IN THE COURT OF APPEAL

GRENADA

Civil Appeal No. 5 of 1970

Between: JAMES KENRICK MILNE Plaintiff/Appellant

and

FLORA CORIEN Defendant/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice P. Cecil Lewis
The Honourable Mr. Justice St.Bernard(Ag.)

S.H. Graham for Appellant
H.R. Scipio for Respondent

1970, September 10, 11 October 9

GORDON, ACTING CHIEF JUSTICE

This appeal arises out of an action brought by the plaintiff/appellant against the defendant/respondent in which he claimed -

(1) specific performance of an oral agreement,

(2) a declaration that the plaintiff is entitled to a lien on the said property for his deposit (together with interest thereon),

(3) further relief,

(4) costs.

After hearing the action the trial judge entered judgment for the plaintiff/appellant in the sum of $300 with one half of his taxed costs and further ordered that the plaintiff/appellant be entitled to a lien on the whole of the defendant/respondent's lands at Pt. Cistern, Carriacou, in the said sum of $300. The plaintiff/appellant has appealed from this decision.

The facts which have given rise to this litigation are as follows:-

The defendant/respondent, together with her five other sisters, inherited the Pt. Cistern Estate at Carriacou from their

/father.....

father, the late Benjamin Alexis. Though not surveyed, the land was divided by mutual agreement into six more or less equal parts, and duly delineated by boundary marks.

After some negotiaitions in which one Bertrand Alexis was the go-between, the plaintiff/appellant agreed to purchase from the respondent, the latter's share of the patrimony estimated at about 6 - 7 acres. The agreed purchase price was £100 per acre for the first 3 acres and £80 per acre for the remaining portion. The respondent on her part agreed to sell, subject to the approval of her children who were all abroad. In anticipation of the agreement of her children, the respondent accepted on the 11th February, 1964 and on the 9th April 1964, the respective sums of $200 and $100 on account of the purchase price. Set out in the receipt which was given for the $200 are the terms of the oral agreement save and except that it was conditional on the children agreeing to sell the land.

After a delay of about two years the respondent intimated to the appellant that her children were not agreeable to the sale, whereupon the appellant asked her to refund his money. The respondent failed to do so.

After a further delay, the appellant made repeated requests of the respondent to sign a conveyance in his favour. She however refused to do so and, on the 29th July 1969, he instituted proceedings against her for the specific performance of the contract.

According to the pleadings in the case, the appellant based his claim on an oral agreement the terms of which were embodied in the receipt for $200 which was made on the 11th February. This receipt was as follows:-

> "Received from Mr. James K. Milne of St.George's, Grenada, the sum of Two Hundred Dollars ($200.00) being deposit on approximately seven (7) acres land situated at Point Cistern belonging to me.

/The agreed....

> The agreed purchase price to be One Hundred pounds sterling (£100) per acre for the first three (3) acres and eighty pounds sterling (£80.0.0.) per acre for the remaining four acres".

According to the defence filed by the respondent the agreed sale was conditional on her children's agreeing. She was willing to return the $300.00 paid on account or in the alternative to execute a Conveyance in favour of the appellant for one acre.

At the trial the respondent apparently abandoned the idea of her willingness to convey one acre of the land for there was no further reference to such an intention throughout the hearing. Before this Court however counsel for the respondent admitted that this plea ought not to have been included in the defence. He apologised for its presence and confirmed that it had not been proceeded with in the lower Court.

In the final stages of his judgment the trial judge stated thus:-

> "The agreement alleged by the plaintiff is too uncertain to be specially enforced, the plaintiff is however entitled to a refund of $300 which he gave to the defendant by way of advance".

The trial judge having accepted the fact that the land which was the subject matter of the agreement for sale had been delineated and marked off with boundary marks, nevertheless based his refusal to make the order for specific performance on the ground of uncertainty. This uncertainty as he stated in his judgment, arose out of the discrepancy between the appellant and the respondent as to the area of the land. The appellant, despite the receipt in his possession referring to seven acres, was under the impression that he was purchasing six and a half acres, while the respondent was of the opinion that the agreement was for seven acres.

Counsel for the appellant quite convincingly and with justification challenged the accuracy of this conclusion of the

/trial...

trial judge.

