Privy Council Appeal No. 12 of 1991

James N. Thompson *Appellant*

v.

(1) Paul A. Corroon and
(2) Lief Corroon *Respondents*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (ANTIGUA AND BARBUDA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD MUSTILL
LORD SLYNN OF HADLEY

*[Delivered by **Lord Lowry**]*

The appellant ("the plaintiff") in this appeal is the widow and personal representative of James Thompson deceased, who was the plaintiff in an action which he brought against the respondents ("the defendants"), Paul A. Corroon and Lief Corroon, who are husband and wife, as defendants, claiming specific performance of a written agreement dated 18th July 1985 ("the Agreement"), rescission of the Agreement and damages for its breach. The appeal is taken from a judgment of the Court of Appeal of the Eastern Caribbean Supreme Court, Antigua and Barbuda, (Bishop, Acting C.J., Moe J.A. and Monica Joseph, Acting J.A.) given on 26th February 1990 and dismissing with costs the plaintiff's appeal from a judgment of Byron J. given on 6th September 1988 in the High Court of Justice of the Eastern Caribbean Supreme Court, whereby it was ordered that the plaintiff's claims arising out of the Agreement between him and the defendants should be dismissed.

[10] At the outset of the appellate proceedings before the Board Mr. Boyle Q.C., for the appellant, informed their

Lordships that the appeal would be confined to a claim that the plaintiff's option to purchase for the sum of US$1.00 premises known as Lathefield Lodge had been validly exercised by him and ought to be enforced or alternatively made the subject of an inquiry as to damages.

In order that the contentions of the appellant, as so limited, may be understood it is necessary to trace the history of the transaction, starting with the Agreement, which read as follows:-

" Registered Land Act 1975

REGISTRATION SECTION	BLOCK	PARCEL
Cedar Grove & Crosbies	44 1997B	170

AN AGREEMENT made the 18th day of July 1985 BETWEEN PAUL A. CORROON and LIEF CORROON both of Hodge's Bay in the Parish of Saint John in the State of Antigua and Barbuda (hereinafter called the 'owners' which expression where the context admits shall include their heirs, personal representatives and assigns) of the One Part and JAMES N. THOMPSON of Crosbies in the State of Antigua and Barbuda in the Parish of Saint John (hereinafter called 'the Developer' which expression where the context so admits shall include his heirs, personal representatives, successors and assigns) of the Other Part:

WHEREAS:

1. Paul Corroon and Lief Corroon are the registered owners of the land comprising Registration Section Cedar Grove and Crosbies Block 44 1997B Parcel 170 with a principal building thereon known as 'Lathefield House' and the building thereon known as 'Lathefield Lodge' on Lot #3, the same as are shown on the map or plan drawn by Jaime Cobas, Architect.

2. The Developer is desirous of purchasing from the owners all that piece or parcel of land known as 'Lathefield Lodge', Lot #3 or however the same shall be referred to upon partition containing approximately .69 acres together with the building thereon and the Owners have agreed to the said purchase.

3. The Developer is desirous of constructing approximately 40 units of multiple bedroom dwelling houses on All That portion of the Owner's land excluding the said 'Lathefield House' with 1.5 acres approximately attached thereto and the said Lot #3 'Lathefield Lodge' and the owners are willing to release the said portion of land to the Developer for the purpose stated subject to certain stated terms and conditions.

4. The Owners and the Developer in furtherance of their objective have agreed to enter into a written agreement.

NOW IT IS HEREBY AGREED:

1) The Owners shall grant the Developer an option exercisable within 3 years of the date of this agreement to purchase the said Lot #3, 'Lathefield Lodge' for the price of U.S.$1.00. PROVIDED THAT if the option is exercised any Vendor's liability for Stamp Duty in excess of $7,500.00 U.S. currency shall be paid by the Developer.

2) The Developer shall have the option to construct approximately 40 multiple bedroom dwelling units on that portion of the Owner's said land comprising approximately 9 acres and outlined in black on the said map or plan by Jaime Cobas or any other map or plan mutually agreed by the parties.

