

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 72/98

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.**

BETWEEN: PHILEMON WILLIAMS DEFENDANT/ APPELLANT

AND: DOROTHY YOUNG NO.1 APPLICANT/RESPONDENT

Amery Huntley and Dr. Diana Harrison for the Appellant

Verleta Green for the Respondent

November 8, 9, 2001 and July 9, 2003

DOWNER, J.A.

Introduction

The rapid depreciation of the Jamaican dollar over the past two decades is the clue to understanding why so many contracts for the sale of land are litigated in the Supreme Court. When the contract is drafted the value of the land may be significantly lower than it is by the time there ought to be a registrable transfer. Real estate is a hedge against inflation in Jamaica.

The appellant vendor brought a summons to strike out the purchaser's Statement of Claim as showing no cause of action and the purchaser brought a summons for summary judgment against the vendor on her Statement of Claim. Pitter J. heard both summonses together and ruled in favour of the purchaser

with respect to both summonses. The result was that there was summary judgment in favour of the purchaser who was granted specific performance of the contract as prayed for in the Statement of Claim. The vendor Williams has appealed against the orders made by Pitter J.

The Facts

In the beginning there was a written contract. See page 21 of the Record. The following clauses are relevant at this stage. They read:

"AGREEMENT FOR SALE

~~THIS AGREEMENT is made this 22nd day of November 1991~~
 WHEREAS the Vendor agrees to sell and the Purchaser agrees to
~~purchase ALL THAT property more particularly described herein~~
 upon the terms and conditions as set out in the Schedule.

SCHEDULE

VENDOR(S) : PHILEMON WILLIAMS of 20 Hughenden
 Avenue, Kingston 20 in the parish of Saint
 Andrew, Contractor.

PURCHASER(S): DOROTHY YOUNG of 4 Latham Avenue,
 Kingston 6 in the parish of Saint Andrew,
 Nurse.

DESCRIPTION : ALL THAT parcel of land now known as
 Apartment #6, 4a Brompton Road, Kingston 5
 in the parish of Saint Andrew and being all the
 land comprised in Certificate of Title registered
 at Volume 1177 Folio 564 of the Register Book
 of Titles.

PURCHASE PRICE: THREE HUNDRED AND FIFTY THOUSAND
 DOLLARS (\$350,000.00)

HOW PAYABLE A deposit of \$52,500.00 to be paid on signing of
 Agreement, balance on completion."

There is no mention of the Strata lot number in the Description. It is that omission which has caused this prolonged litigation which reached the Resident Magistrate's Court. Now the issue is to be settled in this Court. It is anticipated that Attorneys-at-law who draft contracts, conveyances and transfers will pay attention to this feature where strata titles are in issue pursuant to the Registration (Strata Titles) Act.

Another omission in this contract is that there was no attorney-at-law having the Carriage of Sale. The correspondence will reveal that Derrick Darby of the firm Derrick Darby & Co. performed that function. Here is his letter of the 12th February 1992 at page 24 of the Record:

"February 12, 1992

DJD/djg

Verleta V. Green
Attorney-at-Law
4 Latham Avenue
Kingston 6

Dear Madam.

Re: Sale of premises – Apt. #6, 4a Brompton Road
St. Andrew – Philemon Williams to Dorothy Young

We are now enclosing the Instrument of Transfer for execution by your client. We have confirmed with the vendor that he will hand you possession of the premises in exchange for further payment of \$200,000.00 on the purchaser's account. Rental of course will be agreed between the parties.

We ask that you now return the signed Transfer to us as soon as possible. We are also awaiting a letter of

approval of the purchaser's mortgage from the National Housing Trust.

We await your prompt response.

Yours faithfully
DERRICK DARBY & Co.

Per:
Derrick J. Darby"

This was a variation of the contractual terms which was accepted by the respondent Young. In particular, this was a variation of the "How Payable" clause already referred to.

There are some clauses in the special conditions of the contract which ought to be mentioned. They are at pages 22-23 of the Record:

"4. This Agreement is subject to the Purchasers raising a first legal mortgage of not less than \$100,000.00 from a reputable financial institution.

5. The Purchasers shall produce a letter of commitment for the mortgage to the Vendor's Attorney on or before sixty (60) days from the date of this Agreement. If the Purchasers fail to produce this letter of commitment within the time specified, either party may terminate the Agreement by giving fourteen (14) days notice in writing to cancel this Agreement and the Purchasers' deposit and further payment shall be refunded in full save and except \$800.00 being costs incurred to date as mentioned above.

6. Unless previously rescinded as aforesaid, this contract shall be binding and unconditional on Purchasers producing the said letter of commitment to the Vendor's Attorney."

Dorothy Young, the respondent, was the applicant in the Court below. She was, and still is, prepared to perform her part of the bargain but the vendor Philemon Williams has resisted.

The Endorsement on the Writ reads:

"The Plaintiff's claim is for specific performance of an Agreement for Sale made on or about the 22nd day of November 1991 for the sale by the Defendant to the Plaintiff of Apartment Number 6, 4A Brompton Road, Kingston 5 in the Parish of St. Andrew.

2. Further or alternatively, damages for breach of contract
3. Costs.
4. Further and other relief.

DATED the 18th day of July 1997

VERLETA V. GREEN
ATTORNEY-AT-LAW FOR THE PLAINTIFF."

Even if it is not possible to grant the discretionary remedy of specific performance at the end of the day, the claim in the alternative for damages would still be a live issue. This fact must be taken into consideration on the issue of whether the Statement of Claim ought to be struck out.

