

ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 329 of 1989



BETWEEN: YAMBOU DEVELOPMENT COMPANY LIMITED

PLAINTIFF

V

SALLY HELENA KAUSER AS EXECUTRIX OF
THE WILL OF HELEN HADLEY, DECEASED

DEFENDANT

O Sylvester Esq CMG QC and Ms N Sylvester with him for the Plaintiff
B Commissiong Esq QC for the Defendant

JUDGMENT

Mitchell J

This case concerned the question whether a Solicitor's unauthorized letter written on behalf of a client created a sufficient memorandum in writing to constitute sufficient proof of a contract for the sale of land. Could an assignee enforce that contract? What was the effect on that contract of a mistake in it?

The action was commenced by a generally endorsed Writ issued out of the Registry of the Supreme Court in St Vincent and the Grenadines on 9 August 1989. It replaced an earlier suit originally commenced in the year 1982, the year of the contract in question. Due to a variety of intervening pieces of litigation, that involved the different parties and interests in this case, but that are not relevant to this action, the Statement of Claim in this suit was not served and filed until 1990. In it, the Plaintiff claims that on 30 January 1982 the original Defendant Helen Hadley (hereinafter Mrs Hadley) agreed to sell (hereinafter the Agreement) to Lesline Bess and Norton Bess deceased (hereinafter the Besses) as joint tenants Lot no 115 at Villa (hereinafter the Property). The Besses, pursuant to the said Agreement, prepared and forwarded the relevant conveyance for execution, but that Mrs Hadley refused to execute it, thus initiating Suit 92 of 1982, the first of the many earlier law suits that this transaction has involved, seeking specific performance of the Agreement. The claim is that after Mr Bess died, Mrs Bess assigned the benefit of the Agreement to the Plaintiff company (hereinafter Yambou) in June 1983. Yambou claims specific performance, damages, an injunction to compel conveyance upon payment in full, a vesting order, and any further or other relief.

By a Defence served and filed on 5 December 1990 Mrs Hadley pleads that by an agreement of 15 November 1981 as amended on 30 January 1982 it was agreed that the Property would be sold to the Besses for \$400,000.00 of which \$130,000.00 was to be paid in cash and the

remaining \$270,000.00 was to be paid over 5 years with interest on the balance at the rate of 1% per month. The principal was to be paid together with the stated interest as follows:

- 1st Year: \$20,000.00, ie, with interest, \$4,366.66 per month
- 2nd Year: \$30,000.00, ie, with interest, \$5,000.00 per month
- 3rd Year: \$40,000.00, ie, with interest, \$5,533.33 per month
- 4th Year: \$50,000.00, ie, with interest, \$5,966.66 per month
- 5th Year: \$130,000.00, ie, with interest, \$12,133.33 per month

Mrs Hadley claims that as a result of a miscalculation, the amount of interest to be paid by the Besses was wrongly stated in the Agreement of 30 January 1982 addressed to the Besses. Immediately Mrs Hadley's agents discovered the error, it is claimed, they brought the error to the attention of the Besses both orally and in writing by a letter dated 9 March 1982. Mrs Hadley's claim is that the Besses were aware of the obvious mathematical error on the face of the written Agreement, remained silent about it, and sought to take unfair advantage of Mrs Hadley, and accordingly, there could have been no binding contract as alleged. Notwithstanding their having been earlier informed of the error, the Besses, it is claimed, on 8 February demanded an abstract of title from Mrs Hadley, thus indicating they intended to proceed with the transaction notwithstanding the error that had been pointed out to them. Mrs Hadley claims that by letter of 9 March 1982 her solicitor wrote the Besses' solicitor pointing out the mathematical error and agreeing to refund the deposit of \$130,000.00 if the Besses failed to complete the transaction with the corrected schedule of mortgage payments by the contracted deadline of 15 March 1982. On the passing of the deadline of 15 March Mrs Hadley refunded the deposit of \$130,000.00 (by a cheque which was returned un-negotiated on 27 March 1982). A large number of other issues are raised in the Defence, but due to the effluxion of time, the completion of other litigation, decisions of the Court of Appeal in relation to some of those issues, and the changed circumstances that now prevail, those issues are no longer germane to this case, did not take up any further time at the trial, and do not trouble this court further. For the record, these issues included whether Mrs Bess was validly married to Mr Bess, whether Mrs Bess was at the time an unlicensed alien under the Aliens Landholding Regulation Act, whether any interest she could have acquired in land would have been automatically forfeit to the Crown, whether Mrs Bess was an heir of Mr Bess, and whether she was legally capable of assigning any interest in the Property.

