SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 1996

BETWEEN:

SPIRICOR OF SAINT LUCIA LIMITED

Appellant

v

(1) THE ATTORNEY-GENERAL OF SAINT LUCIA
(2) HESS OIL ST.LUCIA LIMITED

Respondents

Before:

The Hon. Mr. C. M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Justice Albert Redhead	Justice of Appeal

Appearances:

Mr. Dexter Theodore for the appellant
Mr. Parry Husbands Q.C. and Mr. Winston Hinkson for the first respondent
Mr. Michael Gordon for the second respondent

1997: January 22;
May 26.

JUDGMENT

BYRON, C.J.[Ag.].

This is an appeal against the judgment of D'Auvergne J. delivered on the 30th April, 1996 dismissing the appellant's case against both respondents and the first respondent's counterclaim.

The Dismissed Claims

The appellant claimed to be entitled to Declarations that. the appellant is the owner and entitled to possession of the Cul-de-Sac Distillery and is entitled to delay payment of the balance of the purchase price until the disturbance of his possession ceases to exist by virtue of a deed of sale dated 20th July, 1987 evidencing that the first respondent sold certain registered lands, buildings and equipment, known as the Cul-de-Sac Distillery to the appellant (with a balance on the purchase price to be paid over five years, secured by Privilege of vendor);

and to a further declararation that the agreement for sale made on 1st February, 1990 whereby the first respondent wrongfully agreed to sell the said Cul-de-Sac and other lands to the secondent respondent is null and void. The appellant also claimed Special Damages for eviction or conspiracy in the sum of $86,625,000.00 and general and exemplary damages on the basis that the second respondent aided and abetted by first respondent wrongfully evicted the appellant from the premises and by their agreement the two respondents conspired to injure the appellant by causing the first respondent to break its contract of sale.

The first respondent counter-claimed for Recission of a Memorandum of Understanding it made with the appellant for the development of the said distillery, the refund of $212,015.43 being moneys expended to secure the distillery after the appellant failed to supervise, utilize or maintain it and damages.

The Background

The background facts are that in 1974 the Government of St. Lucia (the first respondent) had granted concessions to the Intercontinental Distilleries Ltd. for the production of industrial and beverage alcohol. That company after commencing its operations ran into financial difficulties and was forced into liquidation by its creditors. In 1984 the first respondent purchased the entire property at a price which was accepted by the secured creditors. The Government's title to the land was registered under the Land Registration Act 1984. In 1986 Mr. Pierre La Traverse, the former owner of Intercontinental, made an offer to purchase and develop the property on behalf of the appellant. The first respondent entered into a Memorandum of Understanding which was not exhibited at the trial, and its terms were not proved in any other way. On 1st July 1987 an Aliens Landholding Licence was granted to the appellant in respect of the said property. On 20th July,1987 the deed of sale was executed. This deed evidenced that the sale was for the sum of U.S.$1,130,000.00 of which U.S.$250,000.00 had been paid and that the appellant covenanted to pay the balance of U.S.$880,000.00 together with interest at 11% within five years secured by Privilege of Vendor. On 25th July 1987, the Fiscal Incentives (Spircor of Saint Lucia) Order,1987 was passed. There were various other actions taken by the first respondent to facilitate the project.

It was accepted by all sides that the appellant went into occupation of the property. This occupation was characterised by the presence of its Distillery

Manager, Mr. Allan Hurley, the taking out of insurance policies and the employment of Security personnel. However, there was an early indication that all was not well. On 21st August 1987, a letter written to Mr. La Traverse by solicitor Vernon Cooper was copied to the Prime Minister. This accused Mr. La Traverse of not remitting the money to pay the stamp duty and thereby causing the non-registration of the deeds and jeopardising the first respondent's security. It referred to the fact that cheques for his conveyancing fees and for insurance premiums had bounced.