The following paragraphs from the Statement of Claim of the respondent Young at pages 6-8 of the Record tell the story and highlight the salient aspect of the dispute:

- "1. By an agreement in writing made on or about the 22nd day of November, 1991 the Defendant agreed to sell and the Plaintiff agreed to buy ALL THAT parcel of land now known as

Apartment #6, 4A Brompton Road, Kingston 5 in the parish of St. Andrew registered at Volume 1177 Follo 564 of the Register Book of Titles at a consideration of Three Hundred and Fifty Thousand Dollars (\$350,000.00).

2. It was a term of the Agreement that completion would be on or before the expiration of ninety (90) days from the date of the Agreement on payment of all moneys payable by the Purchaser in exchange for the Duplicate Certificate of Title duly endorsed with the Transfer to the Purchaser as Registered Proprietor.
3. On or about the 5th day of November, 1991 the Plaintiff duly paid the deposit of Fifty Two Thousand Five Hundred Dollars (\$52,500.00) pursuant to the said Agreement.
4. It was a term of the Agreement that it was subject to the Purchaser raising a first legal mortgage of not less than One Hundred Thousand Dollars (\$100,000.00) from a reputable financial institution.
5. The Plaintiff duly applied to the National Housing Trust for a loan on the security of the property to complete the purchase of the said Apartment.
6. On or about the 10th day of March, 1992 the Plaintiff made a further payment of Two Hundred Thousand Dollars (\$200,000.00) on account of the purchase price."

The respondent Young was put in possession at an agreed monthly fee of \$1,500 for use and occupation and during that occupation a survey was commissioned by her, presumably to satisfy requisitions on title sought by the prospective mortgagees. This survey gave rise to the dispute between the

parties because the Surveyor detected an error which prevented the transfer of the property described in the contract.

Here is how the averments in the Statement of Claim continue the story:

- "7. On or about the 17th day of March, 1992 the Plaintiff was put in possession of the said Apartment #6 at an agreed rental of One Thousand Five Hundred Dollars (\$1,500.00) per month and has remained in possession since that date.
- 8. In or about March, 1992 a survey of the property revealed that there was an error in the Defendant's title in that Apartment #6 is registered at Volume 1177 Folio 563 of the Register Book of Titles.
- 9. By letter dated September 10, 1993 the Attorney-at-Law acting on behalf of the Defendant informed the National Housing Trust of the error in the registration of the apartment and advised that rectification of the error would be completed not later than October 30, 1993." (Emphasis supplied)

At this stage it is essential to state that although the respondent, Young occupies Apartment 6, as stated in paragraph 8, the registered owner is Durant James Germaine. He has brought proceedings in the Resident Magistrate's Court to repossess the apartment from the respondent Young. Pitter J. granted the following orders at page 56 of the Record:

- "2. That the Agreement made between the Defendant and the Plaintiff for the sale and purchase of ALL THAT parcel of land now known as Apartment # 6 4a Brompton Road, Kingston 5 in the parish of St. Andrew and being all the land comprised in Certificate of Title registered at Volume 1177 Folio 564 of the Register Book of Titles be rectified to read

Volume 1177 Folio 563 in lieu of Volume 1177 Folio 564 as the Volume and Folio numbers of the Certificate of Title.

3. That the said Agreement be specifically performed and carried into execution as rectified. ”

The learned judge gave no reasons for this odd decision.

Here is the letter, at page 25 of the Record, that was adverted to in paragraph 9 above:

“Derrick Darby & Co.
Attorneys-at-Law

September 10, 1993

Legal Officer
National Housing Trust
4 Park Boulevard
Kingston 5

Attention: Ms. Benita Chin

Dear Madam,

Re: Sale of Premises – Apt. #6, 4A Brompton Road
Philemon Williams to Dorothy Young

We refer to the above sale to your mortgagor. The time set for completion of the Agreement has long passed as a result of the error in the registration of apartment at the office of Titles. We have made an application for the transfer of the relevant Titles by way of exchange so as to rectify this error.

This application is now at an advanced stage and we expect the process to be completed no later than October 30, 1993. We therefore, request that you extend your commitment to grant a mortgage herein to Mrs. Dorothy Young until that date at which time the proposed sale ought to be completed.

Yours faithfully,
DERRICK DARBY & CO.

copy: Ms Verleta V. Green
Attorney-at-Law
4 Latham Avenue
Kingston 6."

The letter speaks of the sale which ought to be completed as, indeed, it was. What was incomplete was the transfer.

The letter also speaks of the "error in the registration of apartment at the office of Titles". It is important to elicit the nature of the error before proposing an effective solution. The first point to note is that the alleged error was detected by the respondent Young. It is important to ask whether Mrs. Green for the respondent purchaser exercised her statutory rights pursuant to section 50(1) of the Registration of Titles Act ("the Act"). The section reads in part:

". . . and the purchaser shall at her own expense make all such searches and investigations into the title as are required to make the application complete."

The appellant Williams sought further and better particulars by letter dated August 6 1997, and the questions and answers are helpful. The relevant part reads thus at page 11 of the Record:

"REQUEST NO.1:

Is the land subject to the alleged contract situated at Apartment No. 6., 4A Brompton Road and being the land registered at Volume 1177 Folio 563 in the Register Book of Titles?

PARTICULARS:

It is within the knowledge of the Defendant that the land is known as Apartment No. 6, 4a Brompton Road. The Defendant represented that it was registered at Volume 1177 Folio 564.

Apartment No. 6 is registered at Volume 1177 Folio 563 of the Register Book of Titles.

REQUEST NO. 2.

Is Durrant Germaine the Registered owner of such land?

PARTICULARS:

Durant James Germaine is the registered proprietor of the land registered at Volume 1177 Folio 563 of the Register Book of Titles. It is within the Defendant's knowledge that by Instrument of Transfer by Way of Exchange the Defendant and Durant James Germaine transferred their respective interests in the respective parcels of land to each other.