By a Reply served and filed in 1991 Yambou claims that by the Agreement of 30 January 1982, Mrs Hadley's solicitor evidenced an agreement for yearly payments, which the Besses were required to make and which payments are specifically stated and enumerated in the letter of 30 January. Yambou claims that if Mrs Hadley discovered an error (the existence of which is not admitted) then Mrs Hadley not only failed to communicate this fact to Yambou's predecessor in title, the Besses, in time, before the Besses wrote their letter of 9th March 1982, but also by her conduct led the Besses to believe that the Agreement would be implemented in accordance with

its terms, and Mrs Hadley is estopped from alleging any error. Various particulars of conduct raising estoppel are pleaded by Yambou.

In their Reply, Yambou claims that, if Mrs Hadley discovered a material error in the Agreement on 3 February then, by her acts and conduct thereafter, she acquiesced in and is guilty of delay, and caused the Besses to continue to assert the existence of the Agreement and to perform acts thereunder in furtherance of the Agreement. Further, Yambou on the faith of the existence of the Agreement took an assignment on 9 June 1983 registered as a Deed. The error, if it existed which is not admitted, was unilateral and does not in law affect Yambou's title and the reliefs sought. Further, Mrs Hadley is estopped from denying Yambou's title by virtue of her conduct. Mrs Hadley, it is claimed, cannot derogate from her grant.

No Request for Hearing was filed by Yambou in the matter, but both parties consenting and being ready the Court proceeded to hear the case. On 23rd June 1997 Sally Helena Kauser as Executrix was substituted as Defendant in the place of Mrs Hadley, the original Defendant. The hearing of evidence commenced on 23, and went through 24 and 25 and 30 June, and addresses concluded on 1 July 1997. During that time Mrs Bess was the sole witness for the Plaintiff, and Samuel E Commissiong Esq (hereinafter Mr Commissiong) was the main witness for the Defendant. Most of the principal actors in the transaction that is the object of this trial have long passed away from advanced old age. In addition to Mrs Hadley, the Vendor of the property, Mr Bess one of the two Purchasers, and Mr Connell, Mrs Hadley's real estate agent in the transaction, have been unable to be with us.

The pleadings are marred only by thinly veiled and completely unnecessary accusations by the solicitors in the matter against each other. This case comes out of a long history of litigation and animosity, and could easily have degenerated into a series of unseemly attacks by the one law firm against the other and vice versa. However, except towards the end both counsel manfully restrained themselves from taking more than an occasional snipe at the other, and did not in leading their evidence pursue whatever the allegations in the pleadings and the correspondence were leading up to. Yambou's final submissions were somewhat spoiled by an entirely unjustified and unsubstantiated personal attack by counsel for Yambou on the professionalism and conduct of Mr Commissiong in his handling of the Agreement on behalf of the parties. All of the evidence before the court indicated that Mr Commissiong, though he made mistakes in his correspondence, acted throughout in the matter with complete probity and solely with the legitimate purpose of protecting his client's interests. Despite repeated pleas from the court to withdraw his remarks, counsel for Yambou uncharacteristically insisted on them to the bitter end. Both counsel presented me with excellently prepared briefs of their submissions and authorities which helped me to follow their argument in support of their clients' cases.