On 3rd November 1987 Mr. Cooper officially informed the Government that the appellant had not put him in funds to register the security in accordance with the laws relating to the Registration of Real Rights. The importance of this is based on the Civil Code which provides as follows:

> Article 1906
>
> "The vendor has a privilege upon the immovable sold for the price due to him…
>
> Article 1907:
>
> "With regard to immovables, privileges produce no effect among creditors, unless they are made public in the manner determined in the Book respecting *Registration of Real Rights*, saving the exceptions therein mentioned."

The privilege of the vendor is not excepted from registration, so that the appellant's solicitor was giving due warning to the first respondent that the appellant's obligation to pay the balance of the purchase price was not secured in the agreed manner.

Mr. Hurley left St.Lucia in September 1987 and never returned. It appears that after he left the wages of the security personnel were not paid. Mr. Lisle Chase who gave evidence for the appellant said that he had been the secretary of the appellant company until he ceased when his fees had not been paid. He remembered that four watchmen came to his office on more than one occasion for payment but he was unable to pay them because he was not put in funds. He said that he paid the watchmen on one occasion when he got money from the company but he does not recall what year that was but it certainly after the deed of sale was signed.

It was accepted that the first respondent paid salaries and wages for the security personnel working on the property in the sum of $125,858.43, insurance premiums in the sum of $55,986.00 and legal fees totaling $30,171.00. from the 10th August, 1988 to 31st March, 1990.

On 28th January, 1988 Barclays bank applied to the first respondent for a refund of the sum of $228,825.00 alleging that in good faith it had negotiated a personal cheque issued by Mr. La Traverse on a Canadian Bank and issued a Bankers cheque in favour of the Accountant General for the payment of Aliens Landholding taxes, and that the personal cheque had not been honoured and despite other actions and promises it had not recovered the advance.

Eventually, on 9th August, 1988 the Prime Minister wrote Mr. La Traverse. The letter included this paragraph:

> "Because of your failure to meet numerous undertakings previously given by you regarding the distillery, including the non-payment of (1) interest, (2) the insurance on the property, (3) the worker's wages, (4) your attorneys fees and (5) the dishonouring of one cheque presented to pay the Alien's Licence fees, Government no longer has any confidence in your ability to meet your commitments to get the distillery operational and consequently is terminating any agreement Government may have made for the sale of property to your company.
> Government intends to repossess the property on 15th August, 1988. Government however as an *ex gratia* gesture will refund you in full the deposit made on the purchase price and will pay to Barclays Bank the cheque which has been dishonoured by the Bank upon which it was drawn, and which is now the subject of litigation in St. Lucia."

On the 15th November, 1989 the Government did make the refund to Barclays Bank.

Subsequent to the letter from the Prime Minister of 9th August, 1988, the appellant embarked on correspondence asserting its rights and offering to complete its obligations, and indicating an intention to enforce its right under the Memorandum of Understanding to Arbitration by the International Center for the Settlement of Investment Disputes under the auspices of the World Bank. In my opinion the ensuing correspondence from the appellant reinforced the impression that they could not meet their commitments. The overall impact was that the appellant was unable to meet its commitments, was unable to find any investor willing to do business with them, and was seeking to renegotiate a fresh arrangement with the Government.

I will refer to a few extracts from the correspondence on which these impressions are based.

On the 11th August, 1988 responding to the letter of 9th August, 1988, in which the Prime Minister said that the first respondent was terminating the contract for the sale, Mr. La Traverse wrote:

> "At our meeting of June 20, 1988, I introduced to you Robert Whyte, of Whyte Equity Corporation, and Carson J. Wynne of General Discovery & Supply Company Limited. You indicate in your letter that one of these

gentlemen has sent you "privileged and confidential" correspondence stating that his company had terminated discussions with me and had no further interest in the project.
As recently as July 28, 1988, Mr. Whyte made an offer to purchase outright my interest in the project. Negotiations are not terminated."

On 17th August, 1988 Mr. La Traverse wrote:

"For the last few days, I have explored with a major International distiller the sale of the property to them."

On 19th September, 1988 Mr. La Traverse wrote:

"Mr. Prime Minister we would like to repeat that no one, including the Tri Star Group, can deal directly with your Government for this property. We have indicated to you our desire to sell outright or lease with a purchase option, the Cul-de-Sac property……
A formal proposal for a lease of the property was made by Spiricor to Tri Star on April 4, 1988. Tri Star terminated negotiations on April 7, 1988 after discussions, proposals and counter proposals for a lease had been going on for almost five months."

