STATE OF ANTIGUA:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1975

BETWEEN: KEITH EDWARDS
EUNICE EDWARDS - Plaintiffs/Appellants

AND

STANLEY JOHN HAWLEY - Defendant/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: Norman Hill Q.C. (Jamaica) and
Time Kendall with him for appellants.

C.O.R. Phillips Q.C. and Archibald
with him for respondent.

1977, March 16, 17; Nov. 15, 16
1978, March

J U D G M E N T

ST. BERNARD, J.A.:

By an agreement made on the 30th day of August, 1972, partly oral and partly in writing between the respondent and the appellants, the appellants agreed to purchase approximately 225 acres of land known as Collins Estate and Carrs Estate for the price of $140,000. The appellants paid a deposit of $5,000 on that date.

Formerly Collins Estate comprised Elliott's Estate, Collins and Carrs. Elliott's Estate is situate on the west side of the main road with its own Great House. The acreage of the three estates is approximately 375 acres. Prior to the agreement with the appellants, the respondent contracted to sell one Leo Gore the

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whole of Elliott's Estate, that is, the portion of Collins on the west side of the road. Apparently this portion was not surveyed and was estimated to be about 150 acres. On the day when the appellant Keith Edwards spoke to the respondent about Collins and Carrs Estate, the respondent told the appellant that he had sold Elliott's to Gore with the understanding that if it was less than 150 acres he would make up the deficiency from the east side. It turned out that when the sale was completed and Elliott's surveyed the acreage was 213 acres and not 150 acres as estimated by the respondent. This came about as there was a portion of the estate under water and there was uncertainty about it. The respondent had to complete his contract with Gore who now received 213 acres for the price of $110,000. The respondent had represented to the appellants that the whole estate contained 375 acres and he would get the remainder after Gore's 150 acres was surveyed.

Difficulties also arose in regard to one Batting who had a cottage on the east side of the road and was promised one acre of land with it by the respondent for work done on Elliott's Great House. The appellants called upon the respondent to perform his part of the contract and litigation ensued. The appellants sued for specific performance and in the alternative for damages in addition to or in lieu of specific performance. The respondent counterclaimed for an inquiry as to damages suffered by the respondent as a result of an interlocutory injunction and for $600 being the amount collected as rent by the appellants who were placed in possession of Collins Great House.

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The trial judge found on the evidence that there was a concluded agreement between the parties for the sale of Collins Estate comprising 225 acres since there was a sufficient memorandum to satisfy the provisions of the Fraud and Perjury Prevention Act, Cap. 34, of the Laws of Antigua and there were acts of part performance on the part of the appellants referable to the contract which, had it been necessary, would enable the provisions of the Act to be avoided. He further stated that he took the view that there was no reason why an order of specific performance should not be made against the respondent whose default resulted in the present situation. He said he thought it was right to order specific performance of the contract. Immediately after this finding he stated that he thought it would be unfair to Gore and Batting to punish them for the questionable acts and defaults of the respondent. He therefore refused specific performance and ordered compensation in lieu thereof in the sum of $50,000 and a refund of the deposit. Both parties were dissatisfied and appealed. The appellants gave notice of appeal and the respondent filed a respondent's notice of appeal.

On ground one Counsel submitted that the trial judge correctly analysed the relationship between the Gore transaction and Batting transaction and came to a correct conclusion when he stated that he saw no reason why specific performance should not be granted. He stated that the judge erred, however, when immediately after this finding he said it would be unfair to Gore and Batting to punish them for the defaults of the respondent. He found this finding contradictory as the respondent had agreed to sell the

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appellants 225 acres of land and any attempt to increase the acreage to be transferred to Gore was not a matter to affect the granting of a decree of specific performance. The trial judge deprived the appellants of specific performance because of Gore but this did not affect appellants' rights. Counsel cited a number of authorities which showed that if there was a subsisting contract although the vendor might not be able to enforce it for misdescription yet a purchaser could always do so with abatement of the purchase price.

Counsel for the respondent submitted that there was no enforceable contract since the parties were not consensus ad idem. He referred to the evidence of the appellant Keith Edwards and to J. Rowan Henry, his legal adviser at the time the transaction took place. He further submitted that the findings of fact of the trial judge were unreasonable in view of the evidence. He pointed out that if the appellants had admitted that what they were buying was on the eastern side of the road there would have been a valid contract, but they never accepted this position in the lower court. They maintained that they were entitled to the remainder of Collins Estate after 150 acres were taken out for Leo Gore. Counsel's argument that there was no concluded contract was based on the following evidence of Keith Edwards -

> "He did not tell me he has sold all the land
> west of the public road to Gore with a guarantee
> that it would not be less than 150 acres. He
> just said that he sold Gore 150 acres from the
> 377 acres consisting of Elliott's portion. He
> did not tell me that he had sold or agreed to
> sell all the land west of the public road which
> runs through the Estate to Leo Gore and James King

/with.......

with a guarantee that it would not be less than 150 acres. He never mentioned James King. He did not say if the 150 acres turned out to be less he would have to make it up from the lands east of the public road. He did not say if it turned out to be less he would have to make up the guaranteed figure by taking lands from the east side of the public road. He did not say he was willing to sell the Collins Great House and what remained of the lands on the east side of the public road, for $140,000.00."