3) CONDITIONS:

   a) The Owners shall deliver to the Developer copies of all existing drawings, maps, plans in their possession relating to the land to be developed.

   b) The Developer shall at his own cost provide all drawings, designs, maps as he shall further require for the building development of the land.

   c) The Owners shall at their cost, obtain and deliver to the Developer approval in writing of the appropriate government authority of -

      (i) the proposed approximately 40 unit building development on the said land;

      (ii) duty free concessions for all dutiable materials for the building development on the said land.

   d) For the purpose of satisfying condition (c) the Developer shall at his own cost deliver with due expediency to the Owners -

      (i) the designs, drawings, plans, specifications quantities and whatsoever else is needed by the Owners for the obtaining of government approval for the development;

(ii) specification, quantities of all materials needed to be given to the appropriate government authority to obtain duty free concessions for the approximately 40 multiple bedroom units.

e) The Owners shall within 60 days after being provided with the information contained in (d) satisfy condition (c).

f) Upon the Owners satisfying condition (c) the Owners shall release a part of the land to be developed and the Developer shall within 180 days from release begin construction of four units.

g) The Developer will pay to the Owner 10% of the gross sale price (excluding all taxes and legal fees except the 5% vendor's tax) of the developed lot and on receipt of same the Owners will release another lot.

h) Additional lots or parcels will be released to the Developer as soon as the Developer pays the Owners 10% of gross developed sale price of that site previously released or any part thereof.

i) The building development will be completed by the Developer within 3 years of the commencement of construction.

j) The Owners shall provide evidence of free and clear title to the land to be developed.

k) The Owners shall be liable for all the cost of all litigation arising from the intervention of parties with a view to delaying or halting this building development provided the Developer shall in no way be liable for the intervention.

l) If the Owners shall make default in performing their conditions the Developer shall have the further option exercisable during one year from the signing of this agreement to purchase Lot #4 at a price of $25,000.00 U.S. Currency.

4) If the Developer shall exercise his option to purchase Lot #3, Lathefield Lodge, then the Owners covenant with him as follows:

(i) that no building will be constructed within 175 feet from the high tide mark on the waterfront property which would interfere with the seaview of the building on Lot #3, Lathefield Lodge.

(ii) that the Developer as Purchaser shall have a right of access by footpath to the waterfront on the adjoining property.

(iii) that the Developer as Purchaser shall have a right of way over the Owner's property sufficient for the use of Lathefield Lodge as a single family dwelling and any multiple residential units which may be constructed on Lots 3 and 4.

5) In consideration of the foregoing the Developer shall pay to the Owners the sum of One Hundred and Fifty Thousand Dollars United States Currency ($150,000.00 U.S.) on the signing of this agreement by both parties.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first hereinabove written.

SIGNED by PAUL and LIEF CORROON
before and in the Presence of:- PAUL A. CORROON
LIEF CORROON
EDWARD C. JOINER

SIGNED by James N.
THOMPSON before and
in the presence of:-
18th July 1985 EDWARD C. JOINER

ENDORSEMENTS

Endorsement No. 1:

It is hereby declared and agreed under Number 3, CONDITIONS, Section J should read as follows:

The Owners shall provide evidence of free and clear title to the land to be developed and to Lot #3, Lathefield Lodge and that no liens shall be taken out against that property. This does not include Lathefield House or the approximate 1.5 acre lot on which it is located.

Endorsement No. 2:

It is hereby declared and agreed under Number 3, CONDITIONS, Section G, the following is added:

The 10% payment shall continue until a total of U.S.$500,000.00 has been paid to the owners. The developer may pre pay the US$500,000 or the balance totalling US$500,000 at any time during the three years. When the US$500,000 has been paid the option is then extended indefinitely and the developer shall pay the owner US$100.00 per unit for each unit until the project is completed.

Paul A. Corroon
Lief Corroon
James N. Thompson

18th July 1985 Edward Joiner Witness"

Thus the plaintiff, who was described in the Agreement as "the developer" and in the Statement of Claim in the action as "a contractor and businessman", purchased two options (which may conveniently be called "the option to purchase" and "the option to build") for the sum of US$150,000 which was not apportioned between the options and which the plaintiff paid shortly after the signing of the Agreement by both parties.