The facts as I find them are as follows. In November 1981 Mrs Hadley was the owner of a Property at Villa, which Property she put up for sale. Her real estate agent was Mr Connell, and her solicitor was Mr Commissiong. They were both fully authorised to represent her and to make contracts binding on her. Mr and Mrs Bess were interested in purchasing the Property, and they contacted Mr Connell. The Besses agreed with Mr Connell on a price of EC\$400,000.00. They went together on or about 13 November 1981 to the law chambers of Mr Commissiong to draw up an agreement. Mr Commissiong prepared an agreement, providing essentially for the agreed deposit of \$23,000.00, and for completion by 13 December 1981. In the event, the Besses were unable to raise the balance of \$377,000.00 in the short period they had under the agreement, and subsequently agreed with Mr Connell for an extension of time. The Besses and Mr Connell went back to Mr Commissiong, and he prepared a document dated 8 December 1981, as instructed by the parties, granting an extension of time to 15 January 1982 for payment of the balance. Sometime thereafter, the Besses still having no luck in securing financing to complete the transaction, they agreed with Mr Connell for a final extension to 15 March 1982. They went back to Mr Commissiong, and he accordingly revised the agreement to reflect the new extended deadline.

The Besses were still unable to raise the necessary financing. Shortly after the above extension was agreed they learned from the last of the banks they had approached that financing was not approved for their purchase. They were, however, able to persuade Mr Connell to get Mrs Hadley to agree to provide the financing for them by taking a mortgage for a part of the purchase price. On or about 29 January 1982 the Besses met with Mr Connell and agreed the terms. They were to pay a total of EC\$130,000.00 leaving a balance of \$270,000.00 outstanding. The interest was to be 1% per month on the balance of the purchase price. They met with Mr Commissiong on the same 29 January and Mr Connell confirmed to him the agreement that they had come to. Mr Commissiong agreed to put the terms into writing for the parties. He did so by a letter of 30 January 1982 addressed to Mr & Mrs Bess, the Agreement that is at the hub of this case. The letter is not expressed to be without prejudice, nor does it contain any reservation, and is an unconditional offer to sell the Property on the terms specified in it. It commences by reciting the history of the negotiations and continues:

"Since that time, Mrs Helen Hadley, through her financial adviser and the authorized real estate agent in Saint Vincent and The Grenadines, Mr Robert Connell, has agreed to assist you in the purchase of the property, and the terms are as follows:

- (a) the purchase price of the property remains at the agreed price of \$400,000.00, of which \$23,000.00 is already paid as a deposit;
- (b) on condition that you are able to pay from your own resources, a further sum of \$107,000.00 so that your total initial outlay will be \$130,000.00, Mrs Hadley is willing to take a first mortgage on the property for \$270,000.00, repayable in five years' time;
- (c) the repayment schedule will be as follows:
 - (i) \$20,000.00 in the first year, with interest payable at the rate of 1 per cent per month. Thus, the full sum payable in the first year will be \$22,700.00 or \$1,891.66 per month;

- (ii) \$30,000.00 in the second year, with interest payable at the rate of 1 per cent per month. Thus, the full sum repayable in the second year will be \$32,500.00 or \$2,708.33 per month;
- (iii) \$40,000.00 in the third year, with interest payable at the rate of 1 per cent per month. Thus, the full amount repayable in the third year will be \$42,200.00 or \$3,516.66 per month;
- (iv) \$50,000.00 in the fourth year with interest at the rate of 1 per cent per month. Thus, the full amount repayable in the fourth year will be \$51,800.00 or \$4,316.66 per month;
- (v) \$130,000.00 in the fifth year, with interest at the rate of 1 per cent per month. Thus, the full sum repayable in the fifth year will be \$131,300.00 or \$10,941.66 per month.

The offer of mortgage financing contained in this letter will remain open to you up to and including the 15 March, 1982 when the life of the contract of sale of the property will expire."