By virtue of the said Instrument of Transfer by Way of Exchange the Defendant is entitled to be registered as the proprietor of land registered at Volume 1177 Folio 563."

The particulars sought was a reverse of the normal procedures. It is the purchaser who normally makes requisitions on title. Here we have the new Attorney-at-law for the vendor, Dr. Diana Harrison, making requests of Mrs. Green for the purchaser.

The exchange between Philemon Williams and Durant James Germaine has never been effected. The Register Book of Titles with Apartment 6

registered at Volume 1177 Folio 563 was never adduced in these proceedings. It would have been useful if a copy of this Book was exhibited with the Summons before Pitter J. Had that been done the desirability of having the Registrar joined in these proceedings would have been made plain. If the Court's order is to be effective it is the Registrar who is responsible for rectification if there has been an error as alleged.

There are two official documents exhibited which put the problem in proper perspective. The first is the survey by Robert T. Bogle, commissioned under the Land Surveyors Act. This initial survey was obligatory for Registration under the Act. Section 33 of the Land Surveyors Act makes provisions for plans made from a survey to be checked by the Director of Surveys. The second document is the strata plan, exhibited at page 28-29 of the Record. The following features are to be noted.

The Strata plan number accorded by the Registrar of Titles is 262. Strata Lots 5 and 6 on the plan are recorded as follows at page 28 of the Record:

"Schedule of Unit Entitlement"		OFFICE USE ONLY Current Certificate of Title		1. ROBERT T. BOGLE of P.O. Box 493 Kingston 8 a surveyor commissioned under the Land Surveyors Law hereby Certify that (1) the building erected on the parcel described above is within the external boundaries of the parcel Dated 26 th August 1982 Signature Approved by the local Planning Authority for the Purposes of the Registration (Strata Titles) Act 1968. Dated 9. 9. 82 Signature Town Clerk
Strata Lot No.	Unit Entitlement	Volume	Folio	
...	
5	12	1177	561	
6	12	1177	563	
...	
...	

It seems that surveyors and the Registrar of Titles use Strata Lot numbers as the crucial link with the Certificate of Title and Register Book of Titles. It also seems that neither Mrs. Verleta Green the Attorney-at-Law for the respondent nor Mr. Derrick Darby the Attorney-at-Law for the appellant took note of this. There is no mention of the strata lot numbers in the Agreement for Sale. It is a curious omission.

Derrick Darby who had the carriage of sale should have incorporated it in the Agreement for Sale. Mrs. Green for the purchaser should have insisted on it before exchange of contracts. In any event that should have been the first request, when making requisitions on title.

The first floor plan shows that the Lots 5 and 6 face each other and are of identical size. It is of importance to insert at this point paragraph 10 of the affidavit of the purchaser Dorothy Young. It will be repeated again for emphasis. It reads at page 19 of the Record:

"10. That on or about the 17th day of March, 1992 I requested a survey of the Apartment by Earl Spencer, a Commissioned Land Surveyor. That on the inspection of the Apartment by the Surveyor I discovered that there was an error in the Defendant's Title in that Apartment # 6 is Strata Lot numbered 5 registered at Volume 1177 Folio 563 and that Apartment # 5 is Strata Lot numbered 6 registered at Volume 1177 Folio 564 of the Register Book of Titles."

This was prompt action on the purchaser's part. She commissioned a survey as soon as she was put in possession.

Turning to the Certificate of Title, it is recorded in the Register Book as Volume number 1177 and the Folio number 563. The transfer is recorded thus at page 27 of the Record:

"Transfer No. 427492 registered on the 30th of May, 1984 to DORANT JAMES GERMAINE of 25 Anthurium Drive, Kingston 6, Saint Andrew, Carpenter. Consideration money Sixty-five Thousand Dollars.

Registrar of Titles"

As for the Certificate of Title of Philemon Williams at page 3 of the Supplemental Record the indication is that the Certificate of title is recorded in the Register Book at Volume 1177 Folio Number 564. The transfer is recorded thus:

"Transfer No. 464254 registered 5th of October, 1987 to PHILEMON WILLIAMS of 20 Hughenden Avenue, Kingston 20, saint Andrew, Contractor. Consideration money Eighty Thousand Dollars.

For Registrar of Titles"

There is an important finding of fact that ought to have been made in the Court below at this point. Apartment 5 which is Strata Lot No. 6 is at present occupied by Durant James Germaine or his tenants. It is registered at Volume 1177 Folio 564. Apartment 6 which is Strata Lot No. 5 registered at 1177 Folio 563 is occupied by Dorothy Young who being a purchaser in possession ought to have an equitable interest while the legal estate and the vendor's lien for the balance of the purchase price is held by Williams.

The appellant Williams, through his Attorney-at-law, made no attempt to terminate the Agreement initially on the basis that the transfer under the Act could not then take place in accordance with the completion clause in the contract because of a defect in the title. The letter of September 1993 to the National Housing Trust was in effect an undertaking to Mrs. Green, the Attorney-at-law for the purchaser, that steps were being taken to correct the title. Again, the mortgagees would never have given a letter of commitment pursuant to the special condition in the Agreement for Sale until the alleged error was corrected.

The change in the stance of the appellant Williams is recorded in his affidavit of 29th November 1997 thus at pages 1-2 of the Supplemental Record:

"3. I agreed to sell Apartment No. 6, 4A Brompton Road in the parish of Saint Andrew to Dorothy Young. I attach hereto marked "PW2" copy Apartment for Sale.

4. By reason of paragraph 3 a survey of the said premises was done.

5. The survey report disclosed that I am the owner of Lot 5 and Mr. Durant Germaine is the owner of Lot 6.

5. As I could not sell that which I did not have I instructed my lawyer, Mr. Derrick Darby to return the deposit to the Plaintiff."