The trial judge found *inter alia* that the plaintiff was a citizen of the U.S.A, which meant that, in the absence of a non-citizen's landholding licence, he could not acquire land in Antigua. (The plaintiff eventually, on 14th April 1988, was granted a licence to purchase 0.7 acres of land at Hodge's Bay; this was plot No. 3, Lathefield Lodge.) The defendants were a married couple who were property owners and residents in Antigua and Barbuda. They were the registered owners of a property known as Lathefield and wanted to have it developed, and they were looking for someone to carry out a condominium hotel development in accordance with plans which they had obtained from an architect named Jaime Cobas. There were two buildings on the land; one was Lathefield Lodge (Lot No. 3), which they wished to sell in order to raise funds to convert the other building, Lathefield Home, where they lived, into a restaurant which they would run themselves. Someone introduced the plaintiff to them and after about three weeks of discussions they signed the Agreement which is set out above. The judge, having adverted to the main provisions of the Agreement, observed, correctly, as their Lordships consider, that the Agreement did not confer on the plaintiff any right to acquire any interest in the 9 acres on which the development was to take place. Thus it was not open to the court, in response to the plaintiff's vague and unspecified claim for "specific performance", to order the defendants to convey to the plaintiff any interest in the land.

After the Agreement was signed the parties took steps to give effect to the option to build. The defendants delivered drawings to the plaintiff under condition 3)(a) and the plaintiff made arrangements for further drawings which he required. He also employed building material suppliers to provide a design for the proposed buildings and architects in Antigua to prepare the information needed to obtain duty free concessions: see condition 3)(c)(ii) and 3)(d). The defendants consulted their solicitors and on 5th September 1985 obtained the registration of a company called Lathefield Development Limited (wholly owned by themselves). This was necessary by reason of Government policy, which was to authorise development not by individuals but only by companies registered in Antigua; see also condition 3)(c) and (e). It may be noted that the plaintiff took no steps to form an Antiguan company, although he gave evidence that he owned a company called Sura NV, which was registered in Curacao.

The defendants made complaints, according to the plaintiff, about the design shown on the plaintiff's drawings,

but this does not seem to have been important, because the plaintiff, having taken advice from his architects, personally presented the application and drawings to the Development Control Authority in the name of Lathefield Development Limited and accompanied by a letter signed by both defendants in the following terms:-

> "Attached please find proof of ownership for the Parcel of Land number 277, Block 44 19970, Registration Section: Cedar Grove & Crosbies, to be used for Phase I of the Lathefield Development Ltd. project.
>
> Mr. James N. Thompson shall be our developer for the submitted project."

The words "our developer" should be noted. Approval was granted on 22nd November 1985 and the plans, with the authority's stamp of approval, were delivered to the plaintiff on or before that date.

The defendants' solicitors had already on 19th August 1985 sought from the Ministry of Economic Development the duty free concessions contemplated by condition 3)(c)(ii). The Ministry replied favourably on 3rd October 1985 and granted other benefits and incentives as well, and on 7th October 1985 the defendant Paul Corroon delivered a copy of the Ministry's letter to the plaintiff. The plaintiff's architect prepared a list of specifications and quantities of dutiable materials which he and the plaintiff submitted to the Ministry. Documentation was completed by a further list submitted on 6th December 1985. The Ministry gave approval to part of the list on 20th December and to the remainder on 15th January 1986 and the documents, bearing the official stamp of approval, were delivered to the plaintiff.

Accordingly, notwithstanding certain arguments advanced by the plaintiff both before starting his action and during the hearing (which will be noted presently), their Lordships are satisfied that the defendants carried out their side of the contract with regard to the option to build and are also satisfied that the defendants "released" the land to be developed, as required by condition 3)(f), by making it available to the plaintiff. The trial judge must be taken to have found this as a fact, since he said, "The plaintiff defaulted from his liability to commence construction 180 days after the 26th January 1986" (which is a reference to condition 3)(f) of the Agreement). It appears to their Lordships that the defendants could properly be said to have "released" the land some weeks before that date (and in their Defence they claimed to have done so in August 1985), but 26th January, as specified by the trial judge, may (quite safely, from the defendants' point of view) be accepted as the basis for the judge's decision, since the plaintiff did not begin construction either within 180 days of that date or at all, and indeed had by implication repudiated

the contract a considerable time before the time limit set by the Agreement for beginning construction had been reached.