On 28th September, 1988 Mr. La Traverse wrote proposing that the appellant sell or lease the property to a distiller or enter into an agreement for the first respondent to buy back the property, or to form a joint venture. It included this request:

"Mr. Prime Minister, I am continuing my efforts to implement nos. 1 or 2 above, and have invited you to send me any party that you know could be interested."

There were a number of similar letters, for example on the 29th March, 1989 Mr. La Traverse wrote:

"Good news at last!
Spiricor now has an irrevocable commitment to be fully funded, in U.S. funds, between April 30 and May 20, 1989.
A first meeting with the still's manufactures, Coulter, Copper and Brass, was held yesterday so that repairs not be delayed."

This too followed the pattern and nothing materialised.

The appellant had not registered its title to the land. In fact it could not register its title because the stamp duty had not been paid.

On the 1st February, 1990 the first respondent executed an agreement for sale of the Cul-de-Sac distillery in favour of the second respondent and acknowledged receipt of the full purchase price of E.C. $3,375,000.00.

On the 9th February , 1990 the Prime Minister wrote the appellant:

"..The Government as the sole owner of the Distillery at Cul de Sac St. Lucia, and the lands comprising the curtillage of the said distillery have

sold the said property to Hess Oil(St. Lucia) Ltd. and has placed Hess Oil into possession of the same as from February 1, 1990."

The Grounds of Appeal

The appellant challenged the judgment on several grounds. They can conveniently be grouped under four headings:

(1) That the learned trial Judge was wrong in law to conclude that the Crown was the owner of the land and that the appellant did not have any overriding interest in it.

(2) That the learned trial Judge was wrong to conclude that the appellant was not in possession at the relevant time.

(3) That the learned trial Judge was wrong to conclude that the contract of sale was avoided for illegality or non-performance.

(4) That the learned trial Judge was wrong to reject the claim for conspiracy.

Title to the Land

Counsel for the appellant relied heavily on the provisions of the Civil Code of 1957 to support his contention that the appellant was entitled to ownership and possession of the Cul-de Sac distillery.

He submitted that as between the appellant and the first respondent (i.e. the vendor and the purchaser), by virtue of articles 957 and 1382 of the Civil Code the execution of the deed of sale itself, without the necessity for registration, transferred ownership free and clear of encumbrances save the vendor's privilege with immediate possession. These provisions read:

Article 957:

"A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the mere consent of the parties. Movables must be delivered in order to affect third parties, and in the case of immovables there must be a deed of sale, or a memorandum in writing, stating the conditions of the sale."

Article 1382:

"Sale is a contract by which one party transfers property to the other, for a price in money which that other undertakes to pay, either expressly or by implication.

> It is effected by the consent alone of the parties, although the thing sold be not then delivered; subject nevertheless as regards third parties to the provisions contained in articles 957 and 956, and to the special rules concerning transfer of registered vessels."

He also submitted that as between the appellant and the second respondent (the first and the subsequent purchasers) by virtue of Article 1980 the non registration of the deed of sale did not affect its binding nature because the second respondent did not have a registered deed of sale either.

Article 1980:

> "All acts *inter vivos,* conveying the ownership, *nuda proprietas* or usufruct of an immovable must be registered at length or by an abstract hereinafter called a memorial.
> In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property or received an onerous gift of it from the same vendor or donor for valuable consideration and whose title is registered."

The Registered Land Act of 1984, however, made significant changes to the regime of land registration and ownership. The most important is that the transfer of land, contrary to provisions of Articles 957 and 1382 of the Civil Code is no longer based on the consent of the vendor but on the completion of the registration process under the provisions of the Act. This is the effect of section 23 which reads:

> "Subject to the provisions of section 27 and 28 the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, ……."

The position with regard to Crown Lands has also been specifically brought into conformity with the intent of the Act by section 26 which reads:

> "The registration of land as Crown Land shall, subject to any registered encumbrances, enable the Governor-General to dispose of such land by a disposition registered under this Act."