Lot 5 is registered at Volume 1177 Folio 563. Lot 6 is registered at Volume 1177 Folio 564.

The affidavit continues thus:

"7. My lawyer, Mr. Darby, suggested that I enter into a transfer arrangement with Mr. Durant Germaine in order to facilitate Ms. Dorothy Young, the Plaintiff. Mr. Germaine and I signed papers at Mr. Darby's office; however, we promptly rescinded "transfer arrangement" when it was disclosed to us that we had to pay stamp duty and transfer tax at 7.5% of the assessed value of the land.

8. The Plaintiff was not privy to this arrangement between me and Durant Germaine.

9. The arrangement was reached on the basis of a mistake that is I have no Title to Apartment 6, 4A Brompton Road, Kingston 5"

It is to be noted that ~~Diana T. Harrison~~ was now the Attorney-at-Law for the appellant. It would have been helpful if she had investigated how the error came about.

Paragraph 10 of the Statement of Claim is crucial. It reads:

"10. In order to rectify the error in registration the Defendant and the Registered Proprietor of the land registered at Volume 1177 Folio 563 duly executed Instruments of Transfers between 1993 and 1994 whereby the Registered Proprietor of the land registered at Volume 1177 Folio 563 transferred all his estate and interest in the said land to the Defendant in consideration of the Defendant transferring to him all his estate and interest in the land registered at Volume 1177 Folio 564."

The importance of this averment is that the appellant Williams would be entitled to have a certificate of title which reflects that he is the registered owner of the property registered at Volume 1177 Folio 563 and Durant Germaine, the other party to the exchange the registered owner of the

property registered at Volume 1177 Follo 564 of the Register Book of titles. All this is consonant with the undertaking given by the Attorney-at-Law having carriage of sale that the correct title would be transferred to the purchaser.

The arrangement by private treaty was an error on the part of both attorneys-at-law. The matter is in the realm of public law as there are statutory provisions to correct the error alleged or misdescription. There could never be any certainty that Durant Germaine, the other party to the transfer by way of exchange, would ultimately abide by the agreement in paragraph 10 of the Statement of Claim. This is so particularly, when he might rightly claim that the error was not his and that he ought not to be burdened with any costs attendant on the proposed transfers. Additionally, real estate prices were rising and that apartment which was being sold in 1991 for \$350,000 was now being valued in 1997 at One Million Five Hundred Thousand Dollars (\$1,500,000): see page 36 of the Record. So Williams would not be anxious to keep the exchange bargain either. The matter of Transfer tax and Stamp Duty was also a factor which Williams and Germaine must have taken into consideration.

What ought to have been done either by Young, Williams or Germaine in the Court below?

The provisions relating to error or misdescription of titles which can be corrected by the Registrar pursuant to the Act read as follows at section 153:

"Procedure and Practice

153. In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar ~~may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination."~~
(Emphasis supplied)

It is in the interest of the parties Williams and Germaine to have their titles corrected. It is also in the public interest that errors in the Register Book of Titles be corrected. The enjoyment of property is an enshrined right in section 18 of the Constitution and it is important that rights in real property are correctly recorded in the Register Book of Titles. The purchase and sale of real estate is facilitated by accurate Certificates of Title which correspond with the Register Book of Titles and a physical plot of land.

It seems that the Registrar is also empowered by virtue of section 80(a) of the Act to amend the certificates of title. That section reads:

"80. On the occasion of the registration of a certificate of title to registered land or at any time thereafter the Registrar, after such enquiry and notices, if any, as he may consider proper and upon the production of such evidence and the compliance with such requests, if any, as he may think necessary to require or make, may –

- (a) amend the description of the land by the omission of any general words of description or in such other manner as he may think proper."

It is not clear why the experienced attorneys-at-law ignored this provision in the first instance. It is not easy to master the provisions of the Act, but those involved in conveyancing and transfers ought to be familiar with it.

This Court is also mindful of its powers pursuant to section 158(2) of the Act which reads:

"(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar –

- (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
- (b) to amend or cancel any instrument, memorandum or entry relating to the

land in such manner as appears proper to the court or a Judge."

However, to my mind before such powers are exercised, Germaine and the Registrar ought to have been summoned by notice to attend the proceedings in Court. The Registrar was never required to attend these proceedings either in the Court below or this Court. Had Durant James Germaine been made a party to these proceedings he would never have instituted proceedings in the Resident Magistrate's Court to recover possession from the appellant Dorothy Young.

When new Attorneys-at-law were retained by the appellant Williams, they did not mention section 80 or 153 of the Act, and the arrangement made by the former attorney-at-law Derrick Darby. They relied on the appellant's right at common law to claim that there was a common mistake and that there was no contract at all. That was the foundation of the summons to Strike out the Writ and Statement of Claim. At page 68 of the Record the relevant paragraph of the Summons reads:

"1. That the Writ and Statement of Claim be struck out as disclosing no reasonable cause of action and/or as being frivolous or vexatious and an abuse of process of the Court."

Paragraph 1 of the Order in the Court below at page 55 of the Record reads:

"1. Summons to Strike Out Writ of Summons and Statement of Claim filed 18th August, 1997 dismissed."

The learned judge gave no reasons for his decision.

Such a contention made on behalf of Williams ignored the fact that the respondent Young may have an equitable interest in Apartment 6 according to the evidence of Mrs. Green. Under the Torrens system, the respondent could request rectification of the title of that Apartment and call for specific performance of the contract as rectified so as to vest her with the legal title as well. For the status of the owner of the equitable interest see **Lysaght v. Edwards** (1876) 2 Ch D. 499 at 506 and more importantly **Abigail v Lapin** [1934] All E.R. Rep. 720 at 725.