While the defendants, as the trial judge held and as their Lordships agree, had done all that was necessary under the Agreement to make it possible for the plaintiff to go ahead, the latter's real difficulty was the lack of further funds or the means of obtaining them in order to embark on the construction of the first four units. Their Lordships do not find it necessary to rehearse every detail of the strenuous efforts made by both the plaintiff and the defendants to obtain the necessary finance. It is worth mentioning the trial judge's finding that the defendants executed the documents which were necessary in order that the land to be developed might be used as collateral security for the money which the plaintiff was negotiating to borrow from the First Bank of Barbuda, although, as he remarked, the Agreement contained no provisions requiring the defendants to provide finance or to assist the plaintiff in obtaining it. The trial judge found that, apart from the sum of US$150,000 which the plaintiff paid for the option to purchase and the option to build, the plaintiff did not intend to spend any more of his money, saying that the plaintiff had access to US$100,000 but did not intend to spend it or any part of it in furtherance of the development. He stated that he was willing to use this money as collateral security for moneys the Bank would lend him to do the construction work; the Bank was to provide finance by way of a loan.

At this point their Lordships would mention a document entitled "Letter Agreement" dated 25th September 1985, signed by the defendants, the plaintiff and two bank officials and purporting to be made between Lathefield Development Limited, Sura NV (the plaintiff's Curacoan company) and the First Bank of Barbuda. This "agreement" commenced with the recital:-

> "Whereas Lathefield Development Ltd/Sura N.V. (hereinafter referred to as Lathefield) is interested in borrowing funds from the 1st Bank of Barbuda and
>
> Whereas The 1st Bank of Barbuda (hereinafter referred to as the Bank) is interested in lending said funds".

The agreement continued:-

> "The following terms and conditions are hereby agreed to:-
>
> 1. Lathefield is desirous of borrowing E.C.$810,000.00 for the purpose of constructing 4 condominiums at Lathefield Estates. Lathefield agrees to collateralize said loan with a U.S.$100,000.00 Fixed Deposit, a house and property already built on Lathefield Estate known as the Guest House, the property (approximately 7/10 of 1 acre) and the buildings to be constructed on said property.

2. The Bank agrees to loan E.C.$810,000.00 to Lathefield for the purpose of the construction of 4 condominiums for a period of 1 year at an interest rate of 16% and a closing cost of 3.2%. This loan will be repaid by one payment on the 1 year anniversary of said loan or as sold to individual buyers, whichever is sooner. The one time payment will be E.C.$939,600.00.

3. The Bank agrees to continue the E.C.$810,000.00 line of credit with Lathefield so long as the debt is being retired timely. When a property is sold, those funds may be released to construct new condominiums on additional property. It is understood that the additional property will replace the sold property as collateral for the Bank."

At the plaintiff's insistence the following words were added:-

"These are the basic terms agreed to this 25th day of SEPTEMBER 1985. This is in no way to be considered a complete contract, therefore a contract must follow this agreement."

Correspondence between the plaintiff and the Bank makes it clear that the US$100,000 mentioned was stated by the plaintiff to be a fixed deposit in the plaintiff's name with the Royal Bank of North America, but the plaintiff never made that sum available to the Bank and the trial judge found that he never intended to do so. The defendants, on the other hand, on 9th October 1985 executed a legal charge, supplemental deed of charge and caution, with the effect of creating a legal mortgage in favour of the Bank to secure the repayment of EC$810,000, and on 15th October 1985 gave copies of these documents to the plaintiff, who on 28th October drew a cheque for US$2,000 on the account with the First Bank of Barbuda payable to American Standard Homes for architectural services, although under condition 3)(b) of the Agreement he was to pay for those services himself. The judge concluded that, while the defendants and the Bank had taken steps to implement the other agreement of 25th September 1985, the plaintiff had failed to honour his promise to make a fixed deposit with the Bank.

On 17th February 1986 the Chairman of the Loans Committee of the Bank organised a meeting with the plaintiff and the defendants and proposed a restructuring of the loan. He suggested that the Bank should engage an architect to review the development plans and that the plaintiff should obtain a work permit and engage a builder acceptable to the Bank. The Bank, in fact, did engage an architect.

On 27th February 1986 the plaintiff wrote to the Bank in the following terms:-

"Dear Sirs,

On September 25, 1985, I signed a letter agreement with the basic terms of a loan (see attached copy).