The evidence in the case indicated clearly that the land which was the subject matter of the agreement for sale was easily identifiable and that its area could equally well have been ascertained; indeed the circumstances were such as to render applicable the maxim id certum est quod certum reddi potest and admitted of no uncertainty. Accordingly, when the trial judge founded his refusal to grant the application of the plaintiff/appellant on the ground of uncertainty he was obviously in error.

Counsel for the appellant further urged on the Court that because the trial judge had drawn a conclusion from the facts before him which was obviously wrong, it was open to the Court on the authority of Coghlan v. Cumberland (1898) 1 Ch Div 704 to correct those errors and to arrive at its own conclusions of facts on the evidence as a whole.

In the instant case although the trial judge made several important findings of fact, he nevertheless gave no effect to them when he arrived at his conclusion of uncertainty. His conclusion in this regard was completely isolated from the many other facts which he found and which could have been in the nature of strong influencing factors in determining material issues in the case. These findings of fact are on record in the judgment of the trial judge. They were the result of his assessment of the witnesses who appeared before him, and his preference for the one rather than the other of two conflicting versions. It is in the face of such findings that counsel urges the Court to regard the facts as being at large, and to find facts other than those found by the trial judge.

The principles whereby an appellate court may review questions of fact tried by a judge without a jury are set out in the cases of Coghlan v. Cumberland supra and in Watt or Thomas v. Thomas 1947 AC 484.

/In the....

In the former Lindley M.R. stated - at p 705

> "When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses."

and in the latter Lord Thankerton had this to say - at p. 457

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his havings een and heard the witnesses, and the matter will then become at large for the appellate court".

These limitations on the circumstances in which an appeal Court will interfere with findings of fact of a trial judge sitting alone clearly indicate the flaw in the submission of counsel, and leave this Court no alternative but to attach the greatest weight to the opinion of the trial judge unless it is plainly unsound. In the instant case, apart from the trial judge's conclusion in relation to the question of uncertainty which I have already indicated had nothing to do with the other facts found, I can find no good reason for interfering with his findings of fact which seem to be amply justified from the evidence which was before him.

The finding by the trial judge that the respondent told

/the.....

the appellant that she could not sell the land unless her children agreed, establishes the conclusion that the agreement to sell was conditional on the approval of the children and since the children did not agree the sale could not have been concluded.

The further finding that in the event of the children not approving the sale the appellant would accept the return of the money lends yet further strength to the respondent's story that the agreement to sell was a conditional one, the non-fulfilment of which rendered the moneys paid on account refundable.

These findings in my view lend finality to these proceedings.

At the request of the Court counsel for the appellant addressed it on the question of interest. He submitted that in view of the order for the refund to the appellant of his deposit, the trial judge should have awarded interest on that sum.

In his Statement of Claim the appellant did claim interest under item (2) and perhaps by implication under item (3) which were as follows:-

> (2) A declaration that the Plaintiff is entitled to a lien on the said property for his deposit (together with interest thereon) and any damages or costs awarded in this action.
>
> (3) Further or other relief.

Despite the fact that the trial judge did not award any interest in his judgment, the appellant in his grounds of appeal did not appeal against this aspect of the judgment and seemed content to rely on the omnibus clause in the relief which he sought viz:-

> 'Further and other relief including in the alternative damages for breach of contract.'

/This.....

This does not in my view give the appellant the right to raise this specific ground of appeal at this stage of the proceedings, vide Rule 12(3) of the Court of Appeal Rules 1968.

In the circumstances I am satisfied that the appellant has not established his claim for an order for specific performance, even though the subject matter of his claim is certain and identifiable. I would for the above reasons dismiss this appeal with costs.

K.L. GORDON
ACTING CHIEF JUSTICE

/CECIL LEWIS, J.A.....

CECIL LEWIS, J.A.

This is an appeal against an order of a judge of the High Court dated May 27, 1970, refusing an application by the appellant for an order for specific performance of an oral agreement allegedly entered into between himself and the respondent on or about the 11th February, 1964, in connection with a portion of land.