There were 11 grounds of Appeal filed on behalf of Williams to set aside the Orders by Pitter J. striking out the Statement of Claim and awarding Specific Performance. It is necessary to summarise the evidence adduced which tends to suggest that Apartment 6 is registered in the Register Book of Titles at Volume 1174 Folio 563 and not at Volume 1177 and Folio 564 as stated in the contract for sale recorded on the Certificate of Title of Williams.

Firstly, to reiterate, Mrs. Verleta Green the Attorney-at-Law for Young stated in her answer to the request for further and better particulars:

"Apartment No. 6 is registered at Volume 1177 Folio 563 of the Register Book of Titles."

How did the officer of the Court state this fact with confidence? The affidavit of Dorothy Young supplies the answer. It reads at page 19 of the Record:

"9. That on or about the 17th day of March, 1992 I was given the keys to the vacant apartment and I took possession thereof.

10. That on or about the 17th day of March, 1992 I requested a survey of the apartment by Earl Spencer, a Commissioned Land Surveyor. That on the inspection of the Apartment by the Surveyor I discovered that there was an error in the defendant's Title in that Apartment # 6 is Strata Lot numbered 5 registered at Volume 1177 Folio 563 and that Apartment # 5 is Strata Lot numbered 6 registered at Volume 1177 Folio 564 of the Register Book of Titles."

It is regrettable that the report of Earl Spencer was not exhibited to the affidavit. The inference is that Mrs. Verleta Green has seen the report and prepared her answer above on the basis of it. She certainly inspected the apartment with Earl Spencer. At page 40 is a letter to Mr. Derrick Darby, where she wrote:

"I trust that in your discussions with the Stamp Office you have advised that this transfer is to remedy an error in the title which error was discovered on the 17th March, 1992 when I attended with the Surveyor Mr. Earl Spencer to inspect the apartment. A visit to the premises will indicate that the Apartment on the right as one ascends the steps is numbered 6."

On a reference by this Court to the Registrar of Titles this report ought to be presented. The other basis for Mrs. Green's confidence is that as an Attorney-at-Law and officer of the Court she must have exercised her right to

inspect and search the Register Book of Titles before answering the request of Dr. Diana Harrison.

Two other paragraphs of respondent Young are relevant in this regard.

They are as follows:

"...

15. That both Apartments 5 and 6 are on the same floor and face each other. I exhibit herewith marked **"DY 6"** a copy of Strata Plan No. 262 showing the location of the said Apartments."

A simple solution would be for the respondent to move across to Apartment 5, but this suggestion was apparently not acceptable to the respondent, Young. ~~Germaine would have had to agree.~~ Then she continues thus at paragraph 18:

- "18. That I have been in occupation of the said Apartment # 6 since I took possession on the 17th day of March, 1992."

That matters are in a confused state, is evidenced from paragraph 14 of Mrs.

Green's affidavit at page 36 of the Record which reads:

"That in an action brought by Dorant James Germaine in the Resident Magistrate's Court for the Parishes of Kingston and Saint Andrew for recovery of possession of Apartment 6 the said Dorant James Germaine stated under oath on the 4th day of June, 1997 in the presence of both the Defendant and the Plaintiff that money is the only objection he has to the transfer and that if he did not have to pay money he would be quite happy to keep Apartment numbered 5 which is the Apartment of which he has had physical ownership since 1984 and in which he now has tenants."

It is regrettable that proceedings were instituted in the Resident Magistrate's Court by Germaine when the tribunals that Parliament have

prescribed for resolving the issue is the Registrar of Titles pursuant to section 153, 154 and 156 of the Act and thereafter, on appeal, this Court. It is not stated on what date proceedings were instituted in the Resident Magistrate's Court.

An action was instituted in the Supreme Court by Writ of Summons on 18th July 1997. Proceedings by summonses were instituted on 24th October 1997 and 18th August 1997. What is surprising is that the lawyers on either side did not seek to invoke section 80 or 153 of the Act.

Paragraphs 11-13 of the Statement of Claim relate to the steps taken by the respondent Young to have the contract completed and stated the reliefs sought. They read thus:

"11. By Notice dated August 6, 1996 the Plaintiff made time of the essence of the contract and required the Defendant to complete the contract within thirty (30) days.

12. The Plaintiff has at all times been and is now ready and willing to perform all her obligations under the said agreement.

13. Notwithstanding requests by and on behalf of the Plaintiff, the Defendant has refused and continues to refuse to take the necessary steps towards completion of the said Agreement.

The Plaintiff claims

- (1) Rectification of the Agreement for Sale to state the correct Volume and Folio number on the Certificate of Title for Apartment No. 6
- (2) Specific performance of the said Agreement for Sale.
- (3) Further or alternatively damages for breach of contract.
- (4) A declaration that she is entitled to a lien on the said property in respect of any damages and costs.

(5) Costs.

(6) Further and other relief."

In fairness to the respondent Young, this Court was told that she has carried out repairs to Apartment 6. Further this Court was told that the state of Apartment 5 is not known to her.

It must be reiterated that the relief of specific performance may not be considered until there has been a rectification of the title to Apartment 6. Such rectification is within the exclusive jurisdiction of the Registrar of Titles in the first instance. The reasons for this are clear. She is the keeper of the records. She is the public officer entrusted with important functions as regards the administration of the Act and she can call on the Judge of the Supreme Court if necessary for the proper administration of it. She can state a case to this Court pursuant to section 22 of the Act. It is she who will say initially if there is any error or misdescription with regard to the Strata lot and she will take into account, that the Registration (Strata Titles) Act speaks of "strata lot" and "strata plan". If there is an error or misdescription it is for her to correct it. In the circumstances of this case a hearing is contemplated pursuant to section 153 of the Act and the reasons for cancellation or correction stated. Alternatively, she can record her findings of fact and state a case to this Court.