The necessity for registration in the process of transfer of ownership is prescribed in section 37 which reads:

> "(1) No land, lease, of hypothec registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease of hypothec shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in the land, lease or hypothec."

And is confirmed by section 56 which reads:

> "(1) A proprietor, by an instrument in notarial form, may transfer his land, lease or hypothec to any person with or without consideration.
>
> (2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or hypothec and by filing the instrument."

The effect of these provisions is clear. The only method of transferring title of registered land is by registration under the Act. Thus, the rights of a vendor, who is the registered proprietor, as well as those of any subsequent purchaser are governed by the state of the register, to the extent that the purchaser has no legal interest unless he has completed the transfer by registration. The registered proprietor remains the owner of the legal title. This proposition would determine the rights of a third party who has purchased the same property whether he has completed his transfer by registration or not. This reflects the same position as the Land Registration system in England, which is explained in the 4th Edition of Halsbury's Laws of England Volume 26 at para 919:

> "Dispositions of registered land are classified as either registered or unregistered dispositions, but it is only by a registered disposition that a transfer of the legal estate is effected. The proprietor may transfer the registered land in the prescribed manner, but until the transfer is completed by registration the transferor is deemed to remain the proprietor. The legal estate thus remains in him until another proprietor is registered in his place."

And again at para.1113:

> "A transfer of the registered estate in land or any part of it is completed by entry on the register of the transferee as the proprietor of the estate transferred, but until such entry is made the transferor is deemed to remain the proprietor of the registered estate."

I have had the opportunity to study the excellent work "Coutume de Paris to 1988, The Evolution of Land Law in St. Lucia" by Winston F. Cenac Q.C., LL.B.(Lond.).

At page 93 he says:

> "It is submitted, however, that Articles 957, and 1382 are impliedly repealed by Sections 56(2) of the Land Registration Act,1984. The concept that entry in the register alone confers title is central to the scheme of the new registration system and any provision which derogates from that central idea or which casts doubt on it should be removed from the Statute Book. The conflict between section 56(2) of the 1984 Act and section 957 of the 1957 Civil Code is an example of the problems which general legislative provisions can create without proper attention being paid to consequential amendments."

I confess complete agreement with that submission. Despite the fundamental changes in the law relating to registration of title to land the

Registered Land Act, 1984 did not expressly repeal the preexisting inconsistent regimes. The side note to section 3 of that Act reads “Reconciliation with other laws”.

Section 3 itself reads :

> “(1) Except as otherwise provided in this Act, no other law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:…”

In my view the term “reconciliation” is euphemistic. Section 3, in reality, has the effect of repealing laws practices and procedures which are inconsistent with the Act. I would like to emphasise the point made by the learned author Cenac Q.C. As a drafting technique it is unsatisfactory, because it creates uncertainty by allowing conflicting provisions to remain on the Statute Books and it imposes the duty of making comparisons between the provisions of the Civil Code of 1957 and of the Act. This is an important branch of the law and the matter should be remedied by removing or modifying the inconsistent provisions.

However, there is no doubt that the provisions of sections 23, 26, 37(1) and 56 of the Registered Land Act 1984 are inconsistent with Articles 957 and 1382 of the Civil Code to which reference was earlier made. I would therefore rule that the effect of section 3 of the Registered Land Act,1984 is to repeal Articles 957 and 1382 of the Civil Code of 1957. Article 1980 is also inconsistent with the provisions of the Act for the reasons I have pointed out and for others that are not material to this appeal. I have come firmly to the view that it too has been repealed by the Registered Land Act, 1984.

Overriding Interest in the Land

Counsel for the appellant submitted that the appellant had an overriding interest that was protected by section 28 of the Land Registration Act 1984 which reads:

> “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
>
> (g) the rights of a person in actual occupation of land or in receipt of the income thereof save where inquiry is made of such person and the rights are not disclosed;”

A careful perusal of the words of section 28(g) would indicate that the "actual occupation" is not the protected interest. What is protected are the "rights" of a person in actual occupation. The word rights is not limited by any definition. In my view although the section does not refer to the equitable interest of a purchaser whose title has not been registered as an overriding interest, if could and should be included among those equitable rights which are treated as overriding if the purchaser is in actual occupation. This has been the construction given to similar provisions in the English Land Registration legislation.