Mr Commissiong had given Mr Connell an unsigned copy of this letter on the 30 January, and Mr Connell showed it to the Besses. Mrs Bess says that she was shocked to receive from a lawyer an unsigned copy of a letter, and that she refused to accept it and demanded a signed copy. I believe that what Mr Connell showed her was an unsigned draft of the letter of 30 January that Mr Connell had received from Mr Commissiong for the purpose of confirming the figures. She claims that the act of Mr Commissiong in letting her see an unsigned draft of his letter containing the repayment schedule made her suspicious. I find nothing unusual or suspicious in a solicitor letting the parties to an agreement first see an unsigned draft, especially when it is the first time they are seeing the terms they have earlier verbally agreed to reduced into writing. This would normally be done so that the parties can study the draft, and let the solicitor know if there are any corrections before the original is prepared for the signature of the parties. There was some other reason for her agitation and consternation when she saw the contents of the letter.

The letter did, of course, contain a very serious error in the calculation of the monthly payments due. I accept the evidence of Mr Glasgow, the chartered accountant who gave evidence for Mrs Hadley, that the payment schedule set out above in Mr Commissiong's letter was based on an interest calculation of 1% per year on the annual declining balance. The interest should have been 1% per month, or 12% per year on the annual declining balance. The monthly payments in the first year in Mr Commissiong's letter should have been \$4,366.67 instead of \$1,891.66. In the second year they should have been \$5,000.00 instead of \$2,708.33. In the third year they should have been \$5,533.33 instead of \$3,516.66. In the fourth year they should have been \$5,966.67 instead of \$4,316.66. And, finally, the monthly payments in the fifth year should have been expressed as \$12,133.33 instead of \$10,941.66. I find that the general existence of this error, if not all of the mathematical detail, was glaring and patent on the face of the document, particularly in the first three years. It did not need a chartered accountant to work out the correct figures for the existence of an error to be apparent to an interested party glancing at the document.

The Besses did not point out to either Mr Connell or Mr Commissiong that the monthly payments itemized in his 30 January letter of offer did not by any calculation equate to the 1% per month interest plus repayment of principal that they had agreed to pay. Instead, when they attended at Mr Commissiong's office on or about 30 January they confirmed that his letter was correct. I find that this letter was not authorised by Mrs Hadley, and that Mr Commissiong issued it without specific authority to do so, whomever he got the figures from. That letter would, however, coming as it does from Mrs Hadley's solicitor without any reservation of Mrs Hadley's rights, be binding on Mrs Hadley. The Besses immediately paid the \$107,000.00 in to Mrs Hadley's account at Barclays Bank as required. They wasted no time in going back on 2 February to Mr Commissiong with the unsuspecting Mr Connell, who confirmed to Mr Commissiong the payment of the balance of the deposit in part performance of the Agreement. They demanded their signed original of the Agreement and duly received it from Mr Connell on the same 2 February 1982. Mr Connell not only gave the Besses a receipt for the money, but he also signed the Besses' copy of the Agreement letter of 30 January, and for good measure added a note to the effect that the deposit had been paid, as if the receipt he had issued was insufficient acknowledgment.

The Besses at the 2 February meeting at Mr Commissiong's chambers demanded of Mr Commissiong an Abstract of Title, so that they could have the conveyance to themselves drawn up. They later that day telephoned Mr Commissiong, again demanding the Abstract immediately. He promised to let them have the Abstract by 5 February. When they turned up on 5 February at Mr Commissiong's Chambers with Mr Connell to collect the Abstract, however, they were told that it was not ready. Mr Commissiong says that by this time both he and Mr Connell had told the Besses verbally on 3 February that there was an error in the monthly calculations. But Mrs Bess denies that she was told of any error, the evidence of Mr Commissiong is self serving to Mrs Hadley and unsupported by any corroborating evidence, and Mrs Bess' conduct thereafter is not indicative of her having been told of an error until 9 March.