The statement of claim which is a short document reads as follows:

> "1. By an oral agreement made between the Plaintiff and the Defendant on or about the 11th day of February, 1964, the Defendant agreed to sell and the Plaintiff agreed to buy ALL THAT lot piece or parcel of land part of Point Cistern Estate in the Dependency of Carriacou containing by estimation Six Acres and Two Roods English Statute Measure and abutted and bounded on one side by land of Florie Alves on a Second side by lands of Elizabeth Taylor and on the two remaining sides by the sea or howsoever otherwise the same may be abutted bounded known distinguished or described for the price of Two thousand Six Hundred and Eighty-four Dollars.
>
> 2. It was further provided by the said agreement that the Plaintiff should pay a deposit of $200.00 in respect of the said purchase price. The Plaintiff duly paid the said sum to the Defendant on the 11th day of February, 1964, and a receipt therefor containing particulars of the said agreement was given by the Defendant to the Plaintiff to which the Plaintiff will at the trial refer for its full terms and effect.
>
> 3. Notwithstanding repeated requests by the Plaintiff the Defendant has neglected and refused and continues to neglect and refuse to take any steps towards the completion of the said agreement for sale.
>
> 4. The Plaintiff has at all material times been and is now ready and willing to fulfil all his obligations under the said agreement.
>
> And the Plaintiff claims:
>
> (1) Specific Performance of the said agreement.
>
> (2) A declaration that the Plaintiff is entitled to a lien on the said property for his deposit (together with interest thereon) and any damages or costs awarded in this action.
>
> (3) Further or other relief.
>
> (4) Costs."

In her defence the respondent denied (a) that a firm agreement was made with the appellant to sell the land described in paragraph 1 of the statement of claim at the price

/therein alleged

therein alleged or any other sum; (b) that any agreement was reached between the parties for the appellant to deposit the sum of $200 as alleged or any other sum. The respondent in her defence admitted that the appellant had made an offer to purchase her interest "in what was then an individual (sic) parcel of land of about 42 acres devised to the respondent and five other sisters in equal shares", at a suggested price of £80 per acre for some parts and £100 per acre for other parts of the said land; that at the time of the offer she told the appellant that she could only sell if she obtained the consent of her children of whom she had twelve, and all of whom were abroad. It was further admitted in the defence that the respondent, subsequent to her conversation with the appellant, accepted on two occasions sums of $200 and $100 respectively from the appellant on the understanding that such sums were in respect of one acre of land only and pending the receipt of replies from such of her children "as had been contacted in the matter, and that if the replies were unfavourable then the plaintiff will accept a return of any sums advanced." It was also admitted in the defence that when the respondent was asked to execute a conveyance of her "interest in the entire lot of land in favour of the plaintiff" she refused to do so, informed the appellant that she had heard from some of her children who had told her not to sell, and offered to return the $300 to the appellant who refused to accept the same. She also pleaded that she is ever ready and willing to return the advance to the appellant.

The trial judge, in refusing the appellant's request for specific performance stated that in his view there was a great deal of uncertainty about the alleged contract. As I understand his judgment he seems to have found that the agreement was uncertain in two respects, viz. as regards the area of land involved and the purchase price to be paid therefor. I base this statement on the following extract from his judgment:

> "The Plaintiff in examination-in-chief said that he paid the $200.00 deposit on 3 acres on the beach and 3 or 4 acres approximately on the hillside. The receipt which was signed by the Defendant after being typed by Mr. Daniel is in respect of seven acres of land, and the oral agreement alleged in paragraph 1 of the Statement of Claim is in respect of 6 acres 2 roods of land. It is quite clear that the Plaintiff was negotiating for the whole of the Defendant's land at Point Cistern, whatever its area, but it is equally

/clear that

> clear that the Defendant was negotiating on the basis that she was selling seven acres of land whereas the Plaintiff, notwithstanding the fact that he was in possession of the Defendant's receipt in respect of seven acres, was under the impression that he was buying 6 acres 2 roods of land.
>
> The Plaintiff alleged in paragraph 1 of his Statement of Claim that the agreed purchase price for the Defendant's land was $2,684.00. If this purchase price was arrived at on the basis of £100 ($480) per acre for 3 acres and £80 ($384) per acre for 3½ acres, it is $100 short."