As the last paragraph of the agreement states: 'This is in no way to be considered a complete contract, therefore a contract must follow this agreement', I must ask your bank's position relative to the status of the loan.

An agreement (in the bank's possession), that Mr Edward Joiner claims is the final contract, was signed between the First Bank of Barbuda and Paul and Lief Corroon. The agreement was not only never signed by me but was not even shown to me until after the signing. The terms of the agreement differ radically from the original concept of the loan. For several months I have been trying to get clarification on the position of the loan and on the U.S.$100,000.00 transferred to Mr Joiner's other bank, RBNA. The U.S.$100,000.00 was to be used for collateral once I accepted and signed the contract.

As it is my opinion I am not a part of this contract until I signed, I would appreciate the Board's position on the following:-

1) Has the loan been approved by the board and if approved, what are the total terms and conditions of the loan.

2) Considering that I have not signed the final contract, who is the loan granted to, and who are the guarantors of the loan? What amounts are due to the bank, when and by whom?

As I am very interested in proceeding with the development, I am more than willing to work with your bank to make this project become a reality.

Requesting the above be brought to the attention of the Board at their meeting of Feb, 28, 1986, I thank your kind assistance in this matter and remain

Respectfully

(Sd) James N Thompson."

The judge stigmatised this letter as "completely dishonest" and in the course of a detailed analysis of the evidence and correspondence gave cogent reasons for his view, which their Lordships regard as entirely justified. He observed:-

> "As far as the $100,000 was concerned, the agreement of the 25th September 1985 specifically required him to open a fixed deposit of $100,000 in the Bank of Barbuda. I cannot resist the conclusion that his

> decision not to do that but open the $100,000 deposit in favour of Sura N.V. in the Royal Bank of North America resulted from his motive to ensure that he did not invest one cent in the project beyond the $150,000 he paid for the option.
>
> I formed the view that this letter was part of his plan to compel the defendants to capitulate to his demands to put him in control of Lathefield Development Limited."

Commenting on the plaintiff's letter to the Bank dated 13th March 1986, the judge said (again with ample justification):-

> "This letter seemed to reflect the plaintiff's intention that the arrangement negotiated on 25th September 1985 should not be made operational."

After describing further fruitless negotiations, the judge added:-

> "This issue of the financing was not part of the agreement of the 18th July 1985 but I have considered it closely as it seems to me that the plaintiff's behaviour justifies the conclusion that he did not intend to observe the agreement of the 18th July 1985. While the parties were negotiating, the plaintiff suddenly instituted these proceedings on the 12th May 1986."

Their Lordships pause here to take note of the fact that the plaintiff, after he had given evidence and closed his case and after an adjournment of the hearing from 3rd February to 18th April 1988, sought leave to amend the statement of claim by introducing the following paragraph:-

> "It was an express condition of a letter of agreement dated the 25th September 1985 that SURA N.V., a company wholly owned by the Plaintiff would be a joint recipient of the line of credit contained therein and/or an implied condition that the Defendants would take all reasonable steps to enable the Plaintiff to draw on the said line of credit for the purpose of his performance under the Agreement of the 18th July, 1985, as appears in paragraph 2 and 3 hereinbefore appearing, and the Defendants have failed to ensure either of the above. The Defendants have failed to take reasonable steps in that they have refused to provide the First Bank of Barbuda with the necessary approval to enable it to disburse funds from the established line of credit to the Plaintiff, or to themselves draw on the said line of credit to provide the Plaintiff with the said funds in order that he might perform his obligations under the Agreement of the 18th July 1985 aforesaid."

The audacity of this proposed amendment, which was refused, can readily be appreciated when it is pointed out that the parties thereto were not the parties in the action, that the defendants honoured the 25th September agreement whereas the plaintiff did not and that the plaintiff had insisted on the addition of words to show that the agreement of 25th September 1985 was "in no way to be considered a complete contract".

