whether there is before the court all the evidence necessary to determine the issue in this matter."

He answered the question thus:

> "There are however, conflicts on the affidavit evidence pertaining to the issues before me and I shall only mention a few of them:
>
> 1. What is meant by the letter of 24th September 1992 which states that we agree to sell you the 32 lots in the Granville Sub-division for a net price to the Company of $1.2 million?
>
> 2. In the context of the situation, what is meant by a draft agreement and 'for your

> "perusal and comments' sent on 8th October 1992.
>
> 3. The plaintiff's proposed draft agreement sent on 15th October, 1992 for your perusal and comments. Was this a counter-offer or mere request for information?
>
> 4. Has the affidavit evidence raised the issue of estoppel on the part of the defendant? These facts are disputed but in any event, Counsel argues, they are omitted from the pleadings.
>
> Based on the authorities cited and the dispute as to questions of fact, there is little doubt that there is a serious question to be tried. The plaintiff may indeed be able with a considerable degree of skill and effort at the trial to make out a formidable case in support of its contentions just as the defendant may be able to make out a formidable case in reply. With the full procedure of the trial coupled with the advantage of seeing and hearing the witnesses and the testing process of cross-examination the court will be able to reach a firm conclusion one way or the other. Because I lack these advantages in dealing with the disputed questions of fact it is my judgment that the plaintiff has made out a case for the remedy which he seeks.
>
> In light of the foregoing reasons it is the judgment of the court that the interlocutory injunction should be granted and the matter be allowed to go to trial for a final determination of the issues."

From the above extracts, it is not difficult to see that Langrin, J. erred. All the issues he identified for determination, referring to them as questions of fact, were undoubtedly questions of law. They involved the construction of the four

documents to ascertain whether or not a binding agreement had been established. The issues had nothing to do with the credibility of witnesses. The documents which flowed between the parties and upon which the parties relied spoke eloquently for themselves. There was absolutely no dispute about the documents. No issue was joined as to the documents themselves. Issue was joined as to the effect of the documents. A question of law pure and simple. Indeed, Mr. Frankson for the respondent conceded that he would not be able to contend that the learned trial judge ought not to have decided the issue. Recognising that the documents which purported to contain the contract were the four referred to in the pleadings he submitted, with candour, that it was open to the court to decide whether or not there was a valid contract. Faced with the fact that he was perched on a time bomb, Mr. Frankson sought an adjournment to apply to a judge of the Supreme Court to amend the Statement of Claim to allege that the agreement between the parties was partly oral and partly in writing. When this salvaging act failed, he applied to this court to amend the Statement of Claim in the following terms. By re-numbering paragraph 6 as paragraph 8 and substituting therefor the following:

> "In the alternative by an agreement partly oral and partly in writing evidenced by the defendant's letter dated September 24, 1992 the defendants agreed to sell and the plaintiff to purchase all those parcels of land comprising 32 lots in the Granville sub-division for a price of $1.2m."

and by adding a paragraph 7 in the following terms:

> "Further and or in the alternative the defendant has entered into a binding and enforceable contract by its letter of September 24, 1992 to sell all those parcels of land in the Granville sub-division containing 32 lots for the price of $1.2m."

It is not difficult to see the purpose for the amendments. The reference to oral agreement would give rise to the submission that all the evidence was not then before the judge. We refused the application to amend.

Langrin, J. ought to have decided the issue then and there. The letter of September 24, 1992, was not an unqualified offer. The draft agreement, as the letter of October 8, 1992 stated, was submitted for perusal and comments. So it is true to say the parties were still negotiating. The draft agreement sent by the respondent under cover of letter dated October 15, 1992, was in the same vein for perusal and comments.

Significantly, the draft agreement submitted by the appellant required the respondent to pay all transfer taxes arising out of the sale. However, the draft agreement of the respondent omitted this significant term of the agreement. This was, indeed, a fundamental change.

Even if the letter of September 24, 1992, and the draft agreement were to be held to constitute an offer, the respondent's draft agreement would clearly be a counter offer as it contained terms fundamentally different to the appellant's draft agreement. This counter offer would have the effect of nullifying any offer made by the appellant. So any attempt to subsequently accept that offer would be in vain. There was nothing to accept.

I entertain no doubt that had Langrin, J. not misdirected himself as to the nature of the issues, he would have embarked upon resolving the issues and, on the documentary evidence before him, he would have been constrained to find that no binding contract existed between the parties, and the matter would have been disposed of then and there.

Further, the transaction between Barnett Limited and the respondent was plainly a commercial transaction. The land was being bought to be resold, hence the arrangement as to blank transfers as per letter dated September 24, 1992. Damages in the circumstances would certainly be an adequate remedy. The damages would easily be ascertainable. All the respondent would have to prove is that he had purchasers for the lot and the price agreed in respect of each lot. Once damages are an adequate remedy, the injunction ought not to have been granted.

Many cases were referred to by Mr. Vassell. I have not adverted to them because of the fact they were concerned with well-established principles of law, so well known as not to require the support of case law.

It is for these reasons that I concurred with my learned brothers in allowing the appeal.