It will be observed that the respondent did not plead uncertainty, and indeed as the trial was conducted this issue was never raised by her. Now as regards the land, the uncertainty to which the judge referred seems to be in relation only to half an acre; the statement of claim mentioning an area "containing by estimation 6 acres and two roods", and the receipt referring to an area of "approximately seven acres". This to my mind is a trivial difference and ought not to have been considered as sufficiently weighty to justify a conclusion that the alleged contract was uncertain in this respect.

Despite the conflicting figures as to area given in the statement of claim and in the receipt, one significant fact emerges, and that is the respondent in her evidence agrees with the boundaries of the land as stated in the statement of claim. The effect of this is to make it evident that the parties in the course of their negotiations were speaking of an area of land delineated by agreed boundaries. The area of the land thus enclosed by these boundaries was capable of being ascertained by survey and since this is so there cannot be said to be any uncertainty in this respect. The trial judge stated in his judgment that "it is quite clear that the plaintiff was negotiating for the whole of the defendant's land at Point Cistern whatever its area." I agree with this statement which in my view puts the matter in its proper perspective, but then he went on to say that "it is equally clear that the defendant was negotiating on the basis that she was selling seven acres of land whereas the plaintiff notwithstanding the fact that he was in possession of the defendant's receipt in respect of seven acres, was under the impression that he was buying 6 acres 2 roods of land." There is no evidence that the plaintiff was under this impression at all. In his evidence he said that he had deposited money "on 3 acres on the beach and 3 or 4 approximately hillside." So in reality the plaintiff was

/saying

saying that the area in respect of which he was negotiating was six or seven acres. However since the land under discussion was land enclosed by boundaries about which there was agreement, the parties could not be said, in the final analysis, to be uncertain as to its area as this was, as I have already said, ascertainable by survey and since it was ascertainable it was certain. As the trial judge has rightly pointed out the purchase price of $2,684 mentioned in the statement of claim would be $100 short if calculated in relation to 6½ acres on the basis of $480 per acre for 3 acres and $384 per acre for 3½ acres. But since the receipt indicated that the "agreed purchase price /was/ to be one hundred pounds sterling ($480) per acre for the first three acres, and eighty pounds sterling ($384) per acre for the remaining four acres", the actual price to be paid could be arrived at by applying the formula set out in the receipt to the land enclosed within the agreed boundaries after its area had been ascertained by survey. The purchase price could thus be ascertained with certainty. I therefore cannot agree with the trial judge that any uncertainty existed as regards the purchase price of the land.

The receipt was signed by the respondent, she has not challenged its authenticity and in fact she made it clear in her evidence that before she signed it she asked "what /she/ was signing for." I agree with counsel for the appellant that the receipt contains all the particulars which would normally be sufficient to lead to an order for specific performance of a contract for the sale of land. It contains a reference to the area of the land, its purchase price and the parties to the transaction. These facts taken in conjunction with the respondent's own admission as to the boundaries of the land, the purchase price and its size, are in my opinion of such a nature as to preclude a finding that the contract was uncertain. I am therefore of the opinion that the trial judge was wrong in holding that the "agreement alleged by the plaintiff is too uncertain to be specifically enforced."

This however does not mean that judgment should be entered for the appellant/plaintiff. There are still to be considered certain findings of fact by the trial judge in relation to the defence which he did not use as a basis for his judgment.

It was submitted by counsel for the appellant that if the Court holds that the trial judge's finding that the contract

/is uncertain

is uncertain cannot stand then the matter is at large, and that the Court is entitled to make its own findings of fact on the evidence as a whole. He accordingly invited the Court to pursue this course. He said support for this submission was to be found in the case of Coghlan v. Cumberland (1898) 1 Ch. D. 704. This was a case involving an appeal from a judge who sat without a jury. The appeal raised questions of fact, and Lindley M.R. made certain observations as to the rules which should be applied by the Court on the hearing of such an appeal. He said at pages 704/705:

> "The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

The evidence on which the trial judge came to his conclusions of fact on issues (other than the issue relating to the uncertainty of the agreement) was of a conflicting nature and his conclusions must in my opinion inevitably have been influenced by the impression which the witnesses made upon him while giving their evidence. This case was one in which the credibility of the various witnesses was determinable largely by their manner and demeanour as there were no other circumstances in the case on which the trial judge could rely for assistance in deciding the other issues. Being of this opinion, I am unable to agree with counsel for the appellant

/that this

that this is a proper case in which the Court should seek to substitute its own findings of fact for those of the trial judge.