On 3rd December 1987, when the pleadings were closed and the case had been set down for hearing, the plaintiff sent a cheque for $1.00 in purported exercise of the option to purchase. As pointed out in the judgment, this fact was not alleged in the pleadings (and of course it had not occurred before the writ was issued) nor were the pleadings sought to be amended. The option to purchase was, however, the subject of debate at the hearing. It will be helpful to set out the judge's conclusions on this point as well as on other matters. He said:-

> "Even if I could consider this evidence [the sending of the $1.00 cheque], it would seem to me to depend on the legal position which is that (the) option to purchase in clause (1) is not severable from the option to build in clause (2). In order to exercise either or both, the plaintiff's conditions in clause (3) must be fulfilled. So that, as the plaintiff failed to commence construction in accordance with clause 3)(f), he could not exercise the option to purchase Lathefield Lodge.
>
> On the facts as I have found them, the defendants performed the conditions imposed upon them by the contract and the plaintiff failed to perform.
>
> In fact, during his closing argument, counsel for the plaintiff conceded that the plaintiff would not be entitled to any orders for specific performance.
>
> The remedy which counsel for the plaintiff argued that the plaintiff should obtain was the return of the US$150,000.00 less deduction of reasonable expenses incurred.
>
> He submitted that because the plaintiff did not have an alien's land holding licence for the Lot #3 then there was supervening illegality which would prevent the plaintiff from even acquiring an interest in the land unless he got an alien's land holding licence. Counsel referred to *Chase Manhattan Bank v. Kaffka* (1984) 33 W.I.R. 132. He submitted that it would be unconscionable and unfair for the defendants to retain the U.S. $150,000.00. He also referred to *Stockloser v. Johnson* (1954) 1 All E.R. 630.
>
> In my view, these were the wrong principles to deal with the issue revealed in this case. The US $150,000.00 was the consideration for the options given to the defendants by the plaintiff.

In my view, the plaintiff got the full benefit of the value of the consideration that he paid for. It was the plaintiff who failed to take the benefit of the contract by not performing the conditions and exercising the options.

If it were simply a question of exercising a discretion in this matter, I would not exercise it in favour of the plaintiff. He has come to Court on pleadings making the most extravagant allegations of illegality, mala fides, fraud and conspiracy against the defendants. In my judgment none of the allegations were supported by the evidence. I agree with counsel for the defendants that the Statement of Claim was an outrage. Instead, the evidence revealed that the defendants went beyond their risk. It was the plaintiff who without jurisdiction and apparently with a view to compelling the defendants to relinquish their interest in the Lathefield Development Company Limited to him gratuitously caused the relationship to break down and then instituted these proceedings.

The plaintiff also claimed to have the contract rescinded. In my view, the principle of Rescission does not apply to the facts of this case. A contract is rescinded by mutual agreement of the parties express or implied where neither party to the contract has performed the whole of his obligations. In this case the contract provided for the plaintiff to be granted two options and for certain conditions to be performed. The defendants performed all their conditions and the plaintiff performed some of his and failed to perform others. In my view it would be improper to make an order rescinding the contract.

The plaintiff had defaulted under Clause (f) of the agreement by failing to begin construction within the time stated or at all. It seems to me that the nature of the default is such as to entitle the defendants to be discharged from further liability to perform any obligations under the said agreement. The plaintiff's breach is accompanied by conduct which implied the renunciation of his contractual obligations, and his failure to begin construction makes it impossible for the defendants to grant the licence or other legal interest that would flow from the exercise of the plaintiff's options.

The defendants have sought a declaration that the plaintiff has repudiated the contract and in my view the defendants are entitled to be relieved from any further obligations under the contract.

The plaintiff defaulted from his liability to commence construction 180 days after the 26th January 1986. So much time has passed and the intentions evidenced by the plaintiff are such that in my view I ought to make the order for repudiation."

The judge dismissed the plaintiff's claims and held that the Agreement of 18th July 1985 had been discharged by the breach of the plaintiff.

In the Court of Appeal the judgment of Moe J.A., with whom the other members of the Court concurred, affirmed the trial judge in every respect. Dealing first with the option to purchase, he said:-

> "A conclusion that the exercise of the option to purchase Lathefield Lodge was of a separate and independent right may be appropriate if that option is severable from the option to build. But Counsel for the appellant did not leave it as an issue before the trial Judge that the options were severable. He in fact conceded that they were not. He even went further and conceded that the appellant was not entitled to any order of specific performance.
>
> The case argued before us is therefore totally inconsistent with the case presented to the trial Judge for consideration. Of course Counsel before us stated that he was withdrawing all concessions made by Counsel at the trial. But the question would be in issue for the first time as to whether on a proper construction of the agreement the options are severable."