Not having been able to prise the Abstract out of Mr Commissiong, the Besses went to see their solicitor, Mr Sylvester, who wrote Mr Commissiong on 8 February 1982. He requested either the Abstract or, if it was not available, certain specified information to permit his clients to have the relevant documents prepared to complete the transaction. It would seem that by this time Mr Commissiong had realized his error in the Agreement. Mr Commissiong did not, however, reply saying "Hold on, there are obvious errors in the monthly repayment figures that you must have seen in my letter of 30 January. We need to have those errors corrected before we proceed further." That would have been the sensible and proper thing to have done. If, immediately on discovering such an error made without authority a solicitor frankly communicates it to the solicitor for the other party that party would not be allowed by a court to insist on the performance of the contract without first agreeing to correct the mistake. Instead, he wrote strangely on 9 February to Mr Sylvester telling him that he, Mr Sylvester, should address his

letter to Mr Connell, as it was some time since he, Mr Commissiong, had last seen Mr Connell, and he quite frankly did not know if he was still retained. Mr Sylvester replied in a letter of 10 February expressing surprise at Mr Commissiong's letter. He reminded him that as recently as 5 February he Mr Commissiong had met with Mr Connell and the Besses about the delivery of the Abstract of Title. Mr Sylvester did not end his letter there. He went on to allege that it had become apparent to his clients that it was the desire of certain persons to ensure a forfeiture of the Bess' deposit. He charged that it appeared that his clients' misgivings were not without foundation, as it was clear that attempts were being made to procrastinate. His letter concluded with the ominous sentence "I hope however one day that you will eventually discover your true position in this matter."

On the same 10 February Mr Sylvester also wrote to Mr Connell apprising him of the situation to date and warning that his clients "do not intend to be pushed around any further." On 16 February Mr Commissiong wrote blandly to Mr Sylvester merely acknowledging receipt of the correspondence, and promising a full reply before 15 March. He still did not take the opportunity offered by this letter to attempt to put on record in writing the existence of the error. He did not say to Mr Sylvester, as one would reasonably expect, that Mrs Hadley's agreement with the Besses was not as the Besses were purporting to accept. On 25 February Mr Sylvester replied to Mr Commissiong's of 16 February explaining that his client had not waited on the receipt of the Abstract, but that he had prepared the Deed of Conveyance and the Mortgage Deed and had had the latter executed by the Besses. He enclosed them with his letter to Mr Commissiong, and requested the early execution of the Conveyance so that the transaction might be completed without further delay. It is not usual, to say the least, for a solicitor for a purchaser/mortgagor to prepare unsolicited by the mortgagee a Deed of Mortgage and to send it to the mortgagee demanding that it be signed. On 5 March 1982 Mr Sylvester next wrote to a Mr Alfred C Hadley advising him that it had been learned that he was the Attorney on record for Mrs Hadley, and that the Deed of Conveyance of the Villa Property was with Mr Commissiong awaiting his signature. I find that Mr Sylvester was by these frantic communications reflecting the extreme pressure for action that his client was subjecting him to. In the absence of any hint from Mr Commissiong to the effect that there was a problem, Mr Sylvester was entitled to believe that with the deadline of 15 March approaching, there was unreasonable procrastination on the part of Mrs Hadley.

It was only now, on 9 March 1982, that Mr Commissiong wrote a lengthy letter to Mr Sylvester, for the first time referring to an error. He went over the history of the negotiations between the parties, and concluded with the bald statement that "the quantum of interest was wrongly calculated, but there was never any doubt as to the percentage charge of 12% per year." He concluded his letter of 9 March with an offer to refund in full if by March 15 the Besses were unwilling to accept the mortgage with its "correct rate of interest," or could not find alternative sources of finance. He still did not clarify what exactly was, or what he meant by, "the correct

rate of interest." There was, of course, nothing incorrect about the rate of interest as expressed in the letter of 30 January. What Mr Commissiong meant to say, but did not say, was that while the rate was correctly expressed, it was the monthly amounts payable that had been incorrectly calculated in his letter of 30 January. His letter of 9 March still did not set out what the correct monthly installments of interest and principal were supposed, in his client's view, to be. Mr Commissiong's letter of 9 March was not merely unhelpful, it added further to the confusion. Mr Sylvester was understandably mystified. He responded on 12 March by a letter to Mr Commissiong observing only that it was clear that Mrs Hadley did not intend to conclude the transaction in accordance with the Mortgage Letter. He ended by demanding the return of the documents forwarded on 25 February. Mr Commissiong on 16 March 1982 accordingly returned the documents. He followed this up with a letter to Mr Sylvester of 16 March enclosing a refund of the \$130,000.00 "now that the completion date of March 15 1982 has passed." Subsequently, the Besses issued their first writ in 1982, Mr Bess died, complicated litigation ensued over the estate, and that first writ became stalled. On 1 June 1993 Mrs Bess had the Plaintiff company Yambou, of which she is an officer, registered, and on 9 June 1993 she assigned the benefit of the contract to purchase the Villa property to Yambou.