The trial judge found -

(a) that the sale of the land was conditional upon the agreement of the defendant's children;

(b) that when the defendant accepted the advance from the plaintiff, the plaintiff's agent Alexis had assured her that the plaintiff would accept the return of the money in the event of her children not agreeing to the sale and that the defendant relied on this assurance, and

(c) that when the defendant informed the plaintiff that her children had not agreed to the sale the plaintiff told her to return to him the sum of $300 he had advanced to her but although the defendant promised to return the money she never did so.

The duty of this Court is to see whether there is sufficient evidence to justify these findings.

As to finding (a), the trial judge after referring to the occasion when the appellant, the respondent and Bertrand Alexis, the appellant's agent, visited the respondent's land and the appellant remarked to the respondent that he liked her land and would be prepared to pay her £100 per acre for the flat land and £80 per acre for the hillside land, went on to say:

> "Prior to this visit of the Plaintiff to the Defendant's land, Alexis and the Plaintiff had gone to the Defendant at her home at Harvey Vale, Carriacou, and the Plaintiff had asked her to sell some land to him whereupon the Defendant told the Plaintiff that she could not sell the land if her children did not agree. The Defendant had twelve children, all resident abroad at that time. The Defendant promised to write her children to hear what they had to say."

Counsel for the appellant conceded that during the course of negotiations the respondent had said she wished to refer something to her children. He admitted that the appellant had given evidence to this effect and he stood by it. It is obvious from the evidence that the only thing which the respondent wished to refer to her children was the question whether or not she should sell her land. It is to be observed that the appellant stated in his evidence that "it is conceivable that she (i.e. the respondent) mentioned her children before I paid the deposit. This lends support to the respondent's story.

/The appellant's

The appellant's agent Bertrand Alexis corroborated the respondent's evidence that she told the appellant that her children's consent was a condition precedent to the sale of the land. He said this -

> "On or about 11/2/64 Plaintiff and I went together to Defendant's home at Harvey Vale and asked her if she would sell a portion of land at Point Cistern Estate. She said she is willing to sell but she can't do no business without the consent of the children."

In my view therefore the judge's finding that the sale was conditional upon the agreement of the respondent's children was one which is abundantly supported by the evidence.

As to finding (b), counsel for the appellant submitted that the respondent had informed the appellant that her children had agreed to the sale and this is why he had made the advance of $200 to the respondent. The witness Bertrand Alexis does indeed give evidence to this effect but the trial judge seems to have rejected this portion of his evidence.

The trial judge's second finding of fact is in the following terms -

> "In the meantime the Defendant accepted $200 from the Plaintiff on or about the 11th February, 1964, on account of the sale to the Plaintiff of her said land. Alexis had assured the Defendant that the Plaintiff would accept the return of his money in the event of the Defendant's children not agreeing that the land should be sold, and the Defendant relied on this assurance."

This passage follows immediately after his first finding of fact that the agreement of the respondent's children was a necessary pre-condition for the sale of the land, and indeed it is really a continuation of the first finding. The first finding terminates with the respondent's promise to write her children to find out what they had to say about the sale of the land, and I understand the trial judge to mean that she accepted the deposit from the appellant <u>while awaiting their replies</u>. This, in my opinion, is the effect of the words "in the meantime" in this context. But as I understand it the respondent never resiled from her position that the agreement of her children was an essential condition of the sale and her stand was that whether or not she had taken any money, the sale could not go through unless this condition was fulfilled. Her evidence in this respect is that she asked Alexis: "if I have money for plaintiff and I got a letter from the children

/telling me

telling me not to sell what he thinks I must do. Alexis told me that plaintiff would take back the money." Alexis denies this, but by his finding the trial judge showed that he did not believe him.

I understand the sequence of events in relation to the first and second findings of the trial judge to be as follows: There was first the discussion between the two parties and Alexis about the land, in the course of which the respondent made clear her intention to refer the question of the sale of the land to her children; then while this was being done and before she received replies from them she accepted the advance of $200 from the appellant, but on the clear understanding that if the children did not agree to the sale then the contract would be off and the money refunded. My interpretation of the trial judge's second finding is that there is implicit therein a finding that the advance was made before the replies were received from the respondent's children and on the understanding that the appellant would accept its return if her children refused to agree to the sale and that Alexis had so assured the respondent and she relied on this assurance.