While observing that the Agreement was not easy to interpret, he questioned whether the plaintiff could have exercised the option to purchase independently and concluded:-

> "Nothing was urged before the Court to impress upon us that it was in the interests of justice to allow the appellant to take a position different from the one he took before the learned Judge. I am not satisfied he should be allowed to do so and he must fail under this head."

In regard to the option to build, Moe J.A. agreed that the defendants had released the land as required by condition 3)(f) and that the plaintiff had not begun construction within 180 days from the release. He adopted the trial judge's view on repudiation, saying:-

> "I would sustain the Judge's finding that the appellant had repudiated the contract. Where a party to a contract manifests an intention to refuse to perform his obligations which are vital to the contract, there is a cause for discharge of the contract. The learned Judge's order was therefore correct."

Although, as their Lordships were informed, the appeal was confined to the option to purchase, that fact did not narrow the issues for consideration, since it continued to be the plaintiff's case that the defendants had not released the land to the plaintiff with the result that he was not in breach of the requirement to begin construction within 180

days of the release. Their Lordships, in agreement with the courts below, are satisfied that the defendants did release the land and that there was no obligation on the defendants to convey or transfer land to the plaintiff. Such a notion would have been inconsistent with a development scheme like that which existed here. It would have been unthinkable for the defendants to part with the property in the land without the security of the buildings having been erected and it could never have been in the contemplation of the parties that the plaintiff might have been left as the owner of land on which nothing had been built. There is no mention or hint in the Agreement of transfer from the defendants to the plaintiff and the reference to vendor's tax is perfectly consistent with the idea of that tax being due from the defendants when a house built by the plaintiff on land owned by the defendants was sold by the plaintiff on behalf of the defendants to a purchaser. The recipient of the Government concessions was in any case Lathefield Development Limited, which the plaintiff was so anxious to control, and at the material time the plaintiff had not acquired or even applied for the licence which he would need in order to hold land in Antigua.

The plaintiff's alternative argument was that he had begun construction and therefore was not in breach of contract. Their Lordships have no hesitation in endorsing the reasoning of the trial judge on this point. They are also satisfied that, on the facts proved, the trial judge was right to hold that the plaintiff had repudiated the contract and that the defendants were thereby discharged from their unperformed obligations, including the obligation to honour the option to purchase.

While payment of $1.00 was not, and could not have been, alleged in the pleadings, it was the subject of evidence and argument at the hearing and the following letters were before the court:

(1) Plaintiff to defendants dated 8th December 1987:-

> "Per the Agreement dated July 18, 1985 and signed by, Paul A. Corroon Leif Corroon and myself, James N. Thompson. I, by this letter with the $1.00 U.S. check enclosed, exercise my option to purchase the said Lot #3 with 'Lathefield Lodge'. Please have the appropriate documents sent to me by Jan 3, 1988."

(2) Defendants' solicitors to plaintiff dated 14th December 1987:-

> "Lathefield Lodge
>
> Yours of the 8th. instant to Mr. & Mrs Paul Corroon with cheque attached for $1.00 has been passed to us for attention.

> The cheque is returned herewith as the conditions contemplated by the agreement (to which reference was made) for exercise of the option have not been met. In any event, everything must remain in suspension until the determination of the current proceedings in the High Court of Justice."

The trial judge held that he could not in the state of the pleadings consider the plaintiff's claim with regard to the option to purchase, but he would also have held that the two options were not severable and accordingly that, in order to exercise the option to purchase, the plaintiff must comply with the conditions in clause 3). He also held that, by reason of the nature of the plaintiff's breach in relation to the option to build, the plaintiff had repudiated the contract and the defendants were discharged. The Court of Appeal refused to entertain argument concerning the option to purchase, as already noted.

In *Connecticut Fire Insurance Co. v. Kavanagh* [1892] A.C. 473, 480 Lord Watson delivering the advice of this Board, said:-

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In the instant case the point was raised at the trial. Although no amendment of the pleading was sought, it would have been open to the court to permit an amendment so as to claim a declaration that, on obtaining a land-holding licence and paying the sum of $1.00, the plaintiff would be entitled to exercise the option to purchase. It also appears that the evidence to support or refute the claim had been given or was available. Their Lordships accordingly consider that it is right to consider that claim on its merits. This involves two points: the construction of the Agreement and the effect of the plaintiff's breach of contract in relation to the option to build.