Yambou, it became apparent as the closing address of counsel for Yambou developed, had purchased from Mrs Bess the right to the Conveyance, excluding the right to the Mortgage. It unfolded in the address of Counsel that Mrs Bess and Yambou considered that the contract evidenced by Mr Commissiong's letter of 30 January consisted of a composite transaction which was divisible into a contract for Conveyance and a contract for a Mortgage. Each of the Conveyance of the legal estate in the land and the Mortgage, it was submitted, were transactions that possessed legal individualities of their own. Counsel submitted that it was the entitlement to the Conveyance that Mrs Bess had assigned to Yambou, not the Mortgage. Yambou had written to Mrs Hadley since 9 June 1983 informing her that it had purchased the benefit of the Contract of Sale originally to Norton and Lesline Bess. Mr Sylvester's letter of that date requested the outstanding balance due to Mrs Hadley "so that he could complete the transaction". Yambou was transmitting to Mrs Hadley by the above cryptic words in the letter, it was submitted by counsel, that the benefit and the burden of only the Conveyance had been assigned to it by Mrs Bess. Yambou was, by the letter of 9 June 1983 it was submitted by counsel, informing Mrs Hadley of its willingness and ability and entitlement to pay cash in full to complete the purchase and take the Conveyance.

So that, it was submitted, Yambou's case was that it did not matter whether the interest was 1% per month or 1% per year. Yambou was seeking to get the benefit of the Conveyance assigned to it, by paying off the balance of the purchase money in cash, without any Mortgage. The fact that the contract for sale of the Property and the agreement for the mortgage were contained in a single document did not coalesce them into one transaction. They remained separate and divisible transactions, each possessing a legal individuality of its own. It was Yambou's further

submission that the agreement to take the first mortgage on the Property could not alter the contract of sale. A mistake in the mortgage terms did not affect the Besses' equitable interest in the Property acquired on the payment of the deposit. From November 1981, when the first \$23,000.00 was paid, Mrs Hadley held the legal estate in the Property in trust for the Besses, and was obligated to convey it as directed by the Besses. I shall ignore for the purposes of this Judgment that in my view it requires mental gymnastics to read the correspondence and pleadings in this case to arrive at the conclusion that Yambou informed Mrs Hadley that it had not acquired and was not interested in the contract of sale with mortgage, but that it had had assigned to it the contract to purchase, without the mortgage, and would pay cash to complete the contract of sale without the need for a mortgage. Accepting for argument's sake that that state of affairs was well known to the parties since 1983, and that it was only the obtuseness of the court that prevented the court until closing argument from seeing the obvious, the question arises was there a valid assignment to Yambou in 1993 of the benefit of the contract for Conveyance sans Mortgage binding on Mrs Hadley?

Two objections to the validity of the assignment by Mrs Bess to Yambou were raised by counsel for Mrs Hadley. The first was that Mrs Bess had no authority to deal in Mr Bess' interest in the contract by assigning any part of it to Yambou. It was not denied by Mrs Bess that some years ago a court in St Vincent in a dispute between Mrs Bess and Ardon Bess, Mr Bess' son, ruled that Mr Bess was not married to Mrs Bess due to a defect. Ardon Bess took out Letters of Administration to the estate of Mr Bess and to this day represents Mr Bess' estate. The answer to that objection is that I find that Mr Bess and Mrs Bess considered themselves married until, after Mr Bess' death, the court found some flaw in their marriage and declared it had not been valid. The evidence was that they considered themselves married, they purchased other properties and always took a joint conveyance, they paid the deposit in this contract from a joint account, and other people treated them as a married couple. A conveyance to a husband and wife without words of severance would normally be considered a conveyance to them jointly. I find that whatever interest they acquired in this transaction they intended to be and it was jointly acquired. I have not, of course, heard Ardon Bess on the question, and will only rule that, for the purpose of this case, Mrs Bess acquired by right of survivorship all the interest of Mr Bess in the contract. She was thus entitled to convey the full beneficial interest in the contract to Yambou. I similarly find that there is no substance in the pleaded objection that Mrs Bess not being a Vincentian at the time of the contract in 1982 could not validly take an interest in land in St Vincent that she could assign to Yambou. The point was dropped and was not argued before me.