See for example Lord Oliver of Aylmerton in Abbey National Building Society v Cann and another (1990) 1 All E.R.1085 at 1098:

> "..it is not the actual occupation which gives rise to the right or determines its existence. Actual occupation merely operates as the trigger, as it were, for the treatment of the right as an overriding interest. Nor does the additional quality of the right as an overriding interest alter the nature or the quality of the right itself. If it is an equitable right it remains an equitable right."

The argument advanced was that the first respondent was a trustee and as such only a purchaser in good faith could defeat the beneficial interest of the appellant and that the second respondent had actual or constructive notice of the appellant's interest. The relevant section is section 38 which reads;

> "(1) No person dealing or proposing to deal for consideration with a proprietor shall be required or in any way concerned-
>
> (a) to inquire or ascertain the circumstances in or the consideration
>
> for which such proprietor or any previous proprietor was registered; or
>
> (b) to see to the application of any consideration or any part thereof; or
>
> (c) to search any register kept under the provisions of Book Eighteenth of the Civil Code."
>
> (2)"Where the proprietor of land, or a lease or a hypothec is a trustee he shall in dealing therewith be deemed to be the proprietor thereof, and no disposition by such trustee to a purchaser in good faith and for consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.
>
> (3) Nothing contained in this section shall relieve a purchaser in good faith and for consideration of his obligation to search the Registry."

The definition section makes it clear that the Registry in section 38(3) is the land Registry set up under the Registered Land Act,1984. In keeping with the central idea of the Act, section 38 (1) removes the responsibility of anyone dealing with a trustee from being any way concerned to search the relevant Civil

Code registers. The requirement of "good faith" in 38(2) cannot therefore relate to knowledge or lack of knowledge of deeds or other instruments in the said Civil Code registers.

The effect of this, and other relevant sections in the Act, seems to be that the doctrine of notice, whether actual or constructive, as it may pertain to purchasers of unregistered land has no application even by analogy to registered land. This is the conclusion at which Lord Wilberforce reached in Williams & Glynn's Bank Ltd v Bolan(1980) 2 All E.R. 408 at 412:

> "The exception just mentioned consists of `overriding interests' listed in s 70. As to these, all registered land is stated to be deemed to be subject to such of them as may be subsisting in reference to the land, unless the contrary is expressed on the register. The land is so subject regardless of notice actual or constructive. In my opinion, therefore, the law as to notice as it may affect purchasers of unregistered land, whether contained in decided cases or in a statute (e.g. the Conveyancing Act 1882, s 3 and the Law of Property Act 1925, s 199) has no application even by analogy to registered land. Whether a particular right is an overriding interest, and whether it affects a purchaser, is to be decided on the terms of s 70, and other relevant provisions of the Land Registration Act 1925, and on nothing else……
> The purpose, in each system, is the same, namely, to safeguard the rights of persons in occupation, but the method used differs. In the case of unregistered land, the purchaser's obligation depends on what he has notice of, notice actual or constructive. In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material."

In this case, however, the issue as to the nature of the rights must be subordinated to the question of actual occupation. The judge made a finding of fact that the appellant was not in actual occupation. It is only if the appellant was in actual occupation or in receipt of the income of the property that section 28(g) would operate to protect any rights he may have had. The meaning of the words "actual occupation" were discussed in both of the cases to which I referred earlier. In Williams & Glynn's Bank Ltd v Bolan (1980) 2 All E.R. 408 Lord Wilberforce said at 412:

> "I now deal with the first question. Were the wives here in `actual occupation'? These words are ordinary words of plain English, and should, in my opinion, be interpreted as such. Historically they appear to have emerged in the judgment of Lord Loughborough LC in Taylor v Stibbert (1794) 2 Ves 437 at 440, 30 ER 713……The purpose for which they were used, in that case, was evidently to distinguish the case of a person who was in some kind of legal possession, as by receipt of the rents and profits, from that of a person actually in occupation as tenant. Given occupation, i.e. presence on the land, I do not think that the word `actual' was intended to introduce any additional qualification, certainly not

> to suggest that possession must be `adverse': it merely emphasises that what is required is physical presence, not some entitlement in law. So, even if it were necessary to look behind these plain words into history, I would find no reason for denying them their plain meaning."