The trial judge's third finding of fact is to the effect that after the lapse of some time the respondent told the appellant that her children had not agreed to the land being sold and the appellant thereupon told the respondent to return to him the $300 he had advanced to her. If this finding of fact can be supported by the evidence then this will be a complete answer to the appellant's claim for specific performance.

The occasion on which the appellant is alleged to have told the respondent to return the money he had advanced to her is identified by the respondent, by the witness John Prime and by the appellant's agent, Bertrand Alexis as being the day when the appellant was paying the respondent's sisters for land he had purchased from them. The appellant was then staying at the Mermaid Tavern Hotel at Hillsborough and the respondent went there with her sister Elizabeth Taylor and Joanna Alves' daughter Jessie Prime. The appellant's agent Bertrand Alexis and a lawyer Mr. Williams were also present. The respondent's evidence as to what happened at the hotel is as follows:

> "Plaintiff and Mr. Williams the lawyer were paying the shareholders. Plaintiff said "Mrs. Corien, I got a letter from Alexis and he told me that if your children do not agree that you should sell the land to me, I will not fight brute force to

/take away

> take away your land from your children. Only one thing you have to do is to just pay me my money back. This was said in everybody's presence.'

Joshua Prime who also had sold some property to the appellant was present. He had gone to the hotel to get the balance of his money from the appellant and his recollection of the events is as follows:

> "I remember when the Plaintiff came to finalise the bargain. That was at the Mermaid Tavern, Hillsborough, Carriacou. There were other people present. Present also were Mrs. Taylor, Mrs. Alves, I, Mrs. Corien and Plaintiff. Alexis was also present. I got my money. Defendant mentioned to Plaintiff that the children and them don't decide to sell the land any more and Plaintiff said to her since the children don't decide to sell, he don't want any confusion with the children so let him have back his money."

And finally there is the evidence of the appellant's own agent, Bertrand Alexis, which is to the following effect:

> "Plaintiff came back to Carriacou. I spoke to the shareholders and they came to the Tavern Mermaid Hotel. Some of them received the money there. Defendant said that the children don't agree. Plaintiff said "If the children don't agree, Madam, you can give me back the money."

The appellant of course denied that he had ever asked for the return of his deposit, but the trial judge did not accept his denial.

The judge in my opinion was fully entitled on that evidence to come to the conclusion that the appellant had asked the respondent to return the money he had advanced to her. This finding means that the appellant could no longer proceed with his claim for specific performance of the contract.

I would accordingly dismiss the appeal with costs.

(P. Cecil Lewis)
Justice of Appeal

/ST. BERNARD J.A. (Ag.)

ST. BERNARD J.A. (Ag.):

I would only add that the judge's finding that the contract for the sale of land was uncertain, in my view, cannot stand. Counsel for the appellant contended that if such a finding could not stand then the facts of the case were at large and this Court should find them. In support of this contention he cited the case of Coghlan v. Cumberland (1898) 1 Ch. D. 704. This finding of uncertainty by the judge is, in my opinion, a question of mixed law and fact and does not affect the findings of fact in respect of the conditional nature of the agreement. In these special circumstances Coghlan v. Cumberland, in my view, does not apply. The finding of fact by the judge that the purchase money for the land would be repaid by the appellant if the respondent's children did not agree to the sale does not depend upon certainty or uncertainty of the contract. This question involves a finding on the credibility and demeanour of the witnesses whereas the question of certainty or uncertainty turns upon the interpretation placed on the words "by estimation" and "approximately" in the evidence. The judge made a clear finding of fact based on the credibility and demeanour of the witnesses that the purchase money was paid on condition that it would be returned in case the respondent's children did not agree to the sale. The judge found they did not agree. This was the only issue in the case and as long as he so found the appellant could not succeed. Unfortunately the judge did not give effect to this finding of fact but for some reason went on to say that the contract was uncertain. I would not interfere with the findings of fact made by the trial judge and would give effect to them.

In regard to interest, although I think it ought to have been awarded in the court below, there is no appeal on this point. I would dismiss the appeal with costs.

(E. L. St. Bernard)
Justice of Appeal (Ag.)