The second objection to the validity of the assignment by Mrs Bess to Yambou is that by the time of the assignment in 1993 Mrs Hadley had long since returned to Mrs Bess her deposit, and accepted the Besses renunciation of the contract, composite or otherwise, based on the Besses wrongful attempt to take advantage of the mistake in the mortgage contract, and refusal to perform it as originally intended. She had written the Besses to that effect, returned the Deeds of

Conveyance and Mortgage, and repaid the deposit. It falls for the court to determine from the evidence whether the Besses made an honest mistake in trying to force to completion the contradictory terms in the Agreement letter of 30 January, or whether they were aware of the mistake and acted dishonestly in what they did to enforce the Agreement of 30 January 1982. Finally, if it is still necessary, the court should make a finding on the effect of the mistake in the monthly repayment schedule in the Agreement.

I find that the Besses first saw on or about 29 January 1982 the draft letter dated 30 January. They were well aware, probably from that moment, that Mrs Hadley's lawyer had made a grave mistake in setting out the schedule of payments in his letter. They did not do the honest thing and point out the error to Mrs Hadley's agents. I find from the evidence that they hastened to accept the terms in his letter and pressed him to sign it and to give them a copy. They then hurried to pay down the further deposit on the contract requested in the letter, and they were precipitate in attempting to secure the Abstract after paying the deposit. They tried all they could to get the Conveyance and Mortgage executed as quickly as possible, and certainly before anybody could check the figures in the monthly repayment schedule. Mrs Bess' testimony, that up to the date of trial she has not bothered to check the monthly payments in the payment schedule in the letter of 30 January to see if they were too high or too low, is incomprehensible. Mrs Bess is a successful business executive in St Vincent, not a simple housewife. I find that the Besses wrongfully sought to take advantage of the mistake made by Mr Commissiong in setting out the calculation of the monthly installments of interest and principal. I find that Mrs Bess, by her payment of the deposit and the other acts she had performed after 30 January 1982 in these wrongful circumstances, has acquired no interest or entitlement that she could assign to Yambou. If the contract is to be enforced by Yambou it must be by the equitable remedy of specific performance. For Yambou to be able to enforce the contract for the conveyance of the legal title in the Property by the equitable remedy of specific performance, then Yambou's predecessor in title Mrs Bess must have been entitled to obtain that remedy from the court. I find that, due to the wrongful attempt to take advantage of the error in the mortgage agreement known to Mrs Bess at the time, she would not come to the court with clean hands. A court applying the law would not give her specific performance of any part of the Agreement, whether of the Conveyance or of the Mortgage. It follows that Yambou would not be entitled to the remedy of specific performance of any part of the Agreement. This would have been so even if Mrs Bess was not, as came out in evidence, an officer and director of Yambou, so that Yambou may be said to be no more than her alter ego. I further find, if it were necessary, that due to the contradictory and incompatible terms for monthly interest and monthly installments there was no agreement between Mrs Hadley and the Besses on the fundamental term of the price to be paid by the Besses. The result is that there was no valid and legally binding contract between the Besses and Mrs Hadley for the Conveyance or for the Mortgage. There was no contract for sale that Mrs Bess could have assigned to Yambou.

The case is dismissed with costs to the Defendant to be taxed if not agreed.

A handwritten signature in black ink, appearing to read 'ID Mitchell', with a large, sweeping flourish extending to the right.

ID Mitchell QC

High Court Judge (Ag)

14 July 1997