In Abbey National Building Society v Cann and another (1990) 1 All E.R.1085 at 1101 Lord Oliver of Aylmerton said :

> "It is, perhaps, dangerous to suggest any test for what is essentially a question of fact, for 'occupation' is a concept which may have different connotations according to the nature of the property which is claimed to be occupied. It does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought, on behalf of his employer. On the other hand, it does, in my judgment involve some degree of permanence and continuity which would rule out mere fleeting presence. A prospective tenant or purchaser who is allowed, as a matter of indulgence, to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time."

Of course section 28(g) applies to a person who was in actual occupation or in receipt of the income. The judge found that the appellant was not in actual occupation and there was no allegation that the appellant was in receipt of the income.

Justification for Judges finding on the Issue of Possession

I must now assess the justification for that finding. The appellant had pleaded that it was evicted by the dismissal of the security staff on the 9th February 1990 by payment of one week's wages and the sale and delivery of possession to the second respondent. The evidence on this issue was that after the deed of sale had been executed the appellant went into possession by its distillery manager and watchmen. The appellant's distillery manager left St. Lucia since September 1987 for Toronto and never returned. The appellant did not pay the wages of the watchmen since August 1988. The appellant had also undertaken insurance on the building. The insurance payments were also in default. The first respondent also took over the payment of these obligations until February 1990 when possession was delivered to the second respondent.

When one considers the totality of the evidence there is ample justification for the conclusion of the learned trial Judge. The position of the first respondent was that the appellant did not have the financial means to undertake the project and virtually abandoned its responsibilities. There was ample evidence for the learned trial Judge to conclude that was in fact the position and

that the appellant was not in possession. The appellant exercised its occupation through its employees on the site and the steps it took to secure the property

insurance. The evidence clearly indicates that it did not continue either of these activities and the respondent who had interests to preserve took over these very activities. In my view there could be no other conclusion than that the first respondent was in actual occupation by virtue of the fact that it was employing the security personnel, paying the insurance and generally doing the things that an occupier of such property would do.

Wrongful Eviction

I would support and uphold the ruling of the learned trial Judge.

The appellant applied for a declaration under article 1445 which reads:

> "If the buyer be disturbed in his possession or have just cause to fear that he will be disturbed by any action, hypothecary or in revindication, he may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary."

The appellant alleged that he was wrongfully evicted by the first respondent and was thereby disturbed in his possession. The conduct which it was alleged amounted to the eviction appears to be the sale to the second respondent and their entry into possession. The judge's findings ruled out any idea that the appellant could have been evicted because it was the judge's view that the first respondent was in possession at the material time. This too is a question of fact and would be governed by the same principles as those in Abbey's case above. In any event I have concluded that the evidence pointed inevitably to the conclusion that the appellant abandoned possession of the property.

Illegality and Aliens Landholding Issue

First respondent pleaded and the judge accepted the contention that it was an implied condition of the deed of sale that the appellant should obtain an Aliens Landholding licence, and there was a breach of that condition which made the deed of sale voidable, on the ground that the use of a dishonoured cheque in payment of the stamp duty for the licence was a fraudulent misrepresentation.

Substantial arguments were advanced to us on the jurisprudence of illegal contracts. With the greatest respect to counsel however, I do not propose to

examine these principles because it is my view that the position was entirely misconceived by the respondents.

The accepted factual position was that the stamp duty for the licence was paid by a Banker's Cheque issued by Barclays Bank. That cheque was honoured and so the stamp duty was actually paid. The unlawful act, or fraudulent misrepresentation, related to the dealings between Mr. La Traverse and Barclays Bank which had no direct relationship to the contract for the sale between the appellant and the first respondent.