No reasons were delivered by the presiding judge Pitter J. although it seems that judgment was reserved on this Order as well as on the order for

summary judgment. The summonses were heard on 3rd December 1997 and Orders handed down on 13th March 1998.

We have frequently pointed out that judges of the Supreme Court should give reasons for their decisions. It is an essential part of the judicial function. The parties expect it, and it assists them to decide if there is to be a further appeal. This Court expects reasons for the proper conduct of appeals. The profession expects it, especially in difficult areas of law as this case has proven.

Proceedings on appeal are lengthened when there is no analysis of the facts or ~~demonstrated~~ ~~consideration of the relevant statutes~~ and authorities. Referral to the judge below for his reasons is time consuming and would cause further delay.

From a litigious point of view the Act is the foundation of the law of real property in this jurisdiction. To my mind had the learned judge put his reasons in writing he might have realized that referral to the Registrar of Titles for correction if there was error ought to have been the preferred course. He would then have adjourned the Summons for summary judgment. It was a condition precedent for the Registrar to correct any error before there could be an award of specific performance.

In fairness to the appellant Williams both in the Court below and in this Court his counsel Amery Huntley and Dr. Diana Harrison took the point that specific performance could not be ordered against the appellant Williams on

the basis of a proposed exchange of titles. Ground 5 of the Notice and Grounds of Appeal is accurate. It reads:

"5. The rectification ordered by the Court is impossible to be carried out without the co-operation of Mr. Germaine who is the registered proprietor of the land the Plaintiff now occupies and seeks to have transferred to her and there being no contract between Plaintiff and Mr. Germaine re the said land. In addition to the fact that the contract between Plaintiff and Defendant is void ab initio the order for rectification is a legal absurdity and is grossly in error."

The appellant Williams does have a title. That title ought to be examined by the Registrar of Titles to ascertain if the reported findings of the Commissioned Land Surveyor Earl Spencer are correct. The relevant Certificates of Title in relation to Dorant James Germaine and Philemon Williams are at pages 26 and 27 of the Record and page 4 of the Supplementary Record. The appeal to Strike out the Writ and Statement of Claim must be dismissed. Any Order for specific performance must await the Registrar's decision. As the foregoing analysis suggests, there might be corrections to be made on the Certificates of Title.

The Summons of the Respondent Young for Summary judgment

The Summons for Summary Judgment in paragraph 1 at page 58 of the Record sought the following relief:

"1. An Order pursuant to Section 86A of the Judicature (Civil Procedure Code) Law for specific performance of the Agreement made between the Plaintiff and the Defendant

mentioned in the Writ in this action in terms of the minutes hereunto annexed, or alternatively.
 ..."

The Order in the Court below at page 55 of the Record reads:

"2. Order in terms of Paragraph 1 of the Summons dated the 24th of October, 1997."

Section 153 of the Act has already been cited. By virtue of section 21 of the Interpretation Act this Court is bound to take judicial notice of that section as well as section 154 of the Act which might become relevant to the issues in this case.

Section 154 reads:

"154. Upon the appearance before the Court or a Judge or any person summoned or brought up by virtue of a warrant as aforesaid, it shall be lawful for the Court or Judge to examine such person upon oath and, in case it shall seem proper to order such person to deliver up such certificate of title or instrument as aforesaid and, upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to prison for a period not exceeding six months unless such certificate or instrument shall be sooner delivered up; and in such case, or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the Registrar shall, if the circumstances of the case require it, issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any certificate of title being lost or destroyed, and shall enter in the Register Book notice of the issuing of such certificate, and the circumstances under which the same was issued, and thereupon the certificate of title or instrument as aforesaid, so refused or neglected to be delivered up as aforesaid, shall be deemed for all purposes to be null and void as far as

the same shall be inconsistent with the certificate or instrument so issued in lieu thereof."

The plan of the Commissioned Land Surveyor Robert Bogle when the Strata Titles were registered is in evidence. It speaks of Lot numbers and it seems that is how it appears in the Register Book of Titles. To my mind had the respondent resorted to the statutory provisions in section 153 and, if necessary, 154 of the Act, this case would have been satisfactorily disposed of long ago. It is the Registrar of Titles who must decide if Mrs. Green's evidence is correct. As was previously stated Mrs. Green's evidence was based on the report of Mr. Earl Spencer a Commissioned land Surveyor. Instead of making an Order for specific performance the learned judge below should have adjourned the Summons and directed the Registrar of the Supreme Court to ascertain if the title to Apartment 6, warranted correction on the ground of error or misdescription. If necessary the correction ought to be made. This Court has all the powers of the Supreme Court on hearing an appeal so the Registrar of this Court is directed to forward this judgment to the Registrar of Titles with the appropriate directions. The Registrar of Titles should be informed, that it is desirable for the Registrar of this Court to have her decision as soon as possible so it would be appreciated if she would give the matter her usual prompt attention.

WALKER, J.A:

I have had the benefit of reading in draft the judgment of my learned brother Downer JA and I agree with his reasoning and conclusions as expressed therein. I would dispose of this appeal in the manner he proposes.

I would only add that in my judgment it was not open to the learned trial judge to order specific performance of the contract in question in circumstances where one of the two contracting parties who was subject personally to that order, was not, himself, a party to the proceedings before the court.