If this passage means that the appellant Keith Edwards anticipated part of the 225 acres stated in the receipt would come from the west side of the road then I agree with Counsel that the parties were not ad idem. When this passage is taken together with the evidence of J. Rowan Henry Q.C. who gave evidence for the defence a different interpretation could be placed on it. Henry stated that when Keith Edwards came to him he asked him if he knew Collins Estate and he said no. He asked him whether he knew Leo Gore had purchased a portion of Collins called Elliott's. He answered in the affirmative. He then asked him why he was buying Gore having bought Elliott's. He said he was buying Collins Great House and the rest of the land. Henry told him the rest of the land would be lying on the east of the road. He said he knew that and that acreage would be about 225 acres. He asked how he arrived at that figure and he said Gore's portion was about 150 acres and he was buying the remainder. It seems clear that the appellant Keith Edwards knew that the land he was buying was all on the east side of the road but was under the impression that Elliott's Estate comprised about 150 acres. He came to this conclusion as the respondent had told him that Collins Estate

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comprised 377 acres and he was selling Gore 150 acres. Henry also stated that when the respondent signed the receipt he commented that Edwards knew he was buying land lying on the eastern side of the road. On that evidence, I would not hold that the judge's finding that the parties were ad idem was an unreasonable finding.

Counsel for the respondent submitted that the receipt was not a sufficient memorandum to satisfy the Fraud and Perjury Prevention Act, Cap. 34 as it did not contain the whole of the terms stipulated by the respondent and it did not sufficiently describe the subject matter. Section 2 of this act reads -

> "2. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person, upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereupon by him lawfully authorized."

The receipt in question reads as follows -
"Received from Mr. Keith Edwards and Mrs. Eunice Edwards the sum of $5,000.00 being deposit on purchase price of Collins Estate in the Island of Antigua (comprising approximately 225 acres together with all buildings). Balance of purchase price, namely $135,000.00 payable on due execution of documents of title in favour of the Purchasers.

/Dated........

Dated the 30th day of August, 1972.

(Sgd.) Stanley Hawley"

The receipt or memorandum must contain the names of the parties, the price, the description of the property and any other essential term. It was argued that the mention of Collins Estate in the Island of Antigua was too vague and was an insufficient description of the property to be sold and that it should state a part of Collins Estate as Leo Gore was entitled to hatch off 150 acres and had a prior right of selection. It was urged that the method by which Gore was to take his acres should have been stipulated.

In my view there is not musch force in this argument as although Gore was buying a part of Collins Estate his part was called Elliott's and lay on the western side of the road of the Collins Estate. The other portion of Collins Estate lying on the eastern side of the road was the subject matter of the contract and was easily ascertainable. The price was stated and the party to be charged signed the receipt. In my opinion the provisions of the statute were satisfied.

The question to be determined now is whether the trial judge erred in refusing specific performance. It was clear that he could not order specific performance of 225 acres if the estate contained approximately 375 acres and Leo Gore had contracted to purchase Elliott's portion which comprised 213 acres on survey. In my view Gore's contract of sale had no connection with the appellants as they never contracted to purchase any land on the western side of the road. What happened was the respondent mistakenly believed that there was more land on the eastern side of Collins Estate than on the western side and innocently misrepresented the acreage available

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to be sold to the appellants. A survey revealed that the eastern portion of Collins Estate comprise about 159 acres with a Great House and not 225 acres as was represented. Several authorities were cited on both sides as to the law applicable in such cases.

The principles which govern this type of case seem to be that where the misdescription is substantial, the purchaser is entitled to resist specific perfomance, and, moreover, is entitled to rescind the contract. Although a substantial misdescription entitles the purchaser to refuse to be bound by the contract, he may, nevertheless, in many cases insist on the vendor conveying what he has with an abatement of the purchase money as compensation.

I would allow the appeal, set aside the orders made by the trial judge and order specific performance of the contract for 158.74 acres and the Great House with an abatement as to price to be assessed. I would dismiss the cross appeal.

Counsel for the appellants stated that if his clients were successful private arrangements for Batting would be made.

The costs of survey ordered by the Court should, in my view, be borne by the appellants.

(E.L. St. Bernard)
JUSTICE OF APPEAL

PETERKIN, J.A.:

I have had the opportunity of reading beforehand the judgment of St. Bernard, J.A. with which I agree. I too would allow the appeal and order specific performance of the contract for 158.74 acres

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along with the Great House, and with an abatement as to price to be assessed. I agree also that the cross appeal should be dismissed, and that the appellants should bear the costs of the survey ordered by the Court.

I should like to add, however, that in my view when assessing the abatement as to price the extent of the property should be limited to approximately 200 acres.

(N.A. Peterkin)
JUSTICE OF APPEAL

I also agree that the appeal should be allowed. I agree too with the order proposed and I would make no order as to costs of this appeal.

(Sir Maurice Davis)
CHIEF JUSTICE

I agree.

(Sgd.) N. Peterkin