The plaintiff contended (1) that the right to exercise the option to purchase (at any time within three years of the date of the Agreement) was independent of the option to build and (2) that the conditions in clause 3) were referable only to the option to build and had nothing to do with the

option to purchase: admittedly the $150,000 was the consideration for both options but, the plaintiff submitted, he need not have proceeded with the option to build and could have contented himself with exercising only the option to purchase, in which event no question of breach of contract could have prevented the plaintiff from buying Lathefield Lodge for $1.00. On the other hand, the purpose of the defendants was so clearly to make money out of the development of their property (which had been their object for some time, as demonstrated by the plans which had been prepared for commercial development) that it is difficult to imagine that they intended to participate in a scheme which would permit the plaintiff to pay the sum $1.00, as soon as he was legally entitled to acquire the ownership of Lathefield Lodge, and walk away from the option to build. The words of the Agreement, however, appear wide and general enough to cater for this possibility.

At all events, that hypothetical situation was not the one which the court, and eventually the Board, had to deal with. The plaintiff exercised the option to build and then committed what their Lordships, in agreement with the courts below, hold to be a fundamental breach of contract. And, even if the options were separate, they were granted for a single consideration under one contract.

Discharge by breach is discussed in *Chitty* on Contracts 26th edition (1989) Chapter 24. It is stated at paragraph 1736 on the authority of *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827 that, where a contract is discharged by breach and the innocent party elects to terminate the contract, that is, to put an end to all primary obligations of both parties remaining unperformed, "(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged" - per Lord Diplock at page 849. Where the innocent party is entitled to, and does, treat himself as discharged by the other's breach, he is thereby released from future performance of his obligations under the contract: *Heyman v. Darwins Ltd.* [1942] A.C. 356, 399 and *Chitty* paragraph 1737. The party in default will not be entitled to recover any deposit paid by him as security for the performance of his obligations. In principle other sums paid by him under the contract before the time of discharge will likewise be irrecoverable: see cases at paragraph 1737 in footnote 22 and paragraph 1738. Of course, as the trial judge rightly pointed out, the plaintiff in this case obtained full value, namely, two options, in return for the US$150,000 which he paid under the Agreement.

Their Lordships refer also to *Cheshire and Fifoot*, the Law of Contract. In the courts below the 6th edition (pages 502-505) was cited, and the same principles may be deduced from the 11th edition (1986) (pages 521-530). A breach, no matter what form it takes, always entitles the innocent party to maintain an action for damages, but the breach does not always discharge the contract. One result which follows from a breach which is sufficiently serious to amount to a discharge is that the party not in default, in addition to suing for damages, may refuse to perform the obligations that he has undertaken.

A breach may be treated as a discharge only if its effect is to render it purposeless for the innocent party to proceed further with the performance of the contract, where a party indicates either expressly or implicitly that he does not intend to complete his side of the contract or where, having regard to the contract as a whole, the obligation which is broken is of vital importance. This is usually called fundamental breach. To bring the first principle into operation, the intention of a party not to proceed further with a contract need not be expressly stated. It may be inferred from his acts or omissions. But repudiation of a contract is a serious matter, not to be lightly found or inferred, and the question whether the inference is justified is one of fact dependent upon the nature of the default and the circumstances in which it was made.

Where the innocent party relies on the second principle, the question arises when the breach may be regarded as cause of discharge. The answer has been expressed in various ways, for example, that no breach may be treated as a discharge of a contract unless it goes to the whole root and consideration of the contract, and not merely to part of it; or unless it affects the very substance of the contract; or unless it frustrates the object of the venture. Everything turns upon the importance of the particular obligation that has been broken. Only if it is of vital importance to the contract as a whole will the innocent party be free to refuse further performance of his own obligations.

Their Lordships are satisfied that the trial judge correctly applied the principles to the facts of this case and that the Court of Appeal, if they had entertained the plaintiff's appeal in regard to the option to purchase, must have rejected it.

Accordingly, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.