LANGRIN, J.A. (Dissenting)

This is an appeal from the judgment of Pitter J, sitting in Chambers on 13th March, 1998 when he made the following orders on a Summons for Summary Judgment and Summons to Strike Out Writ of Summons:

1. Order that the Agreement made between the Defendant and the Plaintiff for the sale and purchase of ALL THAT parcel of land now known as Apartment # 6, 4a Brompton Road, Kingston 5 in the parish of Saint Andrew and being all the land comprised in Certificate of title registered at Volume 1177 Folio 564 of the Register Book of Titles be rectified to read Volume 1177 Folio 563 in lieu of Volume 1177 Folio 564 as the Volume and Folio Numbers of the Certificate of Title.
2. Order that the said Agreement be specifically performed and carried into execution as rectified.
3. Order that the Defendant within 14 days of the judgment register at the Office of Titles the Instrument

of Transfer by Way of Exchange executed by the said Defendant and Durant James Germaine in respect of lands registered at Volume 1177 Folio 564 and Volume 1177 Folio 563.

4. And upon the Transfer being registered let the Plaintiff obtain a Letter of Commitment from the National Housing Trust or other reputable financial institution for a first legal mortgage of not less than One Hundred Thousand Dollars (\$100,000.00) on the security of the property within 42 days of the Vendor's Attorneys-at-law furnishing proof of such registration to the plaintiff's Attorney-at-law.
5. Order that upon production of the said Letter of Commitment the Defendant produce a Registrable Transfer and the Duplicate Certificate of Title for the said Apartment # 6 and take all steps necessary to transfer ALL THAT parcel of land now known as Apartment 6 to the Plaintiff.
6. That if the Defendant refuses or fails to pay any or all statutory duties and fees and assessments payable on the Agreement for Sale and Transfers the Plaintiff be at liberty to pay same and deduct the payments from the balance purchase money.
7. That the Registrar of the Supreme Court be empowered to do all or any acts necessary to carry into effect the transfer of the Apartment # 6 to the Plaintiff upon failure or refusal of the Defendant or any person for him to do such act(s).
8. Order the Defendant by himself, his servants or agents or any person for him be restrained from transferring, leasing, changing or otherwise dealing with the Apartment to the prejudice of the Plaintiff.
9. Order that the costs of the action be paid by the Defendant to the Plaintiff such costs to be taxed if not agreed".

The circumstances giving rise to this appeal were that an Agreement for the Sale of all that parcel of land now known as apartment No 6, 4a Brompton Road, Kingston 5, St. Andrew was made on or about the 22nd day of November, 1991 and signed by the appellant as vendor and the respondent as purchaser. The land in question was registered at Volume 1177 Folio 564 of the Register Book of Titles.

It was a term of the Agreement that completion would be on or before the expiration of ninety (90) days from the date of the Agreement on payment of all moneys payable by the purchaser in exchange for the duplicate Certificate of Title duly endorsed with the Transfer to the purchaser as registered proprietor. On the 5th November, 1991 the purchaser duly paid the deposit of Fifty Two Thousand, Five Hundred Dollars (\$52,500.00) pursuant to the said Agreement. It was a term of the Agreement that it was subject to the purchaser raising a first legal mortgage of not less than One Hundred Thousand Dollars (\$100,000.00) from a reputable financial institution. The purchaser duly applied to the National Housing Trust for a loan on the security of the property to complete the purchase of the apartment. On the 10th March, 1992 the purchaser made a further payment of Two Hundred Thousand Dollars (\$200,000.00) on account of the purchase price. On the 17th March, 1992 the purchaser was put in possession of apartment # 6 at an agreed rental

of One Thousand Five Hundred Dollars (\$1,500.00) per month and has remained in possession of that apartment since that date.

A survey was conducted by a Commissioned Land Surveyor when it was discovered that apartment #6 was in fact Strata Lot numbered 5 which was registered at Volume 1177 Folio 563 in the name of Dorant James Germaine. Consequently, apartment #5 was actually Strata Lot#6 which was registered at Volume 1177 Folio 564 in the name of Philemon Williams. The errors came about because the apartment numbers did not coincide with the numbering of the strata lots.

By letter dated September 10, 1993, the Attorney-at-Law acting on behalf of the appellant informed the National Housing Trust of the error in the registration of the apartment and advised that the rectification of the error would be completed not later than October 30, 1993.

In order to rectify the error in registration the appellant and the registered proprietor of the land registered at Volume 1177 folio 563 duly executed Instruments of Transfer by way of exchange between 1993 and 1994. The effect was that the registered proprietor of the land registered at Volume 1177 Folio 563 transferred all his estate and interest in the said land to the appellant in consideration of the appellant transferring to him all his estate and interest in the land registered at Volume 1177 Folio 564.

It is necessary to set out this transfer in its entirety for its full terms and effect:

**"TRANSFER UNDER THE REGISTRATION OF TITLES
ACT BY WAY OF EXCHANGE**

WE, PHILEMON WILLIAMS, 20 Hughenden Avenue, Kingston in the parish of Saint Andrew and DORANT JAMES GERMAINE of 25 Anthurium Drive in the parish of Saint Andrew, Contractor and Carpenter respectively being registered at Volume 1177 Folio 564 and by Certificate of Title registered at Volume 1177 Folio 563 respectively as proprietors of an estate in fee simple in said Certificate of Title and endorsed on the said Certificate of Title and subject to the incumbrances recited in and endorsed on the said Certificate of Title both otherwise free from incumbrances.

IN CONSIDERATION of the Transfer to me, PHILEMON WILLIAMS of all the estate and interest in the land described in the Schedule hereto and registered at Volume 1177 Folio 563 by DORANT JAMES GERMAINE, I, PHILEMON WILLIAMS, contractor do hereby transfer my estate and interest in the said land which I am entitled to transfer in ALL THAT parcel of land described in the Schedule hereto and registered at Volume 1177 Folio 564.

IN CONSIDERATION of the Transfer to me, DORANT JAMES GERMAINE of all the estate and interest in the land described in the Schedule hereto and registered at volume 1177 Folio 564 by PHILEMON WILLIAMS, I, DORANT JAMES GERMAINE, Carpenter do hereby transfer my estate and interest in the said land which I am entitled to transfer in ALL THAT parcel of land described in the Schedule hereto and registered at volume 1177 Folio 563.