It is my view that the issues surrounding the licence have no bearing on the question of the appellant's rights or obligations under the deed of sale. The appellant's obligation to obtain an Aliens Landholding licence was not based on any contract. It was a statutory obligation imposed and regulated by the Aliens (Landholding Regulation) Act 1973. The law is well established. This Act provides that land held by an unlicenced alien shall be liable to forfeiture. This means that an unlicenced alien can hold land subject to the right of the Government to forfeit it. The point was clarified in Young v Bess (1995) 46 W.I.R. 165 (which was applied by this court in Village Cay Marina v Acland and others B.V.I. Civil Appeal No. 8 of 1995).

In Young v Bess the Privy Council was interpreting similar Aliens landholding legislation from St. Vincent and the Grenadines. Lord Jauncey, delivering the judgment of the Board said at 170:

> "..the title remains in the alien until the Crown has obtained judgment under sections 5(1) and 16 when it vests in Her Majesty as from the time above referred to. There is no vacuum. The result is that the aliens title is violable until the Crown obtains judgment and a *bona fide* purchaser from him would be protected."

The existence or non existence of a licence is therefore quite irrelevant to the issue of the appellant's title. If title had passed to the appellant the title would be good, even in the absence of a licence, until the Crown exercised its discretionary power to forfeit the land. Nothing in the Act invalidates the deed. In my view even if there was an illegality in obtaining the licence it could have no effect on the deed of sale.

More importantly, as a matter of fact, the licence was duly registered. It has never been revoked nor has its registration been canceled. I agree with counsel for the appellant that the licence is valid. It is a well settled principle that an Aliens Landholding licence becomes operative upon its registration. [See Section 4 (2) (c) of the Act and Lehrer v Gordon (1964) 7 W.I.R. 247 approved

in Young v Bess (*supra*).] The Act does not make any provision for the invalidation of a licence. It provides for the forfeiture of the right, title or interest in the land on breach of conditions of the licence. In this case no steps were taken by the Government for forfeiture with regard to breach of any condition of the licence or for any other reason.

Counsel for the first respondent had also contended that the appellant was in breach of the memorandum of understanding. I agreed with counsel for the appellant that the court could not adjudicate on the memorandum of understanding because the document was not exhibited and its terms were not proved in evidence. More fundamentally, however, I accepted his submission that the terms of the memorandum of understanding and the Aliens Landholding licence were collateral to the contract of sale and that any breaches with regard to them could not amount to repudiation of the contract of sale which must be determined by reference to the terms of that contract itself.

Repudiation and Recission

Counsel for the appellant submitted that judge was wrong to conclude that the appellant repudiated the contract on the ground of actual breach by non-performance. He contended that the time for performance had not passed as the appellant had five years within which to pay the balance of the purchase price and had continued to evince willingness to complete the purchase.

The legal principles are not controversial. It is clear that conduct, which inevitably leads to the conclusion that a party to a contract will not be able to perform, amounts in law to a repudiation of the contract. Willingness to perform is irrelevant if it is evident that there is no ability to do so. The contract becomes determined if the other party adopts the repudiation by so acting as in effect to declare that he too treats the contract as at an end.

These principles are expressed in the 4th edition of Halsburys Laws of England Vol. 9 para 548:

> "Repudiation may be an express renunciation of contractual obligations. However, it is more commonly implied from failure to render due performance or, in cases of anticipatory repudiation, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time."

And in the 25th Edition of Chitty on Contracts at para 1608:

> "Anticipatory breach and actual breach. There is no distinction between the tests for what is an anticipatory beach and what is a breach after the time for performance has arrived. It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he will not be able to perform when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. He is allowed to anticipate an inevitable event and is not obliged to wait until it happens."

Finally a court has to make a finding from the evidence as to whether the contract has been put at an end. This is explained in the 4th edition of Halsbury's Laws of England volume 9 at para.556:

> "The question whether or not a party has elected to rescind is one of fact. An election to rescind must involve an unequivocal assertion by the innocent party that he regards himself as no longer bound by the contract as a result of the breach."