THE PARTIES hereto declare that this transfer is a transfer by way of exchange of premises registered at Volume 1177 Folio 564 in exchange for premises registered at Volume 1177 Folio 563 and that the said premises are of equal value

and that the transfer is effected only to correct an error in the registration of the proprietorship in respect of Certificates of Title for both premises.

SCHEDULE

ALL THAT parcel of land part of BROMPTON in the parish of SAINT ANDREW being the Strata Lot numbered FIVE on the strata plan numbered Two Hundred and Sixty Two and TWELVE undivided 1/62nd share in the common property therein being all the land comprised in Certificate of Title registered at volume 1177 Folio 563 of the Register Book of Titles.

A N D

ALL THAT parcel of land part of BROMPTON in the parish of SAINT ANDREW being the Strata Lot numbered SIX on the Strata Plan numbered Two Hundred and Sixty-two and TWELVE undivided 1/62nd share in the common property therein being all the land comprised in Certificate of Title registered at Volume 1177 Folio 564 of the Register Book of Titles.

SIGNED by the said TRANSFEROR)

PHILEMON WILLIAMS)

In the presence of)

.....

ATTORNEY -AT-LAW

SIGNED by the said TRANSFEREE)

DORANT JAMES GERMAINE)

In the presence of)

....."

ATTORNEY-AT- LAW

It should be observed that the problem of matching each apartment to its respective Certificate of Title would have been achieved by the method of execution of the transfer by way of

exchange. What remains to be done is for the duties to be paid and the transfer by way of exchange to be registered.

By notice dated August 6, 1996 addressed to the appellant the respondent made time of the essence of the aforementioned contract between the parties and required the appellant to complete the contract within thirty days. It was the refusal of the appellant to complete that contract which gave rise to the application by the plaintiff/respondent to seek the remedies of Rectification and Specific Performance of Contract before Pitter J.

On this appeal the two main grounds argued by Mr. Huntley are:

- "(1) The rectification ordered by the Court is impossible to be carried out without the co-operation of Mr. Germaine who is the registered proprietor of the land plaintiff now occupies and seeks to have transferred to her and there being no contract between plaintiff and Mr. Germaine re the said land. In addition to the fact that the contract between plaintiff and defendant is void *ab initio* the order for rectification is a legal absurdity and is grossly in error.
- (2) The order for specific performance cannot be carried out because Mr. Germaine is the registered proprietor of the land registered at Volume 1177 Folio 563 in the Register Book of Titles."

Snell's Principles of Equity 27th Edn., p. 610, paragraph 1 states the relevant law dealing with rectification:

"If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake

in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing. 'Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts'." (emphasis supplied).

Further at page 611 under the heading "common mistake" the learned author states:

"The general rule is that rectification will not be granted unless there has been a mistake in expression which is common to all parties. In general, a claim will succeed only if it is established, first, that there was some prior agreement between the parties, secondly; that this was still effective when the instrument was executed; ~~thirdly, that by mistake the instrument~~ fails to carry out that agreement; and fourthly, that if rectified as claimed, the instrument would carry out the agreement".

In the instant case it cannot be gainsaid that there was a mistake, not in the transaction itself, but in the way in which that transaction was expressed in writing. The appellant owns the correct apartment but there was an obvious error in the numbering of the apartments. Now that the owners whose apartments were affected by the mistake have executed a transfer by way of exchange, the mistake can be corrected. The transfer by way of exchange is a document executed in pursuance of the terms of the contract, and as such it can therefore be rectified.

In an affidavit sworn to by the appellant on the 29th November, 1997 it was stated at paragraph 7 as follows:

"My lawyer, Mr. Darby, suggested that I enter into a transfer arrangement with Mr. Durant Germaine in order to facilitate Ms. Dorothy Young, the plaintiff. Mr. Germaine and I signed papers at Mr. Darby's office; however, we promptly rescinded 'transfer arrangement' when it was disclosed to us that we had to pay stamp duty and transfer tax at 7.5% of the assessed value of the land."

There was no evidence before the learned trial judge to establish the rescission of the transfer arrangement. Indeed, the stamp duty which such a transfer attracts is minimal and any such reason for rescinding the transfer arrangement would be unconscionable. In my view, the learned trial judge was correct in rectifying the agreement between the parties in light of the transfer by way of exchange. An appeal court is slow to interfere with the discretion of a trial judge. This was the sentiment expressed in ***Hadmor Productions Ltd. v. Hamilton*** [1982] 1 All ER 1042 where Lord Diplock said :

"... the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only, it may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated

to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it".

I therefore, reject the appellant's submission that there is no valid contract between the respondent and appellant and that, therefore, there can be no specific performance as requested by the respondent. Furthermore, I am of opinion that the learned trial judge was correct in ordering that the agreement should be specifically performed as rectified. Mr. Germaine gave evidence in the Resident Magistrate's Court that his only objection was as to the payment of money, and he said that if he did not have to pay he would be quite happy to keep the apartment he has owned since 1984. Without this transfer arrangement Mr. Germaine would find himself in the same predicament as the appellant when he comes to deal with his property.

In all the circumstances, and for the foregoing reasons, I would dismiss this appeal with costs to the respondent to be agreed or taxed.

ORDER:

DOWNER, J.A.:

By a majority, [(Downer and Walker JJA, Langrin JA dissenting)].

1. Appeal dismissed with respect to Summons to Strike Out Statement of Claim.

2. Hearing with respect to Summons for Specific Performance adjourned pending reference to the Registrar of Titles pursuant to section 153 of the Registration of Titles Act.
3. Order for costs to abide resumed hearing .