The description of this principle in Universal Cargo Carriers Corpn. v Citati (1957) 2 All E.R. 70 at p.85 by Devlin J. is often quoted:

> "Hochster v De la Tour (18) established that a renunciation, when acted on, became final. Thus if a man proclaimed by words or conduct an inability to perform, the other party could safely act on it without having to prove when the time for performance came the inability was still effective. Since a man must be both ready and willing to perform, a profession by words or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say "I would like to but I cannot" negatives intent just as much as "I will not……..
> The two forms of anticipatory breach have a common characteristics that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact - or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited. …….
> Anticipatory breach was not devised as a whip to be used for the chastisement of deliberate contract-breakers, but from which the shiftless, the dilatory, or the unfortunate are to be spared. It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen."

The evidence clearly established that by July 1987 the first respondent had performed all its obligations under the contract of sale. It had made the preliminary arrangements by issuing the Aliens Landholding licence and enacting

the statutory instrument conferring fiscal incentives. Then it executed the deed of sale and put the appellant into possession.

However, at that time, there were a number of terms which the appellant had to perform.

1. The appellant had to complete the transfer by registration of title.
2. The appellant had to give effect to the Vendor's Privilege by registration.
3. The appellant had to preserve the value of the property while there was an unpaid balance on the purchase price.
4. The appellant had to pay the unpaid balance on the purchase and the interest thereon.

The appellant never performed these obligations. The issue for the court to determine was whether the first respondent was justified in concluding that the appellant had evinced an inability to perform them. The undisputed factors which made it so apparent were;

1. The appellant failed to pay the stamp duty on the deed of conveyance and was therefore unable (i) to complete the transfer of title by registration and (ii) to provide security for the unpaid balance of the purchase price.
2. The appellant's use of dishonoured cheques evidenced impecuniosity and unreliability and established its inability to meet the fundamental obligation to pay the purchase price.
3. The appellant was unable to maintain possession of the property. In view of the improbability of payment and the absence of security for the balance of the purchase price the respondent was under a duty to mitigate his loss. Although the law does not define the manner of such mitigation it is clear that retaking possession of the property and securing it and negotiating its sale was an effective method of such mitigation.
4. The appellant expressed its abandonment of the idea to develop the distillery and was trying to renegotiate the arrangement so that it could sell, or lease it to another developer or enter into a different arrangement with the first respondent as a partner. These negotiations

could only be effected if it was accepted that the original deal was terminated.

5. The unfortunate but clear conclusion was that the appellant could not get anyone to invest in its undertaking, which was a natural result of the unsavoury reputation which the appellant's financial dealings must have earned.

In my opinion those circumstances would lead a reasonable man to believe that the appellant could not perform his contractual obligations. The evidence is clear that the first respondent so concluded, and I agree with the learned trial judge's finding that the letter of 9th August 1988 was an unequivocal termination of the contract.

Conspiracy

The appellant contended that the second respondent knowingly and without reasonable justification or excuse procured the first respondent to break its contract with the appellant. In the grounds of appeal the learned trial Judge's finding that the second respondent did not know was challenged. I do not think that it is necessary to examine the evidence to determine whether that finding was supportable.

The tort alleged is committed when a person knowingly procured a breach of contract. The question which must first be answered is when did the contract between the first respondent and the appellant terminate. It would seem that the admitted facts of this case show that it was in August 1988 when the first respondent wrote the appellant in avoidance of the contract. The proposition which the appellant would urge is that the contract was terminated only in1990 when the sale between the two respondents took place. I cannot agree with that view.

I have already concluded that the appellant repudiated the contract of sale by evincing inability to perform its obligations, and that the first respondent elected to and did treat the contract as being at an end. In the circumstances it follows that no one and certainly not the second respondent procured a breach of contract. For this reason I would uphold the dismissal of the claim for damages for conspiracy.

In summary, I agree with the learned trial Judge that the appellant was not entitled to any of the declarations claimed, nor to damages for eviction or conspiracy.

I would therefore order that the appeal be dismissed with costs.

C. M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal