33, 1969

IN THE PRIVY COUNCIL — No. 9 of 1969

ON APPEAL FROM

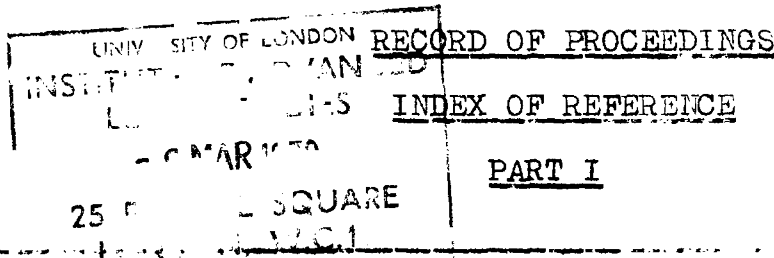
THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED — Appellant

AND

MANUS BONNER — Respondent


UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
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LONDON W.C.1

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED — Appellant

AND

MANUS BONNER — Respondent

R E C O R D   O F   P R O C E E D I N G S

In the Supreme Court of New Zealand

No. 1

Statement of Claim

10

No. 1

STATEMENT OF CLAIM

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
(WELLINGTON REGISTRY) — No. A. 134/67

BETWEEN THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED a duly incorporated Company having its registered office at
20
70/72 Cuba Street Wellington and carrying on business as a Land Investment Company

PLAINTIFF

A N D MANUS BONNER of Wellington a Building Supervisor and now a Mathematics Teacher

DEFENDANT

In the Supreme Court of New Zealand

No. 1

Statement of Claim

10 May 1967 - continued

STATEMENT OF CLAIM

Wednesday the 10th day of May 1967

THE PLAINTIFF says :

1. THE Plaintiff is a duly incorporated Company having its registered office at Wellington and carrying on business as a Land Investment Company.

2. THAT the Defendant resides at Wellington and appears on the Titles hereinafter mentioned as a Building Supervisor and is now a teacher of Mathematics. 10

3. THAT the Defendant is the registered proprietor and owner of a real property situate in the City of Wellington comprising two dwellings known as Nos. 5 and 7 Ranfurly Street Wellington more particularly described as under:

Firstly all that piece of land containing more or less Sixteen Perches (16 ps.) being Lot 6 on Deposited Plan 855 Part Sections 715 and 716 City of Wellington and being all the land in Certificate of Title Volume 90 folio 294 (Wellington Land Registry) SUBJECT to: (i) Grant of Easement contained in Transfer 21064 and (ii) Conditions set forth in an agreement made between Richard Keene and the Mayor, Councillors and Citizens of the City of Wellington deposited in the Land Registry Office, Wellington, Z. 106. 20

Secondly all that piece of land containing Sixteen Perches (16 ps.) more or less being Lot 7 on Deposited Plan 885 and part Section 716 City of Wellington and being all the land in Certificate of Title Volume 93 folio 161 (Wellington Land Registry) SUBJECT to : (i) Grant of Easement contained in Transfer 21064; (ii) Conditions set forth in Z 106 and (iii) Covenants as to building, etc. contained in Transfer 30403. 30

4. THAT by Agreement for Sale and Purchase bearing date 27th day of February 1967 and made between the Plaintiff by its Governing Director Michael Gavin Francis as purchaser 40

In the Supreme Court of New Zealand

No. 1

Statement of Claim

10 May 1967 - continued

and the Defendant as Vendor the Defendant agreed to sell to the purchaser the said real property upon the terms set out in the said Agreement. A copy of the said Agreement is hereto annexed.

5. THAT prior to the said transaction there had never been any communication whatsoever between the Plaintiff or any person on behalf of the Plaintiff and the Defendant and that on the present transaction up to the execution of the said Agreement by both parties all communications took place between the Plaintiff by its Governing Director the said Michael Gavin Francis and Mr R.F. Lochore of Wellington Licensed Real Estate Agent who was the Agent for the Defendant as Vendor on the said sale.

6. THAT the said Agreement for Sale and Purchase was prepared by Mr R.F. Lochore of Wellington Licensed Real Estate Agent carrying on business as R.F. Lochore and Company (at his office at 16 Cambridge Terrace Wellington) and that the said Agreement was entered into and signed by the Plaintiff at the office of the said Mr R.F. Lochore and at a later time by the Defendant at the said office.

7. THAT upon the execution of the said Agreement for Sale and Purchase the deposit of £500 therein provided for was forthwith duly paid by the Plaintiff to the Defendant by paying the same to the said Agent of the Defendant.

8. THAT prior to the settlement date (7th March 1967) provided for in the said Agreement the Memorandum of Transfer of the said land to the Plaintiff from the Defendant was duly prepared and tendered to the Solicitor acting for the Defendant with a request for a settlement statement and for settlement of the sale.

9. THAT the Defendant has thereupon refused to complete the said sale.

10. THAT the Plaintiff has performed all the obligations on the part of the Plaintiff imposed on it by the said Agreement and all conditions were fulfilled and all things happened necessary to entitle the Plaintiff to have the said

In the Supreme Court of New Zealand

No. 1

Statement of Claim

10 May 1967 - continued

Agreement performed by the Defendant and the Plaintiff has been and still is ready and willing to accept the Memorandum of Transfer of the said piece of land and otherwise to comply with the said Agreement but the Defendant has refused and still refuses to execute a Memorandum of Transfer in terms of the said Agreement

WHEREFORE THE PLAINTIFF PRAYS:

1. THAT the Defendant be ordered specifically to perform the said agreement by executing to the Plaintiff a Memorandum of Transfer of the said piece of land in terms of the said Agreement and to do all the acts necessary to put the Plaintiff in full possession of the same. 10

2. OR in the alternative if specific performance cannot be had, £1500 damages.

3. The costs of this action.

4. Such further or other relief as to the Court may seem fit. 20

(The Agreement is set out in the judgment of the Right Honourable Mr Justice North on page 1030 of the New Zealand Law Reports attached.)

In the Supreme Court of New Zealand

No. 2

Statement of Defence

14 June 1967

No. 2

STATEMENT OF DEFENCE

WEDNESDAY THE 14th DAY OF JUNE 1967

THE DEFENDANT by his Solicitors says :-

1. HE denies the allegations contained in paragraph 1 of the Plaintiff's Statement of Claim. 30

2. HE admits the allegations contained in paragraph 2 of the Plaintiff's Statement of Claim.

3. HE admits the allegations contained in paragraph 3 of the Plaintiff's Statement of Claim.

In the Supreme Court of New Zealand

No. 2

Statement of Defence

14 June 1967 - continued

4. HE denies the allegations contained in paragraph 4 of the Plaintiff's Statement of Claim and says, in addition, that if such a document as is referred to in the said paragraph 4 exists, it is of no legal effect.

5. HE denies each and every the allegations contained in paragraph 5 of the Plaintiff's Statement of Claim.

6. AS to the allegations contained in paragraph 6 of the Plaintiff's Statement of Claim, the Defendant says :-

(a) He admits that he signed, on the 27th day of February 1967, in the offices of Mr. R.F. Lochore, an acceptance to what was represented to him by the said Mr. R.F. Lochore to be an offer made to the Defendant by one of the Lamphouse Group of Companies;

(b) He had, at that time, no intention to enter into any contract with, or to accept any offer made by, any company which was not one of the Lamphouse Group of Companies, and his said intention was known to the said Mr. R.F. Lochore;

(c) In procuring his said purported acceptance to the said purported offer the said Mr R.F. Lochore held himself out to the Defendant to be acting as agent for the said member of the Lamphouse Group of Companies.

But save and except as is hereby expressly admitted the Defendant denies each and every the allegations contained in paragraph 6 of the Plaintiff's Statement of Claim.

7. HE denies the allegations contained in paragraph 7 of the Plaintiff's Statement of Claim.

8. AS to the allegations contained in paragraph 8 of the Plaintiff's Statement of Claim, the Defendant admits that prior to the 7th day of March, 1967, a memorandum of

In the Supreme Court of New Zealand

No. 2

Statement of Defence

14 June 1967 - continued

transfer was tendered to his solicitor with a request for a settlement statement and for settlement of the sale; but save and except as is hereby expressly admitted the Defendant denies each and every the allegations contained in paragraph 8 of the Plaintiff's Statement of Claim.

9. HE admits the allegations contained in paragraph 9 of the Plaintiff's Statement of Claim. 10

10. HE denies the allegations contained in paragraph 10 of the Plaintiff's Statement of Claim.

11. SAVE and except as is herein expressly admitted the Defendant denies each and every the allegations contained in the Plaintiff's Statement of Claim.

AND FOR A FURTHER AND ALTERNATIVE DEFENCE the Defendant by his solicitor says :-

12. HE repeats the denials, admissions and allegations contained in paragraphs 1 to 11 inclusive hereof. 20

13. HE says that, on or about the 27th day of February, 1967, the said Mr R.F. Lochore, acting as the Plaintiff's agent, invited the Defendant to accept an offer (set out as an exhibit to the Plaintiff's Statement of Claim) which said offer was represented to the Defendant by the said Mr. R.F. Lochore to have been made by one of the companies in the Lamphouse Group of Companies. 30

14. BEFORE purporting to accept the said purported offer the Defendant sought to be assured by the said Mr. R.F. Lochore that the offeror was, in fact, a member of the Lamphouse Group of Companies, and such assurance was given.

15. ACTING upon the faith of that assurance the Defendant thereupon purported to accept the said purported offer. 40

16. THE said representation was known to the said Mr. R.F. Lochore to be false at the time when it was made; was intended to, and did induce the Defendant to accept the said purported offer.

In the Supreme Court of New Zealand

No. 2

Statement of Defence

14 June 1967 - continued

AND FOR A FURTHER AND ALTERNATIVE DEFENCE the Defendant by his Solicitor says :-

17. HE repeats the denials, admissions and allegations contained in paragraphs 1
10 to 16 inclusive hereof.

18. AT no time did the Defendant ever intend to enter into any contract with the Plaintiff; and the Plaintiff at all material times knew, or ought to have known, that it was a company with whom the Defendant had no intention of contracting.

No. 3

NOTES OF EVIDENCE TAKEN BEFORE THE RIGHT HONOURABLE THE CHIEF JUSTICE
20 OF NEW ZEALAND

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Examination

MR CAHILL CALLS:

Michael Gavin Francis of 43 Palliser Road, Wellington.

I am a Company Director. I produce a number of documents relating to the incorporation of the company (EXHIBIT A). I am governing director of the company according to those articles. Is that the original of the Agreement for sale and
30 purchase referred to in the Statement of Claim? Yes. (EXHIBIT B). 27th February is the date of that.

Mr Lochore, a salesman in the employ of R.F. Lochore & Company rang me up on the telephone on 27th February - in the morning of that day - 1967, and asked me to go out with him and inspect some properties they had for sale in Island Bay, Wellington. We made an appointment about 10.30 and went
40 out to inspect several properties, none of

In the Supreme Court of New Zealand

Plaintiff's evidence

No. 3

Michael Gavin Francis

Examination - continued

which were of any use to either me or my company. On the way back from Island Bay however Mr Lochore mentioned two properties in Ranfurly Terrace and that is just off Tasman Street, and before we got there Mr Lochore said they had had two prior offers for the property neither of which had been accepted, so I said "Well let's have a look at them". I said "Are any terms available on this transaction?" Mr Lochore said the vendor would be leaving money back on mortgage, so I said "I am very interested in the properties and I will give the vendor the full price he is asking providing he deposits approximately £11,000 back to my Land Investment company." He said "We can only try, let's go back and talk to my dad." So we both went to the offices of R.F. Lochore & Co., Cambridge Terrace where I met Mr R.F. Lochore senior, and I told him I was interested in the properties and that I would be offering the full price. The time of this would be roughly 11.30 in the morning of the 27th. Mr Lochore said the owner of the properties had purchased and had done them up and also said I was paying quite enough for the properties. I said "I don't mind as long as he deposits so much back to my Land Investment Company". I didn't have much time myself. I told Mr Lochore to draw up the necessary documents and I would sign them. I said I would be signing them as agent for my company, the Loan Investment Corporation. The document was actually signed one-and-a-half hours later by me when Mr Lochore Junior, salesman, brought the contract to my office in Cuba Street. I read through the contract and found out it was what I wanted. I signed the contract and drew a cheque on my company's bank account and signed that and pinned it on top of the contract. The amount of that cheque was £300. Together with the cheque I pinned a circular setting out the various functions of the Loan Investment Corporation and the reasons that it accept moneys on deposit. All these documents I handed back to Mr Lochore junior, and he

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Examination - continued

said he would try and get in touch with the owner as soon as possible. He told me he was a teacher of mathematics at one of the colleges - I think Wellington Polytechnic. Then I rang Mr Lochore about 2.30 in the afternoon of the same day asking him if acceptance had been got and he told me he had not got in touch with the vendor yet. So I asked him to let me know as soon as possible.

Mr Lochore rang me up about 5.30 that night. Look at this document: is that what you refer to as the circular? Yes. (EXHIBIT C). Signed 'Yours faithfully. Loan Investment Corporation'. It has my actual signature and the words 'Managing Director'. There is a paragraph in that which refers to reason why my company takes money.

When Mr Lochore told me acceptance had been obtained, he said the vendor was very happy and that it only took a matter of ten minutes but he required a further sum of £200 to be paid as deposit for part purchase money. Cheque - EXHIBIT D.

After that I instructed my solicitor to proceed with the purchase. I passed a resolution in my Minute Book in reference to the contract. (Minute Book - signed copy of resolution put in - EXHIBIT E). Settlement date was eight days later on 7th March? Yes. I instructed Mr Morrison as a matter of course. It took three or four days before he heard from Treadwells that there was some trouble over settlement. I rang him every day, sometimes twice a day. I particularly wanted settlement on the settlement date. We were at one stage considering developing the property and converting it into flats. I have two brothers who are builders. I had a look at the size of the properties and I thought they were big enough to convert into flats. Mr Morrison said Treadwells, the defendant's

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Examination - continued

solicitors at the time, would probably be settling, and I was waiting to hear why the delay. This was about a week after settlement date, just before the Easter holidays. He later told me he had received a letter purporting to rescind the contract. It was after Easter. After Easter I instructed Devine Crombie & Cahill to take action in the matter. I consider I would have got a conservative rental for the flats of £7. 10. 0 each. I hadn't decided whether I was definitely going to do that, but it was a thought. I had the property valued. Mr Morrison arranged that. I am still waiting to proceed with this transaction.

INGLIS XXD:

Cross-Examination

Has your Company at this moment £11,000 in cash to pay Mr Bonner? The company can meet its commitments under the contract, if proper notice were given. Could your company on 7th March have paid Mr Bonner £11,000 in cash? I can't recall the bank statement at that date. You are a Governing Director of the company, aren't you? Yes. You must have a very good idea from day to day how much cash your company had to draw on? I knew when I wrote the cheque out appropriate funds would be there to cover it and there would be funds for settlement. Let me ask you to assume you have been advised that £11,000 cash was required from your company on 7th March: how would you have gone about raising that? If I was called upon at that particular time there was a building the company owned in Ghuznee Street with an equity of £10,000 to £12,000, but we were not called upon for such funds. With an equity of £10,000 or £12,000 in Ghuznee Street property, how would you have raised £11,000 in cash from that property? From mortgaging it, or if there was a forced sale - we would have had to sell the property. Those are the only things

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Cross-Examination - continued

that come to my mind. Bearing in mind that the contract was signed on 27th February and settlement was a week later, would it have taken you only five days or so to have arranged a forced sale of the Ghuznee Street property? (MR CAHILL OBJECTS TO QUESTION). Would it have taken you as little as five days to have made a forced sale of the Ghuznee Street property? That is one of the properties we
10 had at the time.

What is your age? 22. How many shareholders are there in the Loan Investment Corporation of Australasia Limited? Two. Who is the other beside yourself? Mr Shepperton, a Public Accountant. How many shares does he hold? One. Is that a fully paid up share? Yes. What about yours, are they fully paid up? £5,000 of shares have been fully paid up plus call of 6s.8d
20 on 96,000 shares has been met. Met by whom? Met by me. Your total shareholding in company is 100,999 shares? No it is more than that. The capital of the company is $102,000 - no, $202,000. I own all the shares except one. Total calls received $74,000, is that right? Approximately. There are a number of registered charges against the company, aren't there? Yes. Would it be fair to say they amount to some-
30 thing in the vicinity of $65,400? That would be a fair estimate. In addition, is there a debenture to the Bank of New Zealand for advances? Yes, by arrangement with the Bank of New Zealand. In fact the company has given the Bank of New Zealand a debenture? Yes. Has it first priority over all other charges? It is a floating charge.

Apart from being Governing Director of
40 the plaintiff company, you are also a director of other companies? Yes. What other companies are you director of? Franco Enterprises Limited - I am a governing director; Security Sales Limited; and Victoria Construction Company Limited. Are

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Cross-Examination - continued

you a director of Working Man's Savings Trust Corporation? No. Are you a director of First Equity Trust of New York? No I am not. Have you been a director of those two companies? (MR CAHILL OBJECTS). I am the governor of Working Man's Savings Investment Society. And First Equity Trust of New York? It has not been incorporated yet. You appear as a director of those two companies on the last annual return filed by you for the plaintiff company? Yes, there is a column provided for setting out a director's connections with other companies. 10

Let me come to your timetable on 27th February last. You told us you started off at 10.30 a.m. to see the Island Bay properties? Yes, I said the appointment was for 10.30. When did you meet Mr Lochore to visit the Island Bay properties? About 11 o'clock. He called at my office and I went in his car to Island Bay. How long would it have taken him to get up there? Five or ten minutes, from Cuba Street. How long were you out there? We just drove around. I was not interested in any of the properties there. Would it be correct to say it would be well after 11 a.m. by the time you got to Ranfurly Terrace? 11.20 a.m. You told us you arrived at the office of Lochore Senior at 11.30? Yes. Of course you had to get there from Ranfurly Terrace? That's right. So it is correct to say it took you about five minutes to decide these were properties you wanted? Three minutes. Had you seen the properties before? No. Had you any idea what their condition was like? Yes, I am experienced in properties. Did you go inside? No. You are not saying you can tell from outside of property what it is like inside? I can. You agree you were really taking a risk, a calculated risk in buying these properties? Everything is a calculated risk. You took three minutes

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In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Cross-Examination - continued

to look at the properties from the outside? Yes. And at that moment decided to bind your company to pay £13,300? At the time I saw the properties I had in mind that the vendor had turned down two prior offers, both of which were subject to leaving mortgages. When I inspected these properties the question of terms came into it, and I realised then if the properties were offered on very good terms I would be interested. Both properties were very well preserved. I know the vendor had two prior offers thereby establishing a market price and if finance could be deposited with my company for ten years the extra price didn't worry me at that stage, knowing that Ranfurly Terrace is marked out by Wellington College as the local government programme and I knew within five years they were going to re-develop that area.

You told us you rang Mr Morrison every day and sometimes twice a day when it looked as if things were starting to go wrong? When there was no settlement. You were particularly anxious? When you are paying £11,000 you must be anxious. So your anxiety was to obtain credit? No, my anxiety was I would like to know if I was buying a business where the credit was coming from. I was worried that another party was not respecting the contract. I take it your anxiety wasn't over Mr Bonner's morals? I don't understand what you mean. You said part of your anxiety was the other party was not respecting the contract - you are not telling us this was the main part of your worry? I was worried about the contract, that if anybody broke that contract then my ideas of a contract meant nothing. Are you telling us you weren't worried at all about the commercial aspect? Of course. I was worried about the commercial aspect. Which aspect were you most worried about - the commercial aspect or the fact your faith in the sanctity contract might be shattered? (MR CAHILL OBJECTS TO QUESTION).

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Cross-Examination - continued

I take it from what you said about discussions with Mr Lochore Jnr. you had dealt with him before? I had bought one property from him before in my name. Has Security Sales Limited had any dealing with Mr Lochore Jnr. before? No. You said Mr Lochore got in touch with you about the property? Yes. Was that as a result of some arrangement you had made with him? No. Are you able to tell us how he would know you might be interested in these properties? Yes, about three months prior to signing of this contract another company of which I am Governing Director signed up for the purchase of a property in Hinau Street in which the vendor deposited back 50 per cent. of the purchase price on similar terms. On unsecured deposit? Yes. Was it as a result of that that Mr Lochore's office knew you were interested in this type of transaction? I don't know. At any event Mr Lochore Jnr. knew where to get in touch with you? He is a Land Agent. You paid you said a cheque for £300 to Mr Lochore's office and that was the cheque to which you pinned the circular? Yes, I pinned the cheque and the circular to the offer - three documents. £300 was amount of deposit provided for by the offer, wasn't it? Yes. You later paid Mr Lochore's office a further cheque for £200? Yes. You told us the explanation of that was that it was the balance of the deposit? No. That didn't strike you as unusual? No, he rang up and said the contract had been accepted and said his principal, Mr Bonner, wanted another £200. According to resolution recorded in Minute Book - it was in fact signed later than 27th February? Yes.

(TO BENCH: Later on than 27th February or later on 27th February? Later than.)

It is quite clear none of your companies have any connection with the Lamphouse Group? No connection whatsoever.

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Michael Gavin Francis

Re-Examination

CAHILL RXD:

You have been asked questions about £11,000 - how much under this contract did you expect to pay on 6th or 7th March? £2,300. You issued deposit notes for moneys on deposit? Yes. These are on forms prepared by your Company? Yes. You were never asked to proceed further in handing over the deposit note? No.

Further Cross-Examination

10 INGLIS FURTHER XXD:

I believe you rang Mr Bonner on 28th March or thereabouts? Yes, I wanted to know why settlement had not taken place. Mr Bonner will say that you told him you were concerned about the extra deposit Mr Lochore was asking for - do you remember that? I did not say that. Did you tell Mr Bonner Mr Lochore had a tape recorder in his office? When Mr Bonner and I conversed on the
20 telephone he told me he had a witness on an extension. At the end of the conversation he told me he had a witness listening to what was said. Presuming he was bluffing I told him Mr Lochore could have a tape recorder in his office - it is possible. Did you tell Mr Bonner you wanted your money back from Mr Lochore? I told Mr Bonner I had paid a deposit, settlement had not been effected. I mentioned the further
30 deposit and it was sitting down in Lochore's Trust Account, the balance of which I understood had been sent to Treadwells. Mr Bonner will say also at the end of that telephone conversation you said if you got the amount of your deposit back nothing more need be said about the matter? If Mr Bonner said that he is telling lies.

Further Re-Examination

CAHILL FURTHER RXD:

In the telephone conversation with Mr Bonner
40 did you have a tape recorder? Yes. Have you referred to it since to refresh your memory? Yes. Was anything said about whose agent Mr Lochore was? I understood him to be Mr Bonner's agent.

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

John Bentley Morrison

Examination

MR CAHILL CALLS:

John Bentley Morrison. I practice as a member of the legal firm of Scott, Hardie Boys, Morrison & Jeffries. I acted for the purchasing company in connection with the contract. The contract was brought in to me personally by Mr Francis on 1st March. I was instructed to act in the matter. I searched the property and prepared transfer in the normal manner (EXHIBIT F). On 6th March I wrote to Treadwells enclosing the Transfer and said we in turn will have the appropriate deposit notes available. Is it correct that the purchasing company uses a form of deposit note prepared by your firm? Yes. The letter of 6th March was delivered to Mr Treadwell's office on that day. I rang Mr Treadwell the same day. He stated that he had not yet had an opportunity to see his client but that he would get in touch with me as soon as possible. I communicated with Mr Treadwell by 'phone on a number of occasions after this, and in a telephone conversation with Mr Treadwell, Mr Treadwell stated that his client alleged misrepresentation on the grounds that the Land Agent had represented that the purchasing company was connected with the Lamphouse Group. I communicated on a number of occasions again on the 'phone in an endeavour to effect settlement. Mr Treadwell promised that he would write to me formally about the grounds on which his client refused to proceed. The only written communication I received from Mr Treadwell was his letter of 23rd March (EXHIBIT G). To the best of my knowledge I received that after the Easter vacation. That letter states no grounds. In the meantime I ordered a valuation from Messrs F.M. Renner & Co. just after I had received the contract in the normal manner. Their fee would have been scale fee for valuation of approximately £20. I produce valuation by Mr Feloon - £10,875 total value of property with mortgage recommendation (EXHIBIT H).

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Examination

MR CAHILL CALLS:

Robert Francis Lochore. I reside at Island Bay. I am a Licensed Land Agent. I appear on subpoena. I carry on business in Kent Terrace. I have been a Land Agent for approximately 12 years.

I have seen that contract before. I received the property for sale from Mr Bonner personally early February. He
10 called at my office about 4.30 and asked me if I would be interested in selling it. He called at my office at approximately 4.30. I made an appointment with him to meet him shortly after 5 to inspect the property. My wife and I kept the appointment. We met Mr Bonner there and I made a thorough inspection of the properties. I told Mr Bonner his price was too high. I gave him a saleable price
20 of £11,000 for the two. He wanted £6,500 for No. 5 and £5,750 for No. 7. After discussing the matter with Mr Bonner he told me he was prepared to leave in approximately £4,500 on first mortgage on both properties. I then told him I would have a crack at selling it. We escorted approximately thirty buyers through the properties, and towards the middle of February I received two offers
30 for the one property - No. 7. They were both conditional offers. One was from a local chemist. He offered £6,300 with cash deposit of £1,500 if Mr Bonner would carry the balance on first mortgage at 7 per cent. The same day I received an offer from a Mr Dreaver, a bank clerk, for the same property for £6,500 with £1,000 deposit on condition Mr Bonner left in first mortgage of £5,500 at 7 per cent.
40 interest. Contracts were prepared and signed by the two purchasers and submitted to Mr Bonner. He took these two contracts away and brought them back to my office later declining to accept either of them, stating that the rate of interest at 7 per

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Examination - continued

cent. was too low and the price offered was also too low. He asked me to get in touch with the would-be purchasers to see if I could increase their offers and also ask them to pay an increased rate of interest. I promised to do so. In the meantime I received from Mr Francis this offer which was prepared - Mr Francis called and made an offer verbally and asked me to draw it up, which I did. I then sent the contract round to Mr Francis' office with my son and Mr Francis signed it there. On receipt of this offer back I rang Mr Bonner's home and left a message that he call and see me. Mr Bonner called at my office about 4.50. On my table were the two abortive contracts, a brochure and this contract. I talked to Mr Bonner about five minutes about the two abortive contracts telling him I could not get the offers increased - that the chemist had the place valued and withdrew his offer completely. I then showed Mr Bonner this contract. He read it over and was quite interested. I then showed him the brochure which he read carefully - there was a brochure prepared by Mr Francis for the Australasia Investment Corporation. Mr Francis attached it to the contract. That is a copy of the brochure which was shown to Mr Bonner.

(TO BENCH: You are quite sure that is what you mean when talking about a brochure? Yes.)

Mr Bonner then re-read the contract and stated "That seems quite O.K. to me" and signed it free of his own accord. He read the whole thing twice and read the brochure. I did not at any stage of my conversation with Mr Bonner mention the name of Lamphouse or any other Investment Company. I speak quite loudly and quite definitely - any mistake was created by himself not by me and it was deliberate. I never mentioned the word Lamphouse to Mr Bonner in my life or any other

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Examination - continued

financial institution. Mr Bonner signed the contract, shook hands with myself and my wife and left my office. I rang Mr Francis to tell him his contract had been accepted.

Two or three days later I received a telephone ring from Mr Shane Treadwell. He said "Have you got any more bloody suckers down there that will pay £11,000 on unsecured credit?" I said "That is standard practice
10 among investment companies". He then stated "You nominate one". I said "Lamphouse". He stated to me then that he was not satisfied with Mr Francis - with the financial standing of Mr Francis' company, and there the conversation finished.

Several days later Mr Bonner called at my office for the key and made a complaint to me that the door of No. 7 had been left open. I apologised for this explaining to
20 him that a valuer, Mr Renner, had been up and must have left it open. Mr Bonner at that time stated to me that Mr Treadwell was making full enquiries into the financial standing of Mr Francis' company and was not satisfied with it. He made no complaint or mention of the word 'Lamphouse'. The word 'Lamphouse' was obviously conceived at a later date.

Approximately 27th March I received a
30 letter from Treadwell & Treadwell (EXHIBIT I) wherein it is stated they had intended to rescind the contract - no mention made of misrepresentation. A copy of my reply - stating this was an unconditional contract (EXHIBIT J). I sent on £155 on the 10th March. I received a letter from Treadwell & Treadwell on 10th April (EXHIBIT K). Nothing was ever told me about what misrepresentation that was supposed to be. I
40 had no communication from Mr Bonner or his solicitor alleging I had misrepresented anything. You realise that in the Statement of Defence it is alleged you falsely

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Examination - continued

misrepresented something? Yes. That is dated 14th June 1967 - yes. At no date prior to that had I received any communication from Mr Bonner or his solicitors alleging I had misrepresented anything. My wife was in the room 6 to 7 feet away when the contract was drawn up.

Cross-Examination

INGLIS XXD

I take it your theory is that any notion Mr Bonner has about Lamphouse being involved were invented by Mr Bonner some days after he entered into the contract? Very definitely. 10

(TO BENCH: Is it a matter of theory or matter of fact so far as you are concerned? It is a matter of theory - I can't prove it. Is that evidence you are giving? The evidence I am giving is I did not make the statement. I am very definite about that.) 20

A witness will give evidence immediately after he left your office Mr Bonner went home and said "I have sold these properties to Lamphouse"? That could never be proved. He could say he sold it to Prince Albert. You say definitely that in your office the word 'Lamphouse' was not mentioned to Mr Bonner? I can say positively and definitely that the word 'Lamphouse' has never passed my lips to Mr Bonner. How long did the interview between you and Mr Bonner last? About twenty minutes. Did he ask you to explain anything about the contract? Only thing he asked was who Mr Francis was. I told him he was Managing Director of two or three companies and that I had considerable business dealings with Mr Francis. Was that the fact that you had had considerable 30 40

business dealing with Mr Francis? Yes. More than just one or two? I had sold to Mr Francis seven properties. I had sold for him eight.

(TO BENCH: At that time? Yes.)

Would it be correct to say Mr Lochore that your firm had a well developed line of communication to Mr Francis? Not unnecessarily so. Would it be fair to say that if anything came in to your firm you thought would interest him you would let him know? He and several other people. You told us that the form of contract in this case providing for unsecured notes was fairly common practice - did you say that? I did. Just how common a practice is it? Here is a copy of an advertisement from the 'Dominion' dated 12th April offering unsecured credit for Lombard Investment Company - it is standard practice. But a business man would know a good deal depends on the financial stability of the company he is dealing with? Yes. To your knowledge does the Lamphouse Group of companies enter into contracts similar to this one? I do not know. You know of the Lamphouse Group? Yes. May I give an explanation why when Mr Treadwell said to me to nominate one I said nominate the Lamphouse - the reason was two or three nights before this over a game of cards with several business men one of my friends said he had invested several thousand pounds with Lamphouse. He was seeking confirmation with us of this investment. We were pulling him to pieces for his investment and then it came out that it was unsecured credit - that is why it was fresh in my memory. Would you describe Mr Bonner as a careful vendor? I only met him six times. He struck me as being a very conscientious man. He had done the properties 5 and 7 Ranfurly Terrace up in an excellent manner and appeared to me to be a gentleman.

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Cross-Examination - continued

Mr Bonner will say in evidence when he came to your office after you telephoned him and asked who the purchaser was in this contract, you told him it was the Lamphouse? No. He will say further in evidence he asked you what the Lamphouse was going to do with the properties? The word 'Lamphouse' was never mentioned by Mr Bonner or myself. In fairness to you and Mr Bonner, can you remember anything that was said at that interview that could possibly have led Mr Bonner to believe Lamphouse was involved? I can only say the word 'Lamphouse' was not used by either Mr Bonner or by me in my office. Even if the name Lamphouse was not used, can you think of anything in your conversation with Mr Bonner which might have led him to believe that Lamphouse was involved in the contract? No. Did you tell Mr Bonner that this way of paying for purchase of properties was a common practice nowadays? No. Did Mr Bonner express any surprise at the way the property was being paid for? Yes, and I told him it had become a practice in lending institutions seeking finance. Is it possible you could have said lending institutions such as Lamphouse? The word 'Lamphouse' was never mentioned by me.

You rang Mr Francis as soon as acceptance had been signed? Yes. You rang him straight through? Yes. He answered the 'phone immediately? Yes. Did you get the impression he was waiting for you to ring him? I knew he was waiting in his office. You told Mr Francis that the contract had been signed? Yes.

<u>CAHILL RXD</u>:

Re-Examination

To go back to the beginning of your evidence, did you tell Mr Bonner you

considered £11,000 was price of these properties? I did. Would that be allowing £4,500 on each of them? That is not quite right. When I spoke to Mr Bonner I told him I thought a fair price for the properties would be about £11,000 but he may get a higher price by leaving finance in.

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Robert Francis Lochore

Re-Examination - continued

TO BENCH:

To Bench

10 Had you had any previous dealing with Mr Bonner? No. You told the Court Mr Bonner called at your office about 4.30 on a day early in February? Yes. You had had no previous dealings at all? No. Had somebody referred him to you as a land agent? I don't know. He came in off the street? Yes. When you said you met him six times, they were all the occasions relating to this deal? Yes.
20 Can I assume you have had no further dealings with him? No. Did you get any written instructions as agent for him? No, he just gave me the keys.

MR CAHILL CALLS:

Olive Ilene Lochore

Examination

Olive Ilene Lochore: I am a married woman, the wife of the previous witness. I work in his office I do typing.

I heard about the agreement on 27th February last. Were you in the office on
30 that day? Yes. I typed the contract. I work in the same room as my husband. I typed it on my husband's instructions. I was present when Mr Bonner came in. He looked at the contract and spoke to Mr Lochore about it and he looked at the accompanying paper. I didn't see the paper but I knew it had been pinned to the contract. He spoke to Mr Lochore

In the Supreme Court of New Zealand

Plaintiff's Evidence

No. 3

Olive Ilene Lochore

Examination - continued

about it and he said "This seems to be all right to me" and he said he was quite pleased to have it off his hands. I had typed two previous offers for Mr Bonner's properties. One was from a chemist and one was from a man by the name of Dreaver. When Mr Bonner was leaving he said he would let us have his other property when he wanted to sell it and he was quite happy.

INGLIS XXD: 10

Cross-Examination

I take it the position was as it usually is in these matters - the two men speaking together and you didn't take much part in it. It was when Mr Bonner got up to leave you started paying attention to what was said? No, I was quite interested in it really. You had no reason to be interested? I am interested in all sales. Who would you say was the better customer - Mr Bonner or Mr Francis? (MR CAHILL OBJECTS TO QUESTION). 20

CASE FOR PLAINTIFF

MR INGLIS CALLS:

Defendant's Evidence

Shane Jervis Treadwell

Examination

Shane Jervis Treadwell: Solicitor, practising in Wellington.

For some time past I have acted for Mr Bonner, the defendant in these proceedings. Did you know he intended to sell some properties at Ranfurly Terrace? It was somewhat of a surprise 30 to me. I learned of it by telephone just before he signed the contract. I advised him to let me have a look at the contract before he did sign, but he seemed particularly keen to go ahead with it. It was a loan to a Lamphouse Group of companies and I said on no account sign anything until I've seen it. I was later handed the contract Mr Bonner had signed. Mr Bonner telephoned me once 40 before he signed the contract. I can't recall exactly how long after he signed

the contract I saw it - a few days. When I saw and read the contract, I was shocked. I had not been keen on this arrangement at any stage - the way this contract was actually entered into - but my impression gathered from the telephone conversation was that the purchaser to be was associated in some way with the Lamphouse Group of companies. Naturally when I saw the
10 contract I saw this was not the position. The plaintiff company is not known to me, but the Director of it, Mr Francis, is. You must have spent many years in the past advising on matters of this kind - were you able to form any opinion of the financial stability of the proposition? (MR CAHILL OBJECTS) (QUESTION WITHDRAWN).

CAHILL XXD:

You got a ring from Mr Bonner - do you
20 know where he rang from? He informed me he was considering this contract. Evidence from Mr Lochore is Mr Bonner called in to his office, read the contract and signed it. I suggest Mr Bonner called from Mr Lochore's office? I've no idea where he rang from. I suggest if he had rung you and you ascertained he was speaking from Mr Lochore's office you would have spoken to Mr Lochore? Not necessarily - I would
30 have advised against an investment on those terms. If it had been a sale to Lamphouse Group of companies the money would have been on deposit or unsecured notes? I don't know. I haven't experienced a sale with the Lamphouse Group of companies. I would still have advised against it. Have you read the Lamphouse advertisements? No I haven't. Can you fix the time of the day Mr Bonner rang you? No I can't.

40 On 23rd March you sent Messrs. Scott Hardie Boys a letter saying you had been instructed to rescind the contract? Yes. Did you at any time inform Mr Lochore the ground your client would be alleging against

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Shane Jervis Treadwell

Cross-Examination - continued

him? Yes I did. He said he was never informed at all? I spoke to Mr Lochore on the telephone once it was known we were rescinding and I'm sure a general discussion took place between us as to the reasons for the rescission. When you wrote him direct returning the balance of the deposit, you still didn't state to him the grounds, did you? (Letter produced this morning). On 7th March, is it correct you were still not ready to settle? No, once I had pointed out to Mr Bonner the true position of the purchasing company, he stated categorically he would not proceed. There was never any doubt about it. Is it correct you have acted for Mr Francis on one or other of his companies? Not really - Mr Francis has seen me on many occasions over the last two years. I've seen him on many occasions, usually about finance. Mr Francis to my knowledge has had many solicitors and I don't think I have ever completed a deal with him but there have been discussions.

TO BENCH:

To Bench

You said you can't remember the date of the telephone conversation with Mr Bonner, but you also said it was just before he signed the contract? That is correct. I must confess that is an impression. Could it have been on that very day? It could have been.

MR INGLIS CALLS:

Manus Bonner

Examination

Manus Bonner. I live in Wellington. I teach at the Wellington Polytechnic.

These two properties I gave to Mr Lochore's firm to sell. I was informed of a young agent in Courtenay Place. In fact Mr Lochore's firm was selling your properties? Yes.

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Examination - continued

(TO BENCH: Had you had any dealings with Mr Lochore before you instructed him to sell these properties? No.)

On 27th February I arrived home and got a message to go to Lochore's office. I arrived in Lochore's office around 5 o'clock. I met Mr Lochore and we discussed the sale. At that particular time I didn't know who had purchased the property so I asked Mr Lochore. Mr Lochore informed me quite clearly then that it was the Lamphouse. My next question to Lochore was 'What are they going to do with the property?' and his reply was that they would probably re-sell. At that time did you know anything about the Lamphouse? All I knew at that time was that the Lamphouse were purchasing quite a lot of property around Wellington. Mr Lochore showed you the form of offer - the document you were to sign? Yes. I read the name of the company which was offering to buy but did not attach very much importance to it. I understood it was the Lamphouse that had purchased. I also saw the name Michael Gavin Francis at the foot of the document. At that particular time I thought he was managing director or somebody from the Lamphouse. I never queried it. At that time did you know Mr Francis? The first time I met Mr Francis was in the foyer of the Court this morning. At the time of this interview with Mr Lochore, did you know of Mr Francis? No. Was there something in particular about the Lamphouse which made you believe this was an attractive proposition? The Lamphouse had been purchasing a lot of property. I took it when Mr Lochore mentioned the Lamphouse it was going to be quite all right. Was it during that particular interview with Mr Lochore you signed the agreement yourself? Yes. Did you take any advice before you did? No advice on that particular matter. What happened after you signed the agreement? Mr Lochore after I signed

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Examination - continued

picked up the telephone and immediately conveyed to somebody over the telephone that the contract had been signed. Would you look at that piece of paper Mr Bonner (Circular - EXHIBIT C - shown to witness). Have you ever seen that before? No. It is not the one I read through in Mr Lochore's office. (Original agreement shown to witness). Would you look at that document; is that the document you have been referring to that you read through? Yes. This one, not the other one. The one you read through is the agreement you signed but you have never read through the circular or brochure? No I haven't. After you left Mr Lochore's office what did you do? I went home. It took seven or eight minutes to get home. I told my wife the properties were sold to Lamphouse. Did you tell anyone else? (MR CAHILL OBJECTS TO QUESTION). (QUESTION ALLOWED). Did you tell anyone else around that time? Yes, Mr Boesley, a neighbour. I told him the properties had been sold and were bought by the Lamphouse. I rang Mr S.J. Treadwell the following day from the Polytechnic office. I informed him the papers were signed and would be arriving. Mr Treadwell rang me maybe a couple of days after. As a result of the conversation I said so far as that is concerned there is no sale because it was supposed to be sold to the Lamphouse. If you had realised this was a sale to Mr Francis' company, do you think you would have signed the contract then? Oh no.

MR CAHILL XXD:

Cross-Examination

You are a Mathematics teacher? Yes. I have been teaching at Polytechnic for about three years now. You are described as a Building Supervisor, what does that mean? I

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Cross-Examination - continued

have been a Building Supervisor for New Zealand Forestry Department, but now I am a teacher at the Wellington Polytechnic. It was supervising buildings and men and purchasing materials. And construction? Yes. How many years did you have that position? About three years. You would then have a good deal of experience in property? Yes, I have been working with property all my life. I take it you have bought and sold on various occasions? No. My first purchase in New Zealand was 7 Ranfurly Terrace. How many properties do you own? Just the two. Did you buy and sell any properties before you came to New Zealand? No. When you were with Forestry Department, did you do work in connection with contract for properties? No. I take it you would read things carefully? Yes. I take it then you read the contract carefully? Yes this one. If Mr Lochore was your agent you would be liable to him for your commission? Yes. You read the name of the company? Yes. You read Mr Michael G. Francis' name? Yes. You read advertisements from Lamphouse? No. You know Mr Cornish is associated with Lamphouse? I didn't know the name of Mr Cornish at that time. Did you know anything about Lamphouse? Only that they purchased property. You realise there is no such company as Lamphouse? No I don't. Mr Cornish describes himself as principal shareholder in Electric Lamphouse Limited? I know now. I suggest you really knew nothing about Lamphouse except it was a name and dealt in property? Yes. Did it not occur to you as a mathematics man the company might not be very sound? The company has a lot of property - a lot of assets - that was my main concern they must be sound. When you were in Mr Lochore's office, about what time was that? 5 o'clock. Between 5 and 5.30? Yes. How long were you there? I might have been there ten

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Cross-Examination - continued

minutes, I might have been there half an hour. That gave you plenty of time to read the contract before you signed? There were three copies the same. Was there a cheque pinned to one copy - cheque for deposit? Yes I think there was. Was there not another item pinned to that copy? Not that I remember.

(TO BENCH: There may have been? I don't think there was anything as large as this cover all the way down.) 10

How long had you had your property for sale with Mr Lochore - since beginning of February? Yes, since beginning of February or thereabouts. He told you he had inspected the place and considered £11,000 a fair price for it? He did suggest £11,000 would be a price. I said there was a house across the road which was not near as large. 20

(TO BENCH: You suggested more? Yes.)

You were prepared to leave money on mortgage? Yes. If you sold to a company called Lamphouse you would be prepared to leave some money on unsecured mortgage? Yes, the reason for that is I would have a reasonable amount of income coming in from that. You would have that in any case? Yes. You heard Mr Lochore's evidence 30 this morning? Yes. He swore he never at any time mentioned the name of Lamphouse - what do you say to that? He did. You heard his evidence he had on his table this other paper and he showed it to you? I did not read that one. I read this one. Did he show you another paper like that? No. Did you observe any paper that size in connection with the contract paper? There were quite 40 a lot of papers on the table. You heard Mr Lochore say that paper was with the other on the table? If it was on the

table, it was not shown to me. If Mrs Lochore says the paper was on her husband's table when her husband was speaking to you, would you contest that statement? I could not contest what she says if she says it was there but there were many other papers there. If she says it was there do you accept that it was there? No I don't. When did you first make any statement to
10 Mr Lochore alleging he had made a false statement? The first I knew it was misrepresentation was from Mr Shane Treadwell when he informed me the next day, the 28th. I did not speak with Mr Lochore after that. Did you instruct your solicitors to write rescinding this contract? With the advice given to me after that all I informed Mr Treadwell was there was no sale. Did you instruct him
20 to write rescinding the contract? Yes. You know he didn't state any grounds in the letter? I did not know. You know now he didn't state any grounds? Yes. I suggest to you no grounds were stated because you were still trying to make up your mind on what grounds you could get out of the contract? No the next day, the 28th, Mr Shane Treadwell informed me over the 'phone it was not sold to the Lamphouse.
30 You knew a deposit of £500 was paid? It wasn't £500. There is a receipt for £500 put in to Court this morning - you knew a deposit of £500 was paid in to Mr Lochore's office? It wasn't £500. It was supposed to be £300, £350 or something paid. You heard evidence this morning £500 was paid? I only knew that when Mr Francis informed me on 28th March. Mr Lochore informed him I wanted another £200.
40 You know that £500 less Mr Lochore's commission was paid to Mr Treadwell? I don't know if £500 was paid. If the £500 was sent along it wasn't attached to that particular form there. It must have been afterwards that £200 was sent. Cheque for £300 was pinned to document originally? Yes. You knew at some stage Mr Lochore

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Cross-Examination - continued

had sent to Mr Treadwell £155? The exact amount that was sent I don't know. You know some money was sent? Yes. Mr Treadwell informed me he sent it back. Did you ever instruct him to send it back? No. This money you know was sent back by Mr Treadwell? Yes. Did you tell Mr Treadwell to tell Mr Lochore on what grounds it was being returned? Mr Treadwell discussed it with me and informed me that he would, and I agreed with him it should be sent back. You didn't tell him to send it back? I presume I did. I might have told him. What did these properties cost you? (RULED OUT)

It has been put to Mr Francis you had a telephone conversation with him? Yes. It has been put to him that towards the end of that conversation he said if deposit was paid back he would call it off? Mr Francis told me at that time he could not get his money back from Mr Lochore, and I gathered if he could get his money back it would put a different complexion on the matter. What you acted on is an assumption on your part? Yes. The money was paid to Mr Lochore as your agent? Yes. Mr Lochore would be holding the money on your behalf and not on behalf of Mr Francis - is that correct? No. Mr Lochore was entitled to receive the money? No longer after Mr Treadwell advised me. He had originally been your agent? Yes. You have not been in touch with Mr Lochore since? No.

MR INGLIS RXD:

Re-Examination

You are very certain about the date of this telephone conversation with Mr Francis - is there some reason why you are sure about the date? Mr Treadwell advised me that if I received a ring

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

Cross-Examination - continued

To Bench

from Mr Lochore or Mr Francis to make a note of what was said. Does the date of the telephone conversation appear on the note you made? Yes. This telephone conversation took place very shortly after Mr Treadwell had advised the contract was rescinded.

TO BENCH:

I want you to fix your mind on the time you went to Mr Lochore's office and signed
10 the contract? Yes. Before that had there been any mention of the Lamphouse or did you know anything about the Lamphouse in connection with this particular transaction? Before that evening no. Before that evening had you spoken to Mr Treadwell at all about this transaction? I informed Mr Treadwell I was selling properties but who the purchaser was or as to who the purchaser might be I was not sure. Is it
20 correct that Mr Lochore had got two offers from other purchasers of No. 7? Yes. And put those before you? Yes. And that you had considered them and decided then not to accept them? From memory both of them were pending the final sum which again I don't think Mr Lochore's clients had. Are you telling me those contracts were still open at the time you signed that offer? There was one in particular I
30 could have signed but that was a low priced one and the other one he wanted too much money left in on first mortgage and another one they were unable to raise the money eventually - that was three definitely I know of. Did you know he had taken quite a number of people through the property? Yes. Quite a number of people were there from time to time. I never heard to what extent - what number there were. There
40 was no mention of Lamphouse at all till you

In the Supreme Court of New Zealand

Defendant's Evidence

No. 3

Manus Bonner

To Bench - continued

went to Lochore's office that evening? No. You said you read that offer and saw the name of the Loan Investment Corporation of Australasia Ltd. typed in there? Yes. Just tell me how it is that you say you thought the Lamphouse was the purchaser? From our discussion and Mr Lochore telling me it was the Lamphouse that was the purchaser I took it this loan company was a subsidiary or some part of the Lamphouse - I never queried it. That was the opinion I formed. I was only concerned it was the Lamphouse who purchased. You knew nothing about the Lamphouse at this stage? When I spoke to Mr Treadwell he informed me it wasn't the Lamphouse and then I realised there was something wrong.

MR INGLIS CALLS:

Vernon Boesley

Vernon Boesley: Taxi Proprietor living in Wellington.

Examination

Until a couple of days ago I knew nothing at all about this case. Did you know Mr Bonner had a couple of properties in Ranfurly Terrace? Yes. Did he tell you he had sold them? He told me he thought ... (MR CAHILL OBJECTS). I think the words Mr Bonner used were he thought he had sold the properties. Are you able to tell us when this conversation took place? In the later part of February this year. He told me to whom he thought he had sold the properties - he told me the Lamphouse people. Can you remember the exact date? No I can't remember the exact date.

No. 4

JUDGMENT OF THE SUPREME COURT

In the Supreme Court of New Zealand

No. 4

Judgment of Supreme Court

30 November 1967

THIS ACTION coming on for trial on Thursday the 30th day of November 1967 before the Right Honourable the Chief Justice AFTER HEARING the Plaintiff and the Defendant and the evidence then adduced IT IS ADJUDGED AND ORDERED THAT the Defendant do specifically perform
10 the Agreement for Sale and Purchase of land bearing date the 27th day of February 1967 copy whereof is annexed to the Statement of Claim in terms thereof AND do pay $407 for costs and disbursements.

DATED the 30th day of November 1967

'J.C. Flanagan'

L.S. DEPUTY REGISTRAR

No. 5

20 NOTICE OF MOTION ON APPEAL

In the Court of Appeal of New Zealand

No. 5

Notice of Motion on Appeal

20 February 1968

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 3/68

BETWEEN MANUS BONNER of Wellington, Mathematics Teacher

Appellant

A N D THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED
30 a duly incorporated Company having its registered office in

In the Court of Appeal of New Zealand.

No. 5

Notice of Motion on Appeal

20 February 1968 - continued

Wellington and carrying on business as a Land Investment Company

Respondent

TAKE NOTICE that on Monday the 4th day of March 1968 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard, counsel for the above-named appellant will move this Honourable Court on appeal from that part of the judgment of the Right Honourable the Chief Justice of New Zealand, delivered on Thursday the 30th day of November 1967 in an action No. A.134/67 in the Wellington Registry of the Supreme Court of New Zealand wherein the above-named appellant was defendant and the above-named respondent plaintiff, wherein it was held ordered and adjudged that the respondent should be granted a decree of specific performance of the agreement referred to in the said action UPON THE GROUND that the said judgment and order is erroneous in law. 10 20

DATED at Wellington this 20th day of February 1968.

'S.J. Treadwell'
Solicitor for Appellant.

No. 6

In the Court of Appeal of New Zealand.

No. 6

Judgment of Court of Appeal

1 August 1968

JUDGMENT OF COURT OF APPEAL 30

Thursday the 1st day of August 1968

BEFORE THE RIGHT HONOURABLE MR.JUSTICE NORTH President
THE RIGHT HONOURABLE MR.JUSTICE TURNER
THE HONOURABLE MR.JUSTICE RICHMOND

THIS APPEAL coming on for hearing on the 20th day of June 1968 AND UPON HEARING Mr. Inglis of Counsel for the Appellant and Mr. Cahill of Counsel for the Respondent THIS COURT HEREBY ORDERS that the appeal brought by the Appellant against the judgment of the Right Honourable Sir Richard Wild K.C.M.G., Chief Justice of New Zealand at Wellington on the 30th day of
10 November 1967 be and the same is HEREBY ALLOWED and DOTH FURTHER ORDER that the Order for Specific Performance and for costs be and the same is HEREBY VACATED AND THAT THE CASE BE REMITTED to the Supreme Court for the assessment and award of such damages that may on the facts be found appropriate AND THIS COURT DOTH FURTHER ORDER that the Respondent pay to the Appellant the sum of $350 for costs and
20 the sum of $82 for disbursements.

BY THE COURT

'G.J. Crace'

L.S.

Registrar

No. 7

ORDER FOR CONDITIONAL LEAVE TO APPEAL TO PRIVY COUNCIL

Monday the 2nd day of September 1968

In the Court of Appeal of New Zealand

No. 7

Order for Conditional Leave

2 September 1968

BEFORE: THE RIGHT HONOURABLE MR. JUSTICE NORTH, President.
30 THE HONOURABLE MR. JUSTICE TURNER
THE HONOURABLE MR. JUSTICE WOODHOUSE

UPON READING the Notice of Motion filed herein AND UPON HEARING Mr. Cahill of Counsel for the Appellant AND Mr. Inglis of Counsel for the Respondent THIS COURT DOTH ORDER that the Respondent do have Conditional Leave to Appeal to Her Majesty

In the Court of Appeal of New Zealand

No. 7

Order for Conditional Leave

2 September 1968 - continued

in Council from the judgment of this Honourable Court herein UPON THE CONDITION of the Respondent within a period of three months from the date of this Order entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding ONE THOUSAND DOLLARS ($1000) for the due prosecution of the Appeal and the payment of all such costs as may become payable to the Appellant in the event of the Respondent not obtaining an Order granting it final Leave to Appeal or of the Appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Respondent to pay the Appellant's costs of the Appeal (as the case may be) AND UPON THE CONDITION that within four months from the date of this Order the Appellant take the necessary steps for the purpose of procuring the preparation of the record and dispatch thereof to England.

BY THE COURT

'G.J. Grace'

Registrar

No. 8

In the Court of Appeal of New Zealand

No. 8

Order for Final Leave

2 December 1968

ORDER FOR FINAL LEAVE

Monday the 2nd day of December 1968

BEFORE: THE RIGHT HONOURABLE MR.JUSTICE NORTH, President
THE RIGHT HONOURABLE MR.JUSTICE TURNER

UPON READING the Notice of Motion filed herein AND UPON HEARING Mr. Cahill of Counsel for the Respondent and Mr. Inglis of Counsel for the Appellant THIS COURT

DOTH ORDER that final leave to appeal to Her Majesty in Council from the Judgment of this Honourable Court delivered on Thursday the 1st day of August 1968 be and is HEREBY GRANTED to the Respondent.

BY THE COURT

L.S.

'G.J. Grace'

Registrar.

In the Court of Appeal of New Zealand

No. 8

Order for Final Leave

2 December 1968
- continued

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED — Appellant

AND

MANUS BONNER — Respondent

EXHIBITS

PART II

EXHIBIT "C"

In the Supreme Court of New Zealand

Plaintiff's Exhibit "C"

Circular 31 January 1967

31st January, 1967

Dear Noteholder,

WELCOME TO THE CORPORATION

Your Managing Director must record his concern regarding the present state of the New Zealand economy which is not strong and which has in recent years had a buoyancy not justified by New Zealand trading overseas.

Your Managing Director has spent five years studying the New Zealand economic situation and has with other New Zealand business men become aware of the problems of overseas control of New Zealand industry and of the New Zealand economy. It is well known that a high proportion of stock and station firms operating in New Zealand are and have been for many years controlled by overseas interests and the scope of this type of investment has gone unnoticed until it recently met with public awareness with

In the Supreme Court of New Zealand

Plaintiff's Exhibit "C"

Circular 31 January 1967 - continued

the recent acquisition by overseas interests of two of New Zealand's principal banking institutions. Because of the enormous drain of profits leaving New Zealand which is a loss of national asset equivalent to a high proportion of the export earnings of both our farmlands and our secondary industry, your Managing Director endorses a policy of "ECONOMIC NATIONALIZATION" whereby the company has resolved to defend the New Zealand economy purely by not permitting overseas investment to control the New Zealand economy.

Overseas investment is of course vital to the young and growing economy but objection is made to the needless sacrifice of New Zealand-owned industry and property to the foreign investor. Through lack of capital resources control is taken out of New Zealand hands and decisions vitally effecting New Zealand are not being made in the best interests of the country. This company will remain pledged to the investing public to carry out its policy of economic self defence. By continuing this policy we continue to be New Zealand-owned and we continue to grow with New Zealand and its citizens.

This company is principally a property owning company and financier. The main disadvantage to any land and investment company is shortage of liquidity. The method employed by the Loan Investment Corporation of Australasia Limited by accepting monies on deposit ensures that at all times the Corporation will have funds available for investment and to take advantage of special situations in the field of property investment as they arise and for which liquidity is essential.

By promoting our policy of "ECONOMIC NATIONALIZATION" we are protecting the investing public of New Zealand from ultimate disaster, and we continue to grow with New Zealand and its citizens and we take this opportunity of thanking all

In the Supreme Court of New Zealand

Plaintiff's Exhibit "C"

Circular 31 January 1967 - continued

our numerous deposit noteholders for appointing the Corporation to carry out this sublime act of national defence.

We take this opportunity of thanking you together with all our other customers that have deposited funds with us in the course of business in the year 1966-1967.

In view of the size and nature of the Corporation namely £101,000 authorised capital and of course our services to the public on the purchasing of Wellington properties, we were recommended to change our name slightly to Corporation which is now of course The Loan Investment Corporation of Australasia Limited.

10

The Corporation has been very fortunate in the allocating of its financial funds to secured mortgages because of its beneficial association with several development and property trading companies. It is due mainly to these vital contacts that the Corporation has access to information as to credit pressures. It does not require a large staff to service or control it, and consequently efficiency is reflected by the Corporation's ability to pay interest rates on deposits 6% at call.

20

So having embarked on a program that is supported by our subscribers, due to the recapitalizing of the Corporation by all accounts we shall have another record profit for the ensueing year and the Corporation would be delighted to discuss your investment and support.

30

Yours faithfully,
THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED.

per:
'Michael G. Francis'

40

Managing Director

EXHIBIT "E"

In the Supreme Court of New Zealand

Plaintiff's Exhibit "E"

Resolution 27 February 1967

Resolution passed by entry in the Minutes Book this 27th day of February 1967.

It was resolved that the Corporation enter into a contract to purchase two properties situate 5 & 7 Ranfurly Terrace, Wellington for the sum of £13,300 on terms as follows:

(a) M.G. Francis Governing Director be authorized to sign such contract on behalf
10 of the Corporation.
(b) The purchase price namely £13,300 shall be satisfied by the Vendor depositing the sum of £11,000 at 7½% for a term of ten years with the Corporation and such deposit to be personally guaranteed by M.G. Francis and the balance namely £2,300 to be paid in cash.
(c) Settlement to take place on or before the 7th March 1967.

20 'M.G. Francis'

'Governing Director'

In the Supreme Court of New Zealand

Letter dated 6 March 1967

SCOTT, HARDIE BOYS & MORRISON
Barristers & Solicitors

6th March 1967

Messrs Treadwells,
Solicitors,
P.O. Box 992,
WELLINGTON.

Dear Sirs,

30 BONNER TO LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED : 5-7 RANFURLY STREET

We forward herewith a transfer in this matter. We note that settlement is set

In the Supreme Court of New Zealand

Letter dated 6 March 1967 - continued

down for tomorrow's date. Would you please let us have a settlement statement. We, in turn, will have the appropriate deposit note available.

Yours faithfully,
SCOTT,HARDIE BOYS & MORRISON

Per: 'J.B. Morrison'

In the Supreme Court of New Zealand

Plaintiff's Exhibit "G"

Letter dated 23 March 1967

EXHIBIT "G"

TREADWELLS
Barristers & Solicitors 10

23rd March 1967

SJT:PW

Messrs. Scott, Hardie Boys & Morrison,
Solicitors,
P.O. Box 514,
WELLINGTON.

Attention: Mr. Morrison

Dear Sirs,

re: The Loan Investment Corporation of Australasia Limited & M. Bonner 20

We act for Mr. Bonner, the Vendor named in a purported Agreement for Sale & Purchase dated the 27th February 1967, and made between our client as Vendor and the abovenamed Company as Agent. We have been instructed to rescind this contract, and accordingly on behalf of our client, release your client Company or its 30 Principal whoever that may be, from all liabilities and obligations thereunder, and would advise that we have authorised R.F. Lochore & Co. to refund the deposit to your client.

Yours faithfully,
(sgd.) TREADWELLS

In the Supre
Court of Ne
Zealand

Plaintiff's
Exhibit "I"

Letter dated
23 March 196

EXHIBIT "I"

TREADWELLS
Barristers & Solicitors

RJT:PW 23rd March, 1967.

R.F. Lochore & Co.
16 Cambridge Terrace,
WELLINGTON.

Dear Sirs,

re: Bonner & The Loan Investment
10 Corporation of Australasia
Limited.

We would refer you to a purported contract for Sale & Purchase dated the 25th February, 1967.

Our client has rescinded this Agreement and released the Purchaser or his agent from all liabilities and obligations thereunder. Would you kindly return the deposit of £300. 0. 0. to the Company accordingly.

20 Yours faithfully,
'TREADWELLS'

In the Supre
Court of Ne
Zealand

Plaintiff's
Exhibit "J"

Letter date
29 March 19

EXHIBIT "J"

29th March, 1967.

Mr S. Treadwell
Treadwells
Barristers & Solicitors
P.O. Box 992
Wellington.

Dear Sir,

30 re: Bonner & Loan Investment
of Australasia Ltd.

In the Supreme Court of New Zealand

Plaintiff's Exhibit "J"

Letter dated 29 March 1967 - continued

In reply to your letter of 23rd March, 1967, wherein Mr. Bonner has now rescinded the abovementioned contract.

As this is an unconditional contract, I forwarded to your office on the 10th day of March, 1967, the sum of £155. being balance of the deposit of £500. The balance of £345. was retained by me as being commission due to me on this sale, I therefore cannot forward to the Loan & Investment Co., of Australasia Ltd. any money. 10

Yours faithfully,

'Robert F. Lochore'.

In the Supreme Court of New Zealand

Letter dated 17 April 1967

DEVINE CROMBIE & CAHILL
Barristers & Solicitors

17th April 1967

Messrs Treadwells,
Solicitors,
Box 992, 20
WELLINGTON.

(Attention Mr.S.Treadwell)

Dear Sirs,

Re: Bonner to Loan Investment Corporation of Australasia Limited

We have received instructions from the purchaser to act herein. We have interviewed the party and have inquired of the Agent. 30

We are instructed to call upon your client vendor to complete the

transaction. Otherwise proceedings which are in train will be issued without further notice or delay.

Yours faithfully,

DEVINE CROMBIE & CAHILL

Per:

'B. Cahill'

In the Supreme Court of New Zealand

Letter dated 17 April 1967 - continued

EXHIBIT "K"

In the Supreme Court of New Zealand

Plaintiff's Exhibit "K"

Letter dated 19 April 1967

TREADWELLS
10 Barristers & Solicitors

19 April, 1967.

SJT:CHTM

Mr. R.F. Lochore,
Real Estate Agent,
1st Floor,
16 Cambridge Terrace,
WELLINGTON.

Dear Sir,

re: Bonner & Loan Investment
20 of Australasia Ltd.

We acknowledge receipt of your letter of the 29th of March.

When we wrote to you on the 23rd of March, we did not realise that you had accounted to us for the balance of the deposit. Accordingly, we enclose herewith our Trust Account cheque for £155. 0. 0., being the amount you forwarded to us.

As we advised you, our client is not
30 proceeding with the arrangement to sell his two properties to the abovenamed

In the Supreme Court of New Zealand

Plaintiff's Exhibit "K"

Letter dated 19 April 1967 - continued

Company, on the grounds of mis-representation and mistake brought about by such mis-representation and we hereby authorise you to return the deposit in full to the Company or whoever the Company's principal may be.

You are not entitled to retain the sum of £345. 0. 0., by way of commission because you did not bring about an effective sale between the parties. 10

Yours faithfully,

'Treadwells'

Encl. Cheque

In the Supreme Court of New Zealand

Letter dated 19 April 1967

TREADWELLS
Barristers & Solicitors

1st May 1967.

SJT:JS

Messrs. Devine, Crombie & Cahill,
Barristers & Solicitors,
P.O. Box 16,
WELLINGTON. 20

Dear Sirs,

re: Loan Investment Company of Australasia Limited and Bonner

We returned to R.F. Lochore the sum of £155. 0. 0 representing the balance of the deposit paid to him under the purported sale between the above named parties after he had deducted commission 30 of £345. 0. 0. We advised him that he was not entitled to his commission as he had not in our opinion effected a proper sale in the circumstances and

requested him to refund the full amount of the deposit paid to your client. He has however returned the sum of £155. 0. 0 stating that he cannot forward the sum required to your client company.

In the Supreme Court of New Zealand

Letter dated 19 April 1967 - continued

We enclose this money accordingly and would advise that we have requested Mr. Lochore to return the sum of £345. 0. 0 which at the present moment he is wrong-
10 fully holding as commission.

Yours faithfully,

'Treadwells'

DEVINE CROMBIE & CAHILL
Barristers & Solicitors

In the Supreme Court of New Zealand

Letter dated 1 May 1967

10th May 1967.

Messrs. Treadwells,
Solicitors,
Box 992,
WELLINGTON.

20 Dear Sirs,

re: The Loan Investment Corporation of Australasia Limited and Bonner

We acknowledge your letter of 1st instant which we have now been able to refer to the Governing Director of our client company. Until the present time your client or his agent has been holding the £500 deposit.

30 The Writ is being forthwith filed and will be served in the next day or two. If we return your cheque you may return it to us and this will not get either party to the matter anywhere. In the

In the Supreme Court of New Zealand

Letter dated 1 May 1967 - continued

circumstances the only sensible course appears to be to lodge the cheque in our Trust Account. It is accepted however without prejudice and will be held there.

Yours faithfully,
DEVINE CROMBIE & CAHILL

per: 'B. Cahill'

LOAN INVESTMENT CORPORATION OF AUSTRALASIA v. BONNER

SUPREME COURT. Wellington. 1967. 30 November. WILD C.J.

COURT OF APPEAL. Wellington. 1968. 25 June ; 1 August. NORTH P. TURNER J. RICHMOND J.

Contract—Performance and excuses for non-performance—Agreement for sale and purchase of land including an agreement to deposit money—Separate but interdependent obligations—Agreement to deposit money not enforceable by way of specific performance—Specific performance of whole agreement not to be ordered—Discretion of Court.

The parties entered into an agreement for the sale and purchase of two freehold properties. The agreement generally followed the usual form of such agreements except for clauses 9 and 9a which provided :

"9. This offer is subject to 9a.

9a. On Settlement the vendor shall deposit with the Loan Investment Corporation of Australasia Limited the sum of £11,000 for a term of 10 years at 7½ percent per annum, interest payable by equal quarterly instalments. Such loan to be personally guaranteed by the purchaser *Michael G. Francis*."

Held, by North P. and Turner J. (Richmond J. dissenting). On a proper construction of the agreement it gave rise to two separate if interdependent obligations one of which the Court would not enforce by way of specific performance and accordingly specific performance of the whole agreement should not be ordered.

Samson v. *Collins* (1910) 29 N.Z.L.R. 1163 ; 13 G.L.R. 95, cited with approval.

Rogers v. *Challis* (1859) 27 Beav. 175 ; 54 E.R. 68 ; *Larios* v. *Bonany y Gurety* (1873) L.R. 5 P.C. 346 ; *South African Territories* v. *Wallington* [1897] 1 Q.B. 692 ; [1898] A.C. 309 ; *Starkey* v. *Barton* [1909] 1 Ch. 284 ; *Ashton* v. *Corrigan* (1871) L.R. 13 Eq. 76 ; *Hermann* v. *Hodges* (1873) L.R. 16 Eq. 18 ; *Gorringe* v. *The Land Improvement Society* (1899) 1 L.R. I.R. (Ch.) 142 ; *Stocker* v. *Wedderborn* (1857) 3 K. & J. 393 ; 69 E.R. 1162 ; *Ogden* v. *Fossick* (1862) 4 De G. F. & J. 426 ; 45 E.R. 1249 ; *Odessa Tramways Co.* v. *Mendel* (1878) 8 Ch. D. 235 ; *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1893] 1 Ch. 116 and *Heilbut Symons & Co.* v. *Buckleton* [1913] C.A. 30; [1911-13] All E.R. Rep. 83, referred to.

Per Turner J. Even if the contract were to be regarded as entire, specific performance of it should be refused in exercise of the discretion of the Court.

Adderley v. *Dixon* (1823) 1 Sim. & St. 607 ; 57 E.R. 239, distinguished.

Judgment of Wild C.J. reversed.

WRIT seeking a decree of specific performance of a contract for the sale and purchase of two freehold properties in Ranfurly Street, Wellington.

In the Supreme Court.

Cahill, for the plaintiff.
Inglis, for the defendant.

WILD C.J. (orally). Early in February 1967 the defendant, who owned the properties, called on Mr R. F. Lochore, a land agent at Wellington, and asked him if he would be interested in selling them. The defendant had had no previous dealings with Mr Lochore. Mr Lochore inspected

the properties and discussed price and terms with the defendant, telling him that he thought an appropriate price to ask was £11,000. The defendant said he would be prepared to leave approximately £4,500 on mortgage on each of the properties, and he authorised Mr Lochore orally to endeavour to sell them. 5

The agent then took, he says, about 30 prospective buyers through the properties and, in due course, he got two conditional offers for one of them, No. 7 Ranfurly Street. He prepared written offers and had them signed and gave them to the defendant who considered them and rejected them. The agent then got an offer from Mr Francis, the governing 10 director of the plaintiff company.

Mr Francis had been shown over the properties on the morning of 27 February by the agent's son and had decided to make an offer. After the inspection Mr Francis said that he would buy the properties at the full price provided the defendant deposited £11,000 of the purchase 15 money with the plaintiff company. Mr Lochore prepared an offer accordingly on his printed form. That offer was addressed to Mr Lochore as agent for the defendant as vendor. It provided a price of £13,300, a deposit of £300, and settlement to take place on 7 March 1967. It then included this provision : 20

> 9a. On settlement the vendor shall deposit with the Loan Investment Corporation of Australasia Ltd. the sum of £11,000 for a term of ten years at 7½ percent interest payable by equal quarterly instalments.

On receiving that offer on the same day, 27 February, Mr Francis 25 signed it as agent and sent it—and I accept his evidence on this—with a cheque for £300 and a printed sheet describing his company's business activities, back to the agent. The agent got the defendant to call the same day at his office. He says that he placed the offer and the printed sheet before Mr Bonner for his consideration.

What then took place between the agent, Mr Lochore, and the defend- 30 ant, Mr Bonner, is of fundamental importance in this case because of the defence to this action which, and I simply summarise it, is that the defendant was assured by his agent that the purchaser was, as is said in the statement of defence, one of the Lamphouse Group of Companies, or, as the defendant said in the witness box, "the Lamphouse Company" 35 and, later, " a subsidiary of the Lamphouse Company ".

Having heard the evidence of the agent and the defendant I accept the account given by the agent as to what happened. That is that, having read through the offer and the printed sheet that I have described, the defendant signed his acceptance of the offer freely without anything being 40 said that would indicate that the purchaser was in fact some company or person other than the purchaser plainly named in the document. The agent is quite emphatic that at no stage was the Lamphouse Company or any such investment institution mentioned. I accept that evidence. I think that the defendant, Mr Bonner, is mistaken in the conflicting 45 account that he has given. I cannot accept his evidence that, though he read the contract carefully, he thought he was accepting an offer from the Lamphouse Company or some associate of it. He is a man of education and some business experience and I find it impossible to accept the account that he gives. There is some confirmation of this conclusion by reason of 50 the fact that when, some three weeks later, the defendant's solicitors wrote to the plaintiff company's solicitors on this matter they said " We have been instructed to rescind this contract ". They made no suggestion at that time that it had been represented to the defendant that he was

really dealing with the Lamphouse Company, or a subsidiary, or a company of that group.

My strong impression is that the defendant repented of the contract the next day or the day after when his solicitor Mr Treadwell advised him 5 of the unwisdom of investing money on deposit with the plaintiff company. I think it was only then that the defendant brought himself to believe that he had either limited his instructions to his agent or had got from him an assurance that the purchaser was one of the Lamphouse Group.

I think then, on the view I take of the facts, that the plaintiff is 10 entitled to relief. For the defendant, however, Mr Inglis argues that specific performance ought not to be granted of this contract because of the terms of cl. 9a of the contract which I have already read. Counsel relies on the authority of *South African Territories Ltd.* v. *Wallington* [1898] A.C. 309. That case was one of an agreement to lend money to a 15 company on the security of debentures. This present case, however, is one of contract for the sale and purchase of land. In my view it is not the case that the mere fact that there is included in such a contract the very usual provision that the vendor will leave part of the purchase money on loan, takes the contract into a class of which the Court will not 20 grant specific performance. Looking at this contract as a whole, although the clause that I have read is in a somewhat unusual form of words, I take the view that it is in truth and substance a contract for the sale and purchase of land, with a provision for part of the purchase money to remain on loan to the purchaser. On that footing I think that the plaintiff 25 company is entitled to a decree for specific performance.

Reference was made during the course of the evidence to the financial standing of the plaintiff company. It is apparent that its governing director is a very young man who, by reason of years alone, can have but little business experience and who seems to have got himself involved in a 30 number of enterprises. It may be that the plaintiff company is not the strongest financial institution in the country and that the governing director is not very experienced. It may well be, too, that the defendant was very unwise to enter the contract that he did enter. But the Court is not concerned with that because, on the view I take, this contract was a 35 valid and binding one and I must therefore act on the principle cited by Mr Cahill from *36 Halsbury's Laws of England*, 3rd ed. 264, that " if the " contract is valid in form and has been made between competent parties " and is unobjectionable in its nature and circumstances specific perform- " ance is in effect granted as a matter of course even though the Judge may 40 " think it involves hardship ".

There will therefore be a decree that the defendant do specifically perform the agreement of 27 February 1967 according to its terms. The plaintiff is entitled to costs according to scale as on a claim for $5,000 with witnesses expenses and disbursements to be fixed by the Registrar.

45 From this judgment the defendant appealed.

In the Court of Appeal.

Inglis, for the appellant.
50 *Cahill*, for the respondent.

Inglis, for the appellant:

This appeal is limited solely to the question whether Wild C.J. was right in ordering specific performance in this case rather than damages.

The first part of the contract contains an offer by the respondent to purchase the appellant's property for £13,300. The contract follows the usual form until clause 9 which provides : " This offer is subject to 9a." which requires the vendor to deposit the sum of £11,000 with the purchaser for a term of ten years at 7½ percent per annum interest. Such loan to be personally guaranteed by the purchaser Michael G. Francis. The contract is in terms which appear to be becoming somewhat fashionable nowadays. There is some doubt in the legal profession generally as to the appropriate remedy in contracts of this kind. 5

The appellant contends : (1) This is not the class of contract in regard to which specific performance is available as a remedy. (a) As a matter of law a contract to lend money (which is the effect of clause 9a) cannot be enforced by specific performance. (b) The obligation on the appellant's part to lend to the respondent the sum of £11,000 is interdependent with the respondent's promise to purchase the land. There is no mutuality and therefore specific performance cannot be ordered. (c) Even if a contract to enter into a personal guarantee is enforceable by specific performance, Mr Francis in his personal capacity is not a party to this contract and no order for specific performance against the respondent could be effective to secure Mr Francis's personal guarantee. In any event there is no evidence that Mr Francis has been ready and willing personally to guarantee the loan. (2) In any event in all the circumstances, an order for specific performance should not have been made. There are elements of unfairness and hardship in the circumstances surrounding the formation of the contract which justified specific performance being refused. (3) If this Court upholds either of the first two submissions then the respondent is entitled to nominal damages only, there being no evidence that it has suffered any actual loss. 10 15 20 25

[Deals with the circumstances surrounding the completion of the contract.] 30

It was the agent's duty to caution Mr Bonner, bearing in mind all Mr Bonner had before him was the respondent's rather imposing name, the brochure, which could be described as a little pretentious and could lead an inexperienced person to believe the company's operations were carried on on a far wider scale than they had been, and the statement of the agent himself that he knew Mr Francis and had had previous dealings with him. All this would have led Mr Bonner to believe that his investment was going into safe hands. 35

As to submission 1 (a) see *South African Territories Ltd.* v. *Wallington* [1898] A.C. 309 ; [1897] 1 Q.B. 692. 40

The statements which appear throughout the judgments make it clear that what was being expressed was a general principle applicable to all contracts to lend money and the matter has been so regarded in the later authorities. As to 1 (b) see *Gold* v. *Penney* [1960] N.Z.L.R. 1032. In that case the contract was severable but in the present case the obligation to buy and sell the land cannot be severed from the appellant's obligation to lend the money. The respondent's offer was expressly made subject to the appellant lending the money. In those circumstances the two obligations contained in the contract are interdependent; *Samson* v. *Collins* (1910) 29 N.Z.L.R. 1163 ; 13 G.L.R. 95. It is impossible to say here, as Wild C.J. implied, that the obligation on the appellant's part to lend the respondent £11,000 was in some way submerged by the other obligation that the appellant should sell the respondent these two properties. 45 50

As to 1 (c), there is no passage in the evidence where Mr Francis has expressed his willingness to execute a guarantee in these terms.

As to 2, Wild C.J. appears to have believed he had no discretion at all. There is always a discretion in such cases, not only when the case involves 5 hardship but where there can be said to be a cumulative effect of matters which indicate hardship and unfairness ; *Jacobs* v. *Bills* [1967] N.Z.L.R. 249, 253 ; *Hall* v. *Warren* (1804) 9 Ves. J. 605 ; 32 E.R. 738 ; *36 Halsbury's Laws of England*, 3rd ed. 299-303 ; *Fry on Specific Performance*, 6th ed. p. 199, paras. 417, 418 ; p. 185, paras. 387, 388, 389.

10 The general principles which appealed to McGregor J. in *Jacobs* v. *Bills* (*supra*) are applicable here. Even though a Court might not be justified in refusing specific performance in this case if only hardship were shown or if only unfairness were shown, when one gets both together that reinforces the ground for refusing specific performance.

15 The whole transaction was presented to the appellant by the land agent and by the respondent in such a way as to lead him—he being a man without extensive business experience—to believe that the respondent was providing him with a sound investment for his £11,000. Specific performance will be refused if the agent of the person against whom it is sought 20 was guilty of some dereliction of duty ; *Galloway* v. *Pedersen* [1915) 34 N.Z.L.R. 513 ; 17 G.L.R. 489. If this case does not come entirely within what was said in *Galloway's* case, it comes very near to it and it is another factor in the chain of events which may be relied upon for declining specific performance. If the agent here had been acting conscientiously he 25 would have pointed out to Mr Bonner what was in his own knowledge, that the managing director, or governing director, Mr Francis, was a very young man and the flattering appearance which was created by the name of the company and its brochure. It was clearly designed to attract unwary investors. Wild C.J. seemed to accept some degree of hardship.

30 As to 3, more than the market price was offered ; *Mayne and McGregor on Damages*, 12th ed. 405, para 454.

Cahill, for the respondent :

Samson v. *Collins* (*supra*) was a case in which there were extraordinary 35 facts and it lends nothing to the authorities. *Jacobs* v. *Bills* (*supra*) was also a case in which there were extraordinary facts.

The appellant said there was no evidence of the intention of Mr Francis to carry out his guarantee but there is evidence of the intention to carry out that part of the transaction. The respondent does not concede 40 that the vendor was not a man of experience. As to the appellant's submission 1 (c) regarding the personal guarantee, that matter was not raised before ; see *Sim's Practice and Procedure*, 465; *Oscroft* v. *Benabo* [1967] 2 All E.R. 548.

The respondent contends : (1) The appellant is bound by his pleadings 45 in the Court below and those pleadings amount simply to an allegation of fraud on which he failed. The respondent was ready and willing to carry out the contract. (2) The judgment finds on the facts for the respondent on all possible aspects. The judgment itself disposes of many of the things that have been advanced in this Court. In so far as there are allegations 50 of hardship and other matters, the judgment covers all that is necessary to deal with them. There was no objection taken by this purchaser to leaving money on deposit. (3) The Court will not interfere with the exercise of discretion of a Judge unless it is clearly satisfied that he was wrong. (4) The general rule is that a party to a contract for the sale of land is

entitled to specific performance ; *36 Halsbury's Laws of England*, 3rd. ed. 264, notes (h) and (i) ; *Hall* v. *Warren* (1804) 9 Ves. J. 605 ; 32 E.R. 738 ; *Haywood* v. *Cope* (1858) 25 Beav. 140 ; 53 E.R. 589 ; *Gold* v. *Penny* (*supra*) 1055 ; *Beswick* v. *Beswick* [1967] 2 All E.R. 1197.

For appropriate action by a vendor who fears for the financial stability of his purchaser, see *Hanbury's Modern Equity*, 8th ed. 560 ; *Jennings Trustee* v. *King* [1952] Ch. 899. The appellant is asking the Court to obliterate the contract but the contract still stands if the Court grants an order to enforce it.

[Richmond J : Mr Inglis says before you can grant a decree of specific performance there must be mutuality, in other words, before you as purchaser can call on the vendor specifically to perform his undertaking to transfer you the land, you must be in a position where, if the situation were reversed, the vendor could call on you specifically to perform your part of the bargain, if you refused to do so and he says part of your bargain was to take £11,000 on deposit at 7½ percent, for ten years. He says if you had come along, settled and said here is the money—I am prepared to pay everything in cash but I am not prepared to take this money on deposit at 7½ percent—that he could not have forced you to take it, therefore the remedy of specific performance is not available. What do you say ?]

That is not this case. This is simply a contract for sale and purchase of land. There is nothing wrong with a vendor leaving part of his money without security at all. There are no cases in the reports where there is a decree of specific performance with a mortgage and it would appear that it has always been taken for granted that specific performance would be given. The contract was for £13,300. The value of the land was about £11,000. He got his full price. He was quite prepared to leave money on deposit with a company he thought was Lamphouse of which he knew nothing. All he is complaining of is that he did not have that company the Lamphouse.

[North P : You are saying we should read this provision as meaning the same as if it had said £3,000 in cash, the balance to remain on deposit with the vendor for 10 years at 7½ percent without any right to repay ?]

If it were a mortgage for ten years it would be the same. It is all the one contract. If there were no security at all and no deposit, there would be perfect mutuality.

Inglis, in reply.

Cur. adv. vult.

NORTH P. The agreement for sale and purchase was expressed in these terms :

R. F. LOCHORE & COMPANY
16 Cambridge Terrace, Wellington, N.Z.
Offer and Acceptance

TO : R. F. LOCHORE (Licensed Real Estate Agent) as agent for
M. BONNER (hereinafter referred to as the Vendor)

FROM THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED AS AGENT (hereinafter referred to as the Purchaser)

THE PURCHASER HEREBY OFFERS to purcase from the Vendor all that property as inspected being more particularly described in the schedule herein (subject to any Order in Council, Building Line Condition, Drainage Easement, or any other restriction affecting the same) on the terms and conditions mentioned below.

SCHEDULE : ALL THAT freehold property situate at: NUMBERS 5 AND 7 RANFURLY STREET, WELLINGTON, TOGETHER WITH ALL EXISTING FLOOR COVERINGS, DRAPES AND LIGHT FITTINGS.

TERMS AND CONDITIONS

1. THE PURCHASE PRICE is £13,300 (Thirteen thousand three hundred pounds).
2. THE DEPOSIT OF £300
shall be paid in part payment of the purchase price immediately upon acceptance hereof.
3. THE BALANCE of the purchase price shall be paid 7th March 1967.
4. THE SETTLEMENT shall be effected on the 7th March, 1967, or such earlier date as shall be mutually agreed upon.
5. VACANT POSSESSION shall be given and taken on settlement.
6. APPORTIONMENT of all incomings and outgoings shall be made as at date of settlement.
7. INSURANCE : Until settlement the Vendor will hold all policies of insurance in respect of the property in trust for the Purchaser subject to the rights of any existing mortgagee and will notify the Insurance Company of such trust.
8. AGENCY : The Vendor hereby acknowledges R. F. Lochore as duly authorised agent in this sale.
9. THIS OFFER IS SUBJECT TO 9a.

9a. ON SETTLEMENT the vendor shall deposit with The Loan Investment Corporation of Australasia Limited the sum of £11,000 for a term of 10 years at 7½ percent per annum, interest payable by equal quarterly instalments.
Such loan to be personally guaranteed by the purchaser. *Michael G. Francis.*

Signature of Purchaser : (Sgd) M. G. FRANCIS as agent
Date ; 27.2.67

THE VENDOR HEREBY ACCEPTS the foregoing offer.
Signature of Vendor : (Sgd) M. BONNER
Date : 27.2.67

Solicitor for Purchaser
Mr Morrison, Scott, Hardie Boys & Morrison.
Solicitor for Vendor
Mr S. Treadwell, of Treadwells.

The facts leading up to this transaction are unusual. The principals never met. Mr Lochore sen. on receiving instructions from the appellant, expressed the opinion that an appropriate price to ask for the property was £11,000. For a time the agents were not successful in obtaining a purchaser willing to buy both properties. The agents then sought to interest the respondent company. The governing director, Mr Michael Gavin Francis, after viewing the dwellings from the street, and without troubling to inspect their interiors, informed the agents that he was prepared to pay the price asked by the appellant—£13,300—for the two dwellings provided the vendor agreed to deposit approximately £11,000 with the respondent company. This offer, having been reduced to writing, was submitted to the appellant by Mr Lochore sen. and was accepted by him. The appellant, having later discussed the agreement with his solicitors, rescinded the contract. The respondent thereupon commenced proceedings seeking an order requiring the appellant specifically to perform the agreement for sale and purchase " in terms of the said agreement " ; in the alternative the respondent sought £1,500 damages. The appellant, in his statement of defence, denied that he had entered into an agreement for sale and purchase with the respondent and further alleged that in any event the document had no legal effect. As a further and alternative defence he alleged that the agents had falsely represented that the respondent was one of the companies in the Lamphouse group of companies and that he had accepted the offer on the faith of that representation.

The action was heard by the learned Chief Justice on 30 November 1967. Mr Francis, in cross-examination, said that he was 22 years of age and that he held all the shares in the respondent company, save one ; that the capital of the company was $202,000 and that the paid-up

capital was $74,000. He agreed that there were a number of registered charges against the company amounting in all to some $65,400 and that, in addition, there was a debenture to the Bank of New Zealand which had first priority over the other charges. He was not asked what amount, if any, the respondent company owed the bank. Nor was he asked what assets the respondent company possessed. The learned Chief Justice, for the reasons given by him, found in favour of the respondent on all issues and made an order requiring the appellant specifically to perform the agreement for sale and purchase. This appeal, which was limited to questions of law, is from that judgment.

Before us, Mr Inglis, for the appellant, made four submissions. His first and primary submission was that as a matter of law a contract to lend money cannot be enforced by specific performance. His second submission was that there was no mutuality and, therefore, specific performance did not lie. His third submission was that in any event an order for specific performance should not have been made as there were elements of unfairness and hardship in the circumstances surrounding the formation of the contract. His fourth and final submission was that as there was no evidence that the respondent had suffered any actual loss, nominal damages only should be awarded.

Before proceeding to consider these submissions I think it right to make a short reference to the form of the agreement. It will be observed that the offer is stated to be made by the respondent company " as agent ". Then, in clause 9a it is stated " such loan to be personally guaranteed by " the purchaser. Michael G. Francis ". Finally, when one looks at the signature it is to be observed that Mr Francis signed the agreement " as agent". No point, however, was made by the appellant regarding these conflicting statements and throughout the proceedings in the Court below and in this Court Mr Inglis was content to accept the position that the respondent company was the purchaser.

I turn now to consider Mr Inglis's first submission. There is no doubt that Mr Inglis was quite right in submitting that the Court will not enforce a mere agreement to lend money even although the loan be one to be secured by mortgage while it rests entirely unperformed either by the intended lender or by the intended borrower : see *Fry on Specific Performance*, 6th ed. 25. This rule formerly applied to a contract to take up and pay for debentures of a company but a contract to take up and pay for debentures of a company is now enforceable both in England and New Zealand as an exception to the general rule. (See s. 100 of the Companies Act 1955.) Mr Cahill, however, said that he did not contend that the appellant's agreement to deposit with the respondent the sum of £11,000 came within the definition of " debenture " in the Companies Act 1955 so I have given no consideration to this matter. The rule, however, is still in full force and effect in the case of private agreements for the lending or borrowing of moneys. One of the earlier cases is *Rogers* v. *Challis* (1859) 27 Beav. 175 ; 54 E.R. 68 where the Master of the Rolls, Sir John Romilly, expressed the opinion that a Court of Equity had no jurisdiction to grant a decree of specific performance of an agreement for the lending of money. He pointed out that it was not an agreement to purchase or sell anything. It was nothing more than a proposal to borrow money upon certain terms which was accepted and later repudiated. He said : " It certainly is new " to me, that this Court has ever entertained jurisdiction in a case where " the only personal obligation created is, that one person says, if you will " lend me the money I will repay it and give you good security, and the " terms are settled between them. The Court has said that the reason

" for compelling specific performance of a contract is because the remedy " at law is inadequate or defective. But by what possibility can it be " said that the remedy here is inadequate or defective ? It is simply a " money demand . . and a jury would easily assess the amount of the 5 " damage which the plaintiff has sustained ".

This question was again considered by their Lordships in the Privy Council in *Larios* v. *Bonany y Gurety* (1873) L.R. 5 P.C. 346, where Sir James W. Colvile, in delivering the judgment of the Board, said (p. 354) : " . . . it seems impossible to treat the cause of action in this case as 10 " anything more than the breach of a contract to honour the drafts of the " respondent to the extent of the amount agreed to be advanced and placed " to his credit. And, upon a full consideration of the arguments and the " authorities, their Lordships are constrained to admit that the Court " of Chancery would not have entertained a suit for the specific perform- 15 " ance of such an agreement, but would have left the party aggrieved by " the breach of it to seek his remedy, where he would find an adequate " remedy, in a Court of Law ".

The case most commonly cited in support of the view that a Court of equity will not entertain a suit for the specific performance of a contract 20 for the lending of money is *South African Territories* v. *Wallington* [1897] 1 Q.B. 692 and in the House of Lords [1898] A.C. 309. In the Court of Appeal Chitty L.J. said (p. 696) : " It is clear that no specific performance " of a contract to lend and borrow money can be granted at the suit either " of the proposed lender or the proposed borrower. It is immaterial 25 " whether the loan is to be on security or without security, or whether " the loan is to be for a fixed period; and it can make no difference " whether the loan is to be made in one sum or by instalments ".

The judgments in the Courts below were sustained in the House of Lords where the Earl of Halsbury L.C. said (p. 312) : " With respect 30 " to the claim for specific performance, a long and uniform course of " decision has prevented the application of any such remedy, and I do " not understand that any Court or any member of any Court has enter- " tained a doubt but that the refusal of the learned Judge below to grant " a decree for specific performance was perfectly right. But of course, in 35 " this, like any other contract, one party to the contract has a right to " complain that the other party has broken it, and if he establishes that " proposition he is entitled to such damages as are appropriate to the " nature of the contract ".

In the Court below the learned Chief Justice distinguished this line 40 of authority on the ground that in the present case there was a contract for the sale and purchase of land and he felt himself able to construe the agreement as a contract for the sale and purchase of land with a provision for part of the purchase money to remain on loan to the purchaser and on that footing he expressed the opinion that the respondent company was 45 entitled to a decree for specific performance. Before us, Mr Inglis was inclined to submit that even in such a case specific performance would be refused. He said that he had been unable to find any case where specific performance had been ordered where part of the purchase money was to be left on mortgage. Our own research has disclosed that there is a clear 50 line of authority justifying the granting of a decree of specific performance in such a case. The rule is stated in *27 Halsbury's Laws of England*, 3rd ed. 171, in these terms: " In equity a mortgage is created by a contract " evidenced in writing for valuable consideration to execute, when required, " a legal mortgage, or by a contract so evidenced and for valuable con-

"sideration that certain property shall stand as a security for a certain "sum. The agreement may be enforced according to its terms, even "though the legal mortgage when executed will confer on the mortgagee "an immediate power of sale".

This very point was taken before Parker J. in *Starkey* v. *Barton* [1909] 1 Ch. 284 where he said (p. 290): "The only other answer given to the plain- "tiff's claim is that the contract is a contract one term of which involves a "loan, and that the Court never grants specific performance of an agree- "ment for a loan. The contract in the present case is not, however, in "any true sense a contract for a loan, but is in substance and in fact a "contract for sale and purchase of land, part of the purchase money being "left upon mortgage. I can see no reason, either theoretically or practical- "ly, why the Court should not grant specific performance of such an "agreement".

True, Parker J. cited no authority in support of his conclusion but earlier authority is readily available: see *Ashton* v. *Corrigan* (1871) L.R. 13 Eq. 76; *Hermann* v. *Hodges* (1873) L.R. 16 Eq. 18 and *Gorringe* v. *The Land Improvement Society* (1899) 1 L.R. I.R. (Ch.) 142. I venture to add that in my experience the Courts of this country on numerous occasions have felt themselves entitled to grant decrees of specific performance in cases where part of the purchase money was to remain on mortgage for a term of years.

Although there appears to be an absence of authority, I see no reason to doubt that a Court would have jurisdiction to grant specific perfomance of a contract for the sale of land even in a case where the vendor had agreed to leave part of the purchase money owing to him as an unsecured debt (whether it would exercise its discretion in favour of the purchaser is another matter). I am not surprised at the lack of authority because it would indeed be rare to find a vendor willing to transfer land on such terms.

The question then that immediately falls for consideration is whether the interpretation placed by the Chief Justice on this contract was correct. With great respect I am of opinion that his construction cannot be accepted. It is all very well to speak of the substance of an agreement such as this, but, in my view, the parties are bound by the form in which they expressed their contract. I interpret cls. 1, 2 and 3 to mean that the respondent has undertaken to pay the balance of the purchase price in cash on 7 March 1967 and I see no reason to doubt that the appellant could have insisted on the contract being performed in this way. Accordingly I reach the conclusion that cl. 9a is to be treated as a separate and distinct stipulation. The appellant at the time of settlement undertook to deposit with the respondent the sum of £11,000. The respondent, for its part, did not undertake to accept the loan but no doubt an obligation to do so may be implied. This being the view I take of the construction of the agreement in my opinion the appellant's undertaking to loan to the respondent the sum of £11,000 on the terms prescribed falls within the line of authority that an agreement to lend money will not be enforced by a decree for specific performance. I quite agree that in one sense the two provisions are inter-dependent in that the appellant could not have succeeded in an action for specific performance except on terms that he complied with his undertaking to deposit £11,000 with the respondent for a term of years but I am equally clear that the respondent could have insisted on the appellant performing his agreement to sell the land if it had been prepared to pay the purchase price in cash. In my opinion the

view expressed in *2 Williams on Vendor and Purchaser*, 4th ed. 1046, correctly states the law on the matter. The learned author there says :

> If, however, a contract contains an agreement to sell land, together with other stipulations, and it is made in such terms that the contract for the sale of 5 land is complete in itself and severable from the rest of the agreement, the sale alone may be specifically enforced.

I think the line of authority supports this statement : see *Stocker* v. *Wedderburn* (1857) 3 K. & J. 393 ; 69 E.R. 1162, per Vice-Chancellor W. Page-Wood ; *Ogden* v. *Fossick* (1862) 4 De G.F. & J. 426 ; 45 E.R. 1249, 10 particularly the passage in the judgment of Turner L.J. where that learned Judge said : " . . . the Court, when called upon specifically to perform part " of an agreement the whole of which cannot be specifically performed, is " bound to see that the part which cannot be specifically performed is " independent of that which it is called upon to perform ". See, too, 15 *Odessa Tramways Company* v. *Mendel* (1878) 8 Ch. D. 235 per Fry J., p. 244: cf. *Ryan* v. *Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, per Lord Esher M.R., p. 124.

Mr Cahill, however, did not ask for a decree for specific performance of the agreement for the sale and purchase of the land *simpliciter*, no 20 doubt for the very good reason that the price that the respondent had agreed to pay was more than Mr Lochore sen.'s valuation. While this is the view I take I have thought it right to go on and consider what the position would be if the contract is to be regarded as one and indivisible. Even if this be the true construction I am still of opinion that a decree for 25 specific performance of the entire contract would be refused and the respondent would be left with his claim for damages. So far as I am aware there is only one recorded case where the Court has been called upon to consider such a case as the present one and that is a New Zealand case *Samson* v. *Collins* (1910) 29 N.Z.L.R. 1163 ; 13 G.L.R. 95 (see *44 English* 30 *and Empire Digest* 118). In that case the precise terms of the agreement are not recorded in the judgment, only its effect. It is stated that the agreement provided that the plaintiff should sell, and the defendant should purchase, a certain motor car for the sum of £475 ; that the plaintiff should lend in cash to the defendant the sum of £100; that the payment 35 of the purchase money of the car and of the sum of £100 to be lent as aforesaid should be secured by the execution by the defendant in favour of the plaintiff of a proper security over the car and the furniture and effects of the defendant in the Northern Hotel, Oamaru. As in the present case the defendant pleaded fraud and misrepresentation on the part of the 40 plaintiff, and also that she had repudiated and rescinded the agreement. Williams J., as here, held that fraud and misrepresentation had not been proved and continued (p. 1164-1166) : " If misrepresentation is not " established, and no unfair advantage has been taken of a purchaser, " there is no reason why specific performance should not be enforced 45 " if the contract is one of a kind of which the Court will enforce specific " performance. . . . On the question as to whether the agreement is one " which the Court will specifically perform I have had considerable " difficulty. If the agreement had been simply for the sale of the motor " car, and to give security for the price over the car and the furniture, 50 " then, as the defendant has received the motor car, specific performance " might be decreed : . . . in addition to that, however, there is a stipulation ' that the plaintiff shall lend and the defendant shall borrow the sum of ' £100, and that the security is to cover that amount as well as the price ' of the motor car. No part of this £100 has been advanced. As was

" stated by Chitty J., in *South African Territories* v. *Wallington* (*supra*):
" ' It is clear that no specific performance of a contract to lend and borrow
" ' money can be granted at the suit either of the proposed lender or the
" ' proposed borrower. It is immaterial whether the loan is to be on
" ' security or without security, or whether the loan is to be for a fixed 5
" ' period '. The agreement to lend and borrow the £100 was an essential
" part of the contract. It was on the strength of the agreement that this
" sum should be advanced by the plaintiff that the defendant was induced
" to enter into the contract to purchase the car. The contract is, in my
" opinion, an entire and indivisible contract, and an essential part of the 10
" contract remains executory. As was said by Lord Romilly M.R. in
" *The Merchants' Trading Company* v. *Banner* (1871) L.R. 12 Eq. 18.
" 23: ' The Court cannot specifically perform the contract piecemeal, but
" ' it must be performed in its entirety if performed at all '. In the
" present case there is an essential and inseparable part of the contract 15
" which the Court cannot specifically perform. I am therefore of opinion
" that the plaintiff is not entitled to specific performance. For the reasons
" above given he is, however, entitled to the alternative remedy of com-
" pensation in damages for breach of the contract by the defendant ".

Sir Joshua Williams was one of our most distinguished Judges and 20
for my part I am content to follow his judgment in the absence of any
compelling authority to the contrary. Accordingly on either view of the
construction of the contract I am of opinion that an order of specific
performance should have been refused and that the learned Chief Justice
should have proceeded to fix the measure of damages for breach of the 25
entire contract.

In view of the conclusion I have reached it is not really necessary
for me to refer to Mr Inglis's second submission. However, in view of the
argument we have heard I will add this. The view expressed by *Fry on*
Specific Performance, 6th ed. 219, that mutuality must exist at the time 30
the contract was entered into has been frequently attacked by other
leading textbook writers. Mr Cyprian Williams for instance, at p. 1053,
had drawn attention to the statement of Lord Cranworth in *Eastern*
Counties Railway Company v. *Hawkes* (1855) 5 H.L.C. 331 ; 10 E.R. 928,
where that learned Judge, over a hundred years ago, expressed the view 35
that in actions for specific performance the matter was to be judged by
the state of things when the bill was filed. *Hanbury's Modern Equity*, 8th
ed. 547, questions whether the rule exists at all. The learned editor of the
22nd ed. of *Anson's Law of Contract* expresses the view that a person
seeking specific performance who has himself completed his side of the 40
contract (whether or not he could have been specifically compelled to do so)
is entitled to the remedy for " by carrying out his part of the bargain
" he renders the remedy mutual ". I do not doubt that on the facts of the
present case if it had so happened that the appellant had instituted
proceedings for specific performance he would have failed to have obtained 45
an order requiring Mr Francis to execute the guarantee of the loan, but
in this case the proceedings were commenced by the purchaser and if it
was in a position to satisfy the Court that Mr Francis had executed the
necessary guarantee I am disposed to think that the appellant could not
have resisted the suit on the ground of lack of mutuality. Whether there 50
is sufficient evidence in the present case that Mr Francis had executed the
guarantee I need not decide. The guarantee certainly was not produced
at the hearing but a letter was exhibited in which the respondent's

solicitors said that the "appropriate deposit notes" were available on settlement. However, I need say no more on this matter.

I pass on to consider Mr Inglis's third submission. If the construction of the contract adopted by the learned Chief Justice had been right then 5 I am inclined to think that as this is an appeal on questions of law only it would not have been open to this Court to have interfered with the way he exercised his discretion. When this difficulty was pointed out to Mr Inglis he argued that at least it was open to him to submit that the learned Chief Justice had not exercised his discretion at all. I am not 10 sure this is so. I am inclined to think that the Chief Justice did no more than point out in effect that his discretion required to be exercised on fixed principles and in accordance with previous authorities and that, if the contract was valid in form and was made between competent parties and was unobjectionable in its nature and circumstances, specific per- 15 formance is in effect granted as a matter of course. This is but trite law in the case of contracts for the sale of land. But for the reasons I have given I am of opinion that the present case cannot be regarded as an ordinary contract for the sale and purchase of land. If then I had come to the conclusion that it was within the jurisdiction of the Court to have made an 20 order for specific performance of the entire contract I would have been disposed to have favoured remitting the case to the Court below with a direction that the Chief Justice should consider how he should exercise his discretion in the light of the different construction I have placed on the contract. There are a number of very unsatisfactory features about 25 this case which have left me uneasy. Mr Francis is a very young man controlling and virtually owning a company with a number of secured charges over its assets. The impression left on my mind is that his principal objective was to secure from the respondent an unsecured loan of £11,000 which his company was not required to meet for a period of ten years. 30 In the meantime the company was free to deal with the property in any way it chose and consequently the prospect of the respondent ever seeing his £11,000 depended wholly on the financial position of the company at the end of the period. These are all matters which no doubt the learned Chief Justice would have considered if he had construed the contract 35 otherwise than in the way he did. However, on the view I have taken of the case these matters are no longer relevant.

I turn now to consider Mr Inglis's fourth submission. He argued that the respondent had suffered no actual loss and, therefore, nominal damages only should be awarded. He invited this Court to fix the damages. I have 40 considered this request but on the whole I think the prudent course is to remit the case to the Supreme Court to assess the appropriate damages. Nothing was said by Mr Cahill in his reply to Mr Inglis's submission. The respondent plainly is entitled to a return of the deposit and there may be other out of pocket expenses as well.

45 For these reasons I would allow the appeal and vacate the order for specific performance and for costs made in the Court below and I would remit the case to the Supreme Court for the assessment and award of such damages as may on the facts be found appropriate.

This being the opinion of the majority of the members of the Court 50 the appeal is allowed on the terms I have proposed. The appellant is entitled to his costs in this Court which are fixed at $350 together with all necessary disbursements including the costs of printing.

TURNER J. The contract of which specific performance was sought by the purchaser, and granted by the Chief Justice, in this action, appears

as Exhibit " B " in the case. It was in the following words : [For which see the judgment of North P.]

The purchaser—the respondent on this appeal—desired the performance of this agreement ; the vendor—in this Court the appellant—after being advised by his solicitors of the probable consequences of completion, refused to complete. The purchaser instituted an action for specific performance accordingly.

Before the Chief Justice the principal defence advanced by the appellant was that set out in para. 6 of the statement of defence, and repeated again in paras. 13 and 14, viz. that the respondent had represented that it was " one of the Lamphouse group of companies " and that the contract was induced by this false, and indeed fraudulent, misrepresentation. The Chief Justice found on the facts against the appellant on this allegation, and found, moreover, that the appellant had in fact repented of the contract upon hearing the observations of his solicitor as to the unwisdom of investing money on unsecured deposit with the respondent company. Having so held, he thought it an inevitable next step that specific performance should be granted to the respondent as a matter of course, since the contract was one in its essence " for the sale and purchase of " land ", notwithstanding that it contained " a provision for part of the " purchase money to remain on loan to the purchaser ". " On that " footing ", he said, " I think that the plaintiff company is entitled to a " decree for specific performance ". Addressing himself then to the discretion which the Court has on an application for specific performance, he referred to the financial standing of the plaintiff company, and the improvidence of the contract from the point of view of the vendor. On these matters he said : " But the Court is not concerned with that because, " on the view I take, this contract was a valid and binding one, and I " must therefore act on the principle cited by Mr Cahill from *36 Halsbury's* " *Laws of England,* 3rd ed. 264, that: ' If the contract is valid in form and " ' has been made between competent parties and is unobjectionable in " ' its nature and circumstances specific performance is in effect granted " ' as a matter of course even though the Judge may think it involves " ' hardship ' ."

I read this passage in his judgment as expressing his view that once he had held this contract one essentially " for the sale of land " he had no effective discretion left which he could exercise on any of the matters of fact which had been raised on the evidence in this case.

I agree with the President, whose judgment I have had the advantage of reading in advance, that this contract was more than one simply " for the sale and purchase of land ", and that more complex considerations arise on the defence to this claim than were dealt with in the judgment now under appeal. As the President has pointed out, the form of the contract must be considered. What does it actually provide ? It is in the form of an offer by the respondent, accepted by the appellant. The terms of the offer define the purchase price of the land at £13,300, and bind the respondent on its acceptance, to pay this agreed price in cash on the date prescribed for settlement ; upon payment of this sum the respondent becomes entitled to the land. But this is " subject to 9a ". Term 9a provides that :

> On settlement the vendor shall deposit with the Loan Investment Corporation of Australasia Ltd. the sum of £11,000 for a term of ten years at 7½ percent p.a., interest payable by equal quarterly instalments. Such loan to be personally guaranteed by the purchaser Michael G. Francis.

This composite offer, made by the respondent, was accepted by the appellant. I read the resulting contract as binding the appellant, upon payment of £13,300 by the respondent (for para. 3 provides for the payment of the purchase price in full in cash) to do two things—(a) to convey the land unencumbered, and (b) to deposit £11,000 on loan with the respondent as specified by term 9a ; and it was not contended to the contrary by Mr Inglis for the appellant.

Although the whole of the obligations to both parties were in the event expressed in one document, the process by which this document was produced could easily have resulted, not in one single contract, but in a pair of quite separate contracts dependent upon each other, such as Lord Moulton referred to in his famous speech in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30; [1911-13] All E.R. Rep. 83 at pp. 47, 90 where he said : " It is evident, both on principle and on authority, that there " may be a contract the consideration for which is the making of some other " contract. ' If you will make such and such a contract I will give you " ' one hundred pounds ' is in every sense of the word a complete legal " contract. It is collateral to the main contract, but each has an independ- " ent existence, and they do not differ in respect of their possessing to the " full the character and status of a contract. But such collateral con- " tracts must from their very nature be rare. The effect of a collateral " contract such as that which I have instanced would be to increase " the consideration of the main contract by £100, *and the more natural* " *and usual way of carrying this out would be by so modifying the main* " *contract and not by executing a concurrent and collateral contract.*"

But in the case before us the " more natural and usual way " referred to by Lord Moulton was adopted, and the whole of the obligations of both parties appeared upon one piece of paper.

There is a difference in form, as Lord Moulton pointed out, and there may indeed be a difference in result, between the case where one party makes an offer to another in consideration of that other entering into a separate contract with him, and the case where the result of an exactly similar process of negotiation is that all the terms are set out in one contract. Had there been two separate contracts between the parties now before us, the one containing the whole of the contents of Exhibit "B" except cl. 9 (" this offer is subject to 9a ") and cl. 9a itself, whose text has been set out above, and the other containing cl. 9a only, then the conditions adverted to by Lord Moulton would have been satisfied. In such a case it could hardly have been doubted that on showing readiness and willingness to complete *both* contracts, either party could have sued for specific performance of the contract for the sale of the land, subject however to the discretion of the Court to which I must later come. But a refusal by either to complete the contract for loan could have led to no better remedy under that contract than damages ; for on an action for specific performance of this contract the Court would, at least in the absence of special circumstances, have applied the rule that damages would afford an adequate remedy for its breach.

On the other hand, if cl. 9 had not appeared at all in the contract, and cls. 3 and 9a, immediately succeeding each other, had provided that the balance of the purchase price should be payable, as to £11,000 by the purchaser giving formal promises to pay this amount on the agreed date, but without security, and as to the balance by payment in cash, then there can be as little doubt that an order for specific performance could have been sought as regards the whole of the obligations of either party. Such

a contract must have been, as the Chief Justice said of the one actually under review, essentially one " for the sale of land " and could have been the subject of an order for specific performance as a whole, but of course subject to the discretion of the Court to which I presently refer.

I cannot read this contract, as the Chief Justice read it, as if it had been worded and set out in the last preceding paragraph. The fact is, that it is not so worded. I think, with the President, that as it is worded it is more accurately to be read as divided into two separate parts, each, it is true, dependent on the other, but separable nevertheless. The obligation to grant a loan is not expressed as a mutual covenant at all. In form it is a promise by the vendor, in respect of which the purchaser does not expressly bind itself to any corresponding obligation, and a promise, moreover, not so much forming part of what has gone before as constituting a separate condition to which all the preceding part of the document is " subject ". And it is also to be noted that the loan of £11,000 is to be made, not by way of deduction from the price, so that the net amount can be tendered, but as a separate payment. The consideration of £13,300 is expressed in terms to be the purchase price of the land. The purchaser is bound by the agreement to pay the whole of this purchase price in cash, whereupon the land is to be conveyed, and only immediately on all this being done—" on settlement "—the vendor must deposit the amount of the loan. The " offer " of the purchaser is made " subject " to this obligation. These *indicia* have led me to the conclusion that this contract is to be read, on its true construction, as giving rise to two separate though interdependent obligations on the part of the vendor—to sell the land, and to make a loan. The sale and purchase of the land, for the price of £13,300 and for no lesser sum, is agreed to, but subject to the separate obligation on the part of the vendor to make the loan. The result is that these obligations are separate, in that the Court is not bound, in ordering specific performance of one of them, necessarily to order specific performance of the other; they are interdependent, however, in that neither party can claim specific performance of either obligation, who is not ready to perform the other. The effect is in this case, as if there had been a classic pair of the contracts described by Lord Moulton, rather than as if there had been a single contract whereunder only the net purchase price was payable in cash by the purchaser, the balance being " left upon loan ". The actual wording of the contract before us does not place it immediately in either of these two categories; it is between them, but, contrary to the view to which the Chief Justice came, I think with respect that it falls into the former, rather than into the latter category, and accordingly I agree with the President that the appellant's obligations under it are severable.

Once this point is reached it follows that whether or not the Court decided upon granting specific performance of the appellant's obligation to sell the land, this remedy should not have been granted in respect of his obligation to make the loan of £11,000 as to which at least in the absence of proved countervailing considerations, damages must be regarded as an adequate remedy; *Snell's Principles of Equity*, 26th ed. 639; *South African Territories Ltd.* v. *Wallington* [1898] A.C. 309.

For these reasons I am in agreement with the President that the order for specific performance of the contract as a whole, which the Chief Justice made in the Court below, must be vacated; there should not have been any order in respect of that part of the appellant's obligations

which bound him to make the loan, for the breach of which damages should have been awarded.

Quite apart from the reasons which I have just given, in which I am in substantial agreement with the President, I have for myself come to 5 the view that even if the contract were to be regarded as entire, specific performance of it should have been refused in the exercise of the discretion of the Court. Had the Chief Justice purported to exercise his discretion on his view of the facts which I am about to canvass, his exercise of it in favour of an order for specific performance would not I think have been 10 open to review on the facts in this Court, at least on the notice of appeal as presented, for the appeal is presented to us on law only. But as I have already pointed out, the Chief Justice did not purport to exercise his discretion, and the only paragraph of his judgment in which the discretion may be taken to be adverted to—in which indeed it is never 15 expressly mentioned, but may be taken to be impliedly referred to—his judgment cannot be read as saying more than that there can be no discretion to exercise in contracts such as the one before him. Indeed it appeared from what counsel said to us at the Bar that he had taken this view throughout the trial, discouraging counsel from canvassing 20 certain aspects of the facts further, on the ground that his cross-examination appeared irrelevant. I accept therefore that he never exercised the discretion which was his and I now proceed to inquire what he should have done had he given the exercise of this discretion due consideration.

The facts of this case are most unusual and it is almost useless to seek 25 guidance from decisions in the reports. But a consideration of the facts has convinced me that in the circumstances of this case the Court's discretion should be exercised against the plaintiff. What does the evidence show ? Let us look at the testimony of Michael Gavin Francis, the governing director and almost sole shareholder in the plaintiff company, 30 who (except for the evidence of Mr Morrison as to legal negotiations subsequent to the contract) was the sole witness called in support of the plaintiff's case. He is 22 years of age. The defendant company rejoices in the name of The Loan Investment Corporation of Australasia Ltd. It might be thought that this name was hardly apt to describe a one-man 35 company wholly owned by one little more than a boy. The corporation has a total nominal capital of $202,000. Mr Francis, aged 22, owns all the shares except one, and of 101,000 shares of £1 each (I deliberately use the old measure of currency here) 5,000 have been fully paid up, while 6s. 8d. per share has been "met"—to use Mr Francis's expression—on the other 40 96,000 shares. There is little evidence as to the assets and liabilities of the respondent company. There is a debenture to the bank covering its assets and " a number of registered charges " amounting to " something " like $65,400 ". In the absence of satisfactory evidence as to the cash position or the relative solvency of the respondent company, which, if 45 any point was to be made of it, it was certainly the responsibility of counsel for the appellant to produce, it certainly would be unfair to assume that the respondent is not actually solvent. But if it is said—as it was said before us on the appeal— that counsel for the appellant should have cross-examined further as to such facts as these it should be remembered 50 that in answer to this suggestion he replied that he had attempted to do so, but was discouraged from this line of examination by the Chief Justice, to whom, on the view which he took of the extent of the Court's discretion, it appeared irrelevant.

The business of the plaintiff company is described in a " brochure ", a copy of which Mr Francis sent to the defendant, pinned to his offer for the property. It begins by recording the concern of the managing director (Mr Francis) regarding the present state of the New Zealand economy, which the managing director has " spent five years in studying " 5 — i.e. since he was 17 years of age. The brochure invites persons to invest their money unsecured with The Loan Investment Corporation of Australasia Ltd., I will forbear from further quotation from it, but having read it I cannot wonder that Mr Treadwell, to whom the defendant took a copy of the contract now before the Court after signing it, expressed his 10 alarm when he found that his client had apparently contracted to deposit £11,000 for ten years without security with those who issued it.

Let us come, however, to the way in which the respondent came to enter into the transaction now under consideration. Mr Francis was out 15 inspecting properties with Mr Lochore, a land agent. They had looked at some in Island Bay but these, on the terms on which they were available, did not appeal to Mr Francis. On the way back from Island Bay Mr Lochore mentioned the two properties in Ranfurly Terrace. The evidence of Mr Francis proceeds : 20

> . . and before we got there Mr Lochore said they had two prior offers for the property neither of which had been accepted, so I said : " Well let's have a look at them." I said: "Are there any terms available on this transaction ? " Mr Lochore said the vendor would be leaving money back on mortgage, so I said " I am very interested in the properties and I will give the vendor the full price he is asking providing he deposits approximately £11,000 back to my 25 land investment company."

It therefore appears that within a few minutes of their being first mentioned to him Mr Francis's company was offering to pay the full sum of $13,300 asked for them provided, however, that £11,000 was on settlement to be placed on deposit by the purchaser with the company. 30 The two went to the offices of the land agent, where they spoke to Mr Lochore sen. He said that the plaintiff " was paying quite enough " for the properties " to which Mr Francis replied, " I do not mind as " long as he deposits so much back to my land investment company ". He signed the written offer about $1\frac{1}{2}$ hours later. 35

The matter is canvassed in more detail in cross-examination. It will perhaps be as well to set out the passage in its entirety.

> Would it be correct to say it would be well after 11 a.m. by the time you got to Ranfurly Terrace ? 11.20 a.m. You told us you arrived at the office of Lochore sen. at 11.30 ? Yes. Of course you had to get there from Ranfurly 40 Terrace ? That's right. So it is correct to say it took you about five minutes to decide these were properties you wanted ? Three minutes. Had you seen the properties before ? No. Had you any idea what their condition was like ? Yes, I am experienced in properties. Did you go inside ? No. You are not saying you can tell from outside of property what it is like inside ? I can. You agree you were really taking a risk, a calculated risk in buying these properties ? 45 Everything is a calculated risk. You took three minutes to look at the properties from the outside ? Yes. And at that moment decided to bind your company to pay £13,300 ? At the time I saw the properties I had in mind that the vendor had turned down two prior offers, both of which were subject to leaving mortgages. When I inspected these properties the question of terms came into it, and I realised then if the properties were offered on very good terms I would be 50 interested. Both properties were very well preserved. I know the vendor had two prior offers thereby establishing a market price and if finance could be deposited with my company for ten years the extra price didn't worry me at that stage, knowing that Ranfurly Terrace is marked out by Wellington College as the local government programme and I knew within five years they were going to redevelop that area.

The passages which I have quoted appear to be the only ones relevant to the way in which the plaintiff came to enter into this contract, of which he now seeks specific performance. There is, however, one other small passage which it is proper to recount. Mr Francis said :

> It took three or four days before he heard from Treadwells that there was some trouble over settlement. I rang him every day, sometimes twice a day. I particularly wanted settlement on the settlement date. We were at one stage considering developing the property and converting it into flats. I have two brothers who are builders. I had a look at the size of the properties and I thought they were big enough to convert into flats.

I read this simply as evidence that after the agreement had been executed, and when settlement was due or nearly due, Mr Francis had considered with his brothers the possibility—it is no more—of turning the houses into flats.

All this evidence seems to me to demonstrate that this purchaser decided to enter into this contract for the purchase of land not with the object of becoming the owner of a particular piece of real property, to which he attached some sort of importance, but simply so as to acquire an unencumbered asset capable of being sold or mortgaged, upon which it could raise finance upon sale or loan. If this was the object of the purchaser in entering into this agreement, the transaction is about as far as is possible from the agreements for the purchase of land referred to by Sir John Leach V.-C. in *Adderley* v. *Dixon* (1823) 1 Sim. & St. 607 ; 57 E.R. 239 where he explains the applicability of specific performance to contracts for the sale of land as being : " not because of the real nature " of the land, but because damages at law . . . may not be a complete " remedy for the purchaser, *to whom the land may have a peculiar and* " *special value*."

If such was the object of the purchaser in entering into this agreement, from the vendor's point of view the result of an order for specific performance in this case must be to take from him an unencumbered asset which he possessed without in return giving to him the purchase price, and without his having any security for the payment of it. I think that such a result, when the circumstances surrounding the origin of this transaction are considered, is so inequitable that the Court should refuse an order of specific performance to this plaintiff, compensating it only by an award of damages for such an amount as may be proper ; and I think that the Chief Justice, had he thought himself entitled to take into consideration the facts which I have mentioned, would have come to the same view.

The Chief Justice took a more restricted view—perhaps it may be said a more orthodox view—of the discretion exercisable by him upon this application. He thought that the very fact that this was an agreement " for the sale and purchase of land " concluded the matter against the exercise of any discretion. If it is said that no decided case can be found in the reports wherein the Court has refused specific performance of an agreement for the sale and purchase of land on the broad ground which I would take in this case, I would reply that this is a Court of Equity, exercising an equitable jurisdiction ; that the discretion reposed in it is a Judge-made discretion, given by Judges to Judges ; and that the law does not stand still for ever, but ought to adapt itself to the circumstances and needs of commercial practice and social conditions. In my opinion the proved facts of this case call clearly for the reassertion of the discretion which is always vested in a Court of Equity in the exercise of equitable remedies, and I would not be inhibited by set rules from doing obvious

equity in this case through an ultra-strict application of what are called settled principles. For this reason, too, then, in the exercise of the discretion vested in the Court I would in the very special circumstances of this particular case refuse specific performance.

I have found it unnecessary in this judgment to deal with the argument which Mr Inglis advanced before us based on lack of mutuality; but I ought to say before leaving the case that I agree with the view which the President has expressed on this point. It must be taken, I think, as the case stands, that the evidence was sufficient to support Mr Cahill's submission that the respondent was in fact ready, able, and willing to complete on the date fixed for settlement—i.e. ready, able, and willing to pay the balance of the sum of £13,300 in cash and to hand over a proper deposit note guaranteed by the signature of Mr Francis. The evidence goes some distance towards satisfactorily establishing this, and there was no evidence to the contrary, and no cross-examination before the learned Chief Justice on the point. On the assumption that the respondent was ready, able, and willing to complete, it was entitled to receive a conveyance of the land, and if this was refused it could expect specific performance of the contract to convey, unless the Court's discretion were exercised against a decree.

For each of the two reasons which I have endeavoured to express, and which I think are independently valid, I would allow this appeal, vacate the order for specific performance and for costs which the Chief Justice granted, and remit the matter to the Supreme Court for the assessment and award of such damages as may on the facts be found appropriate. I would allow the appellant costs of this appeal.

RICHMOND J. In this case, the first submission made by Mr Inglis was that the Supreme Court did not have jurisdiction to make a decree of specific performance of the agreement of 27 February 1967 because the effect of that decree was to order the appellant specifically to perform an agreement for the loan of money. It cannot be doubted that this was the effect of the decree, which requires the appellant specifically to perform the agreement "according to its terms". Those terms include a contractual undertaking on the part of the appellant to deposit with the respondent, on settlement, the sum of £11,000 for a term of ten years at 7½ percent per annum.

In support of his submission, Mr Inglis relied on *South African Territories* v. *Wallington* (1898) A.C. 309; *Larios* v. *Bonany y Gurety* (1873) L.R. 5 P.C. 346; *Rogers* v. *Challis* (1859) 27 Beav. 175; 54 E.R. 68 and *Sichell* v. *Mosenthal* (1862) 30 Beav. 371; 54 E.R. 932. The judgments in these cases are conclusive authority that the law is as stated in the following extract from the judgment of Chitty L.J. in *South African Territories* v. *Wallington* [1897] 1 Q.B. 692, 696: "It is clear that no "specific performance of a contract to lend and borrow money can be "granted at the suit either of the proposed lender or the proposed borrow- "er. It is immaterial whether the loan is to be on security or without "security, or whether the loan is to be for a fixed period; and it can make "no difference whether the loan is to be made in one sum or by instal- "ments."

The real question is whether the authorities relied upon by Mr Inglis do, in fact, apply to the circumstances of the present case. I do not propose to review in detail the facts with which the Courts were concerned in those cases. In none of them did the question arise of a composite

agreement to lend money and sell land. The basic principle upon which they were decided was that jurisdiction in specific performance is based on the inadequacy of the remedy at law. In the case of a mere agreement to lend money specific performance will not be granted because the borrow-
5 er can obtain money elsewhere, and, if he has to pay more for it, he may sue for damages.

I do not regard any of the authorities relied on by Mr Inglis as binding on this Court when it is confronted, as for reasons given later in this judgment I think it now is, with a composite and indivisible contract under
10 which a vendor agrees both to transfer the ownership of land and to make a money advance to the purchaser. So far as the researches of counsel and of the members of this Court have carried the matter, it would appear that there is a dearth of authority in relation to such a case. In these circumstances, the matter must be approached from the point of view of
15 first principles and I shall attempt to do this shortly. Meanwhile, I wish to express my respectful disagreement with the view of the Chief Justice that the agreement between the parties " is in truth and substance a " contract for the sale and purchase of land, with a provision for *part* " *of the purchase money* to remain on loan to the purchaser ". I agree with
20 the view which has just been expressed by the President that the parties are bound by the form in which they expressed their contract. The contract does not stipulate that the appellant is to make the advance out of the purchase money. The equitable lien of an unpaid vendor has been abolished in New Zealand and so far as I can see the practical results of
25 the agreement, if fully performed by the parties, would be the same as if they had entered into an agreement whereby the appellant was to transfer title and possession on payment of part only of the purchase price, leaving the balance unsecured and payable after a period of ten years, with interest in the meanwhile. This, however, is not the form in which they have
30 chosen to express their bargain and I see no reason (when considering whether the agreement is of a kind which the Court has jurisdiction to enforce by specific performance) why the Court should attribute to the agreement a legal effect which is not reflected in its form.

What does impress me about the form of the agreement, however, is the
35 emphasis which it places on cl. 9a. Performance of this contractual undertaking on the part of the appellant is by cl. 9 clearly made a condition of the respondent's obligation to complete the agreement. The various obligations of both parties (including cl. 9a) are grouped together under the one heading of " Terms and Conditions ". It is, in my view,
40 impossible to escape the conclusion that the price being paid by the respondent is being paid not only for the land but also for the loan. Put in another way, the appellant's undertaking to transfer the land and his undertaking to make the loan are both undertakings supported by an indivisible consideration and, as such, must be regarded themselves as
45 forming a composite and indivisible undertaking on the part of the appellant. Further, it is not possible to say that either of these undertakings on the part of the appellant can be treated as merely subsidiary to the main purpose of the contract—in my view, they both go to the essence of the bargain between the parties.

50 It is for these reasons that I agree with Mr Inglis that the agreement is an " entire " as opposed to a " divisible " contract—it cannot be severed into two contracts, one to buy and sell land and one to lend money. It is indistinguishable in principle from the agreement which was considered by the Court of Common Pleas in *Hopkins* v. *Prescott* (1847)

4 C.B. 578 ; 136 E.R. 634. Furthermore, the notion of a " collateral " contract, as explained by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30 ; [1911-13] All E.R. Rep. 83 at 37, 90 cannot apply to a case in which there is only one contract. The distinction between an undertaking forming part of an entire contract and an undertaking 5 contained in a collateral contract is illustrated by a comparison between the cases cited in footnotes (*m*) and (*p*) in *8 Halsbury's Laws of England*, 3rd ed., p. 112. I have dealt at some length with this particular topic of indivisibility as it is fundamental to my own approach to the present appeal. It is with these considerations in mind that I turn to consider 10 the jurisdiction of this Court to decree specific performance of the entirety of the appellant's undertakings.

The basic principles governing the assumption of jurisdiction by the Courts of Equity in claims for specific performance are not in doubt. They are conveniently stated in the following passage taken from a 15 judgment of Street C.J. in *McIntosh* v. *Dalwood (no. 4)* (1930) 30 S.R. (N.S.W.) 415, 418 : " The true ground of the jurisdiction to entertain " suits for specific performance is still, as it has been from ancient days, the " insufficiency of Courts of Law to provide a complete remedy and to give " adequate relief. If an award of damages will be commensurate to the 20 " injury sustained by a breach of contract, the party injured will be left " to his remedy at law. If not, if an order for specific performance is " indispensable to justice, and if the contract is not from its nature of " such a kind that the Court cannot enforce its performance, it will " interfere to enforce it and will, if necessary, interfere before the plaintiff 25 " has actually been damnified. . . . The test is always the same. In " every case the contractual obligation must first be ascertained in order " that it may be seen whether an adequate remedy exists at law in the " event of a breach."

In the present case, for reasons already given, I take the view that the 30 contractual obligation on the part of the appellant which must be subjected to the foregoing test is not a simple undertaking to lend money but is a composite and indivisible undertaking to transfer land and lend money. To emphasise this distinction it may be noted that in *Fry on Specific Performance*, 6th ed. 24-25, the authorities relied on by 35 Mr Inglis are cited as authority for the proposition that " It is, however, " settled that the Court will not so enforce a *mere* agreement to lend " advance or pay money . . ." (the italics are mine) whereas later on p. 25 the opinion is expressed that " a contract is not, however, unenforceable " merely because it involves a loan ". 40

The common law remedy of the respondent is to recover damages for the loss of the *entire* bargain. If this remedy is inadequate as to an essential part, then it must be inadequate as to the whole. Is this then a case in which damages would be an adequate remedy for breach of the appellant's obligation to transfer and give possession of the land ? 45

Turner J. has referred to the well known judgment of Sir John Leach V.-C., in *Adderley* v. *Dixon* (1823) 1 Sim & St. 607 ; 57 E.R. 239 which is cited by all the textbooks. I understand the judgment as meaning that Equity intervenes because of the *possibility* that damages may not provide an adequate remedy to the purchaser. It is so interpreted in *2 Dart on* 50 *Vendors and Purchasers*, 8th ed. 877, where the comment is made that " In the case of land, the purchaser's right to sue can seldom if ever be " questioned on this ground (i.e. that damages would be adequate) ; for " the land may, to him, have a peculiar and special value ". The remarks

of Lord Redesdale in *Harnett* v. *Yeilding* (1805) 2 Sch. & Lef. 549, 556 are to the same general effect. Lord Redesdale said : " Unquestionably " the original foundation of these decrees was simply this, that damages " at law would not give the party the compensation to which he was " entitled ; that is, would not put him in a situation as beneficial to him " as if the agreement were specifically performed. On this ground, the " Court in a variety of cases, has refused to interfere, where from the " nature of the case, the damages must necessarily be commensurate to " the injury sustained ; as, for instance, in agreements for the purchase " of stock : it being the same thing to the party where or from whom the " stock is purchased, provided he receives the money that will purchase " it."

The effect of all the authorities is in my view at least this. A Court of Equity will presume in favour of a purchaser of land that the land in question has a peculiar and special value to him. It may be that our law has developed to a point where this presumption has become irrebuttable. Thus in *Megarry and Wade: The Law of Real Property*, 3rd ed. 600, the view is expressed :

> But the land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course.

For present purposes, however, I am prepared to assume that the presumption is one which may be rebutted by proof (in Lord Redesdale's words) that damages must necessarily be commensurate with the loss sustained.

I am of the opinion that the evidence in the present case falls far short of establishing any such state of affairs. The point was not taken in the Supreme Court and in consequence Mr Francis was not asked directly just what purpose he had in mind in purchasing the land. The question is one of fact, and in my view is not fairly open in this Court. If it were open then in my view the evidence is quite consistent with Mr Francis wishing to let the property (with or without alteration) and eventually to sell it at a profit or redevelop it as circumstances proved expedient. In my opinion, damages are not an adequate remedy to compensate a person who decides (however quickly) to buy a particular piece of land as an investment. He has shown by his choice that that land, as opposed to other land which may be available, has a " peculiar " and special value to him ", albeit merely from a financial point of view. Damages for the loss of the bargain would be arrived at by setting off any premium value in the loan against the excess over and above the market price which the respondent has apparently paid. The damages could be nominal or negligible and a poor substitute for the land itself whether as an investment or as a property with future possibilities of development.

In the result I am satisfied that the present agreement, when looked at as a whole, satisfies the first requirement of equitable jurisdiction—an award of damages will not be commensurate to the loss which would be suffered by the respondent it it were forced to accept the appellant's wrongful repudiation of his bargain. I turn now to consider the second requirement of jurisdiction—Is the contract from its nature of such a kind that the Court cannot enforce its performance ?

In my opinion the appellant has not undertaken any contractual obligation which, from its nature, is of such a kind that the Court *cannot* enforce its performance. There is no practical difficulty in ordering the appellant to pay a sum of money and such orders are frequently made by

the Court by way of specific performance as, for example, in a vendor's action. *Turner* v. *Bladin* (1951) 82 C.L.R. 463 is an illustration. This, to my mind, at once distinguishes the present case from cases of the kind relied on by Mr Inglis and collected in *Fry on Specific Performance*, 6th ed., Pt. III, chapter XVI, under the heading " Incapacity of the Court to 5 " Perform Part of a Contract ". This chapter relates to the rule that " This Court cannot specifically perform the contract piecemeal, but it must " be performed in its entirety if performed at all " (per Lord Romilly M.R. in *Merchants Trading Company* v. *Banner* (1871) L.R. 12 Eq. 18, 23). The cases which illustrate the application of this rule are, as 10 far as I am aware, all cases (with one exception) in which one or more essential contractual obligations have been of a kind which Courts of Equity have found it physically impossible or inexpedient to attempt to enforce by a decree, or else cases in which a part of the bargain has not been finally concluded. The one exception to which I have referred is 15 *Samson* v. *Collins* (1910) 29 N.Z.L.R. 1163 ; 13 G.L.R. 95. I shall come back to this case later. Meanwhile, it is readily understandable that in the case of an entire contract a Court of Equity, finding itself *unable* to decree performance of one part of the contract which is not severable from the remainder, will refuse to enforce the remaining part. To do so 20 would involve a clear risk of injustice. In my view, however, this principle is not applicable to a case such as the present one, for the appellant's undertaking to lend money is not of such a kind from its nature that the Court *cannot* enforce its performance. In the former type of case the Court is confronted with the actual impossibility of enforcing the entirety of the 25 contract and chooses not to intervene at all. In the latter class, the Court has a good reason to intervene to enforce the entirety of the contract. It is not confronted with any question of impossibility and the fact that a part of the contract would not have been specifically enforced if at had stood alone (because damages would have been an adequate remedy) is 30 not, in my view, an argument which can properly be advanced to deprive a plaintiff entirely of the intervention of a Court of Equity when damages would not be an adequate remedy for the loss of the entire bargain because that bargain indivisibly involves a sale of land.

It is convenient, at this point, to refer in more detail to *Samson* v. 35 *Collins* (*supra*). The facts of that case and the relevant passage from the judgment of Williams J. have already been fully set out in the judgment which has been delivered by the President. As the President has pointed out, the precise terms of the agreement between the parties are not recorded in the judgment and it may be that there are other relevant 40 facts which do not appear in the report. I am, naturally, reluctant to differ from Williams J. but unfortunately I find myself constrained to do so as, with the greatest respect to that learned Judge and for the reasons already given, I think he applied the rule expressed by Lord Romilly to a type of case to which it had not previously been applied 45 by the Courts and in respect of which no logical reason for its application can be advanced. In saying this I find some support from certain views expressed by Owen J. in *Fell* v. *New South Wales Oil & Shale Co.* (1889) 10 N.S.W.L.R. Eq. 255, 260. In that case there was an agreement under which the defendants covenanted to allow the plaintiffs the use of 50 certain premises and works for a term of six years and also covenanted to supply to the plaintiffs a certain quantity and quality of shale which was to be treated by the defendants at the works. The refined oil was then to be sold to the plaintiffs. The question arose as to whether the agreement

was one which could be enforced as against the defendants by a decree of specific performance. It was held that specific performance could not be ordered because the contract involved the performance of continuous acts. The point was also taken, however, in argument, that the delivery 5 of the shale by the defendant company was only the delivery of a severed chattel and that the law provided an adequate remedy at law by way of damages for its non-delivery. Owen J. said (at 260) : " It was contended, " in the first place, that the delivery of the shale by the defendant company " was only the delivery of a severed chattel, and that the law provided 10 " an adequate remedy by damages for its non-delivery. In support of " this principle, a number of cases were cited, in all of which the contract " related solely to the sale of chattels, and the chattels were such as could " be obtained at all times in the open market, so that damages would be an " adequate remedy for a breach of the agreement. *But in this case the* 15 " *contract is indivisible, and it is impossible to deal with the defendant's* " *shale apart from the rest of the contract.* The defendant company have " leased to the plaintiffs their retort and refinery works, plant and machin- " ery, and undertake to supply them with shale from their adjoining mine " free of cost, the plaintiffs undertaking to sell to the defendant company 20 " the kerosene and gasoline obtained from the shale at a fixed price. " In other words, instead of the defendant company manipulating their " own oil, the plaintiffs are to manufacture the oil from the defendants' " shale by means of the defendants' works and machinery, and to sell " the manufactured article to the defendants for a fixed price. That being 25 " so, *if the plaintiffs had to go into the market to buy shale the whole character* " *of the contract would be altered.* I think, therefore, that the first ground " of demurrer fails." (The italics are mine).

Some assistance can also be derived from *Nutbrown* v. *Thornton* (1804) 10 Ves. Jun. 159; 32 E.R. 805, a decision of Lord Eldon. The case was 30 not one for specific performance of a contract but involved the somewhat analogous equitable jurisdiction to order the specific return of chattels. Lord Eldon made an order for return of the chattels on the grounds that damages would not be an adequate remedy as the chattels had been in the 35 possession of the plaintiff, as a tenant of the defendant, under what Lord Eldon described (at p. 164) as " an entire contract for the estate and " the chattels; the enjoyment of the latter being requisite for the enjoyment " of that estate ". There is an obvious analogy between a contract for the sale of a chattel and a contract to advance money. In both types of 40 case the basic reason for the refusal of a Court of Equity to assume jurisdiction is the adequacy of the common law remedy. Both *Nutbrown* v. *Thornton* and *Fell* v. *New South Wales Oil & Shale Co.* are authority for the proposition that a Court of Equity will not refuse jurisdiction in respect of an entire contract involving the sale of land because that contract 45 also involves chattels of a kind in respect of which, taken on their own, damages would be an adequate remedy.

The particular problem which I am discussing does not appear to be dealt with in any English or Commonwealth textbooks available to me. It is, however, discussed in the well known American textbook *5A Corbin* 50 *on Contracts*, para. 1159. The learned author comments :

> There are many cases in which compensation in money would be a fully adequate remedy for failure to render one part of a promised performance, but not an adequate remedy for failure to render another part. In such a case, if the other requisites for such a decree exist as to the latter part and if there is no reason for refusing a decree as to the former part other than the adequacy of

money compensation, a Court may properly decree specific performance of the whole.

The authorities referred to appear to be instances of contracts for the transfer of land and personalty but, unfortunately, most of the reports are not available here. 5

The agreement in the present case is in an unusual form, and it is not surprising that there is little authority directly in point. I have accordingly attempted to approach the matter in accordance with well settled principles of Equity and in so doing have reached the conclusion that the Court has jurisdiction to decree specific performance of the entirety of 10 the appellant's composite undertaking. In my view this jurisdiction exists, notwithstanding the form of the contract, as fully as if the contract had expressly provided that part of the purchase price should remain on loan to the purchaser.

Having reached this point, I believe that the respondent is entitled to 15 a decree of specific performance " as much of course as damages are given " at law " unless circumstances are shown to exist which make the agreement " objectionable " in accordance with the fixed rules and principles which govern the Court's discretion to refuse a decree (cp. *Williams on Vendor and Purchaser*, 4th ed. 40). 20

However important the form of the agreement may be when deciding whether it is of a kind which may properly be enforced by a decree of specific performance, I think that any question of discretion should be decided against a background of the real effect of the transaction. In my view the evidence shows quite clearly that this is a case in which it 25 suited the appellant, who was anxious but unsuccessful in his attempts to sell the land at a price considerably higher than that suggested by Mr Lochore, to accept the offer of the full price made by the respondent on the special conditions set out in the contract. These special conditions seem to have been quite to the appellant's own liking—he said in evidence 30 that he was " prepared to leave some money on unsecured mortgage " because he " would have a reasonable amount of income coming in from " that ". It suited the respondent, on the other hand, to pay a high price provided he could purchase on very generous terms. That was the effect of the transaction, whether settled strictly by an exchange of money or 35 cheques on the date for settlement, or less strictly by giving credit for the amount of the loan against the purchase price.

In these circumstances I do not think that the learned Chief Justice approached the exercise of his discretion on a basis that was wrong in law. This was a bargain made between competent parties and of a kind from 40 which both parties stood to derive benefits that appealed to them. The only real ground on which the appellant could have asked the Court to refuse a decree in its discretion is the risk of hardship to the appellant arising from the financial position and prospects of the respondent. In my opinion, however, it would have been necessary for the appellant to 45 have obtained more detailed evidence as to the financial position of the respondent before the Chief Justice would have been justified in exercising his discretion against the respondent. No particulars were sought or given regarding assets possessed by the respondent. See *Gurney* v. *Gurney (No. 2)* [1967] N.Z.L.R. 922, 927, 928, where T. A. Gresson J., in 50 this Court, referred to a number of cases on this topic. The observations of Lord Langdale M.R. in *Neale* v. *MacKenzie* (1837) 1 Keen 474 ; 48 E.R. 389, are particularly in point. He said : " I do not say that insolvency " would not be a ground upon which the Court would refuse specific

" performance, but the insolvency must be proved in some satisfactory
" manner . . . but there must be such proof of general insolvency as the
" Court can act upon, and as Judges upon great consideration have deemed
" sufficient to indicate that state of circumstances ; and there does not
5 " appear to me, in the present case, to be such evidence of general in-
" solvency as can induce me to say that the plaintiff is not in a situation
" to perform the covenants contained in this lease."

As T. A. Gresson J. rightly said, the question is always one of fact and degree and even if this had been an appeal on fact as well as law I
10 would have hesitated to have interfered with the discretion of the learned Chief Justice who had the opportunity of seeing and hearing the witnesses.

I confess that I wish this matter had been pursued further in the Supreme Court, particularly as it was the real ground on which the appellant repudiated the agreement. Mr Inglis said that he had been discouraged
15 from pursuing the matter by the Chief Justice, but he did not say that he had objected to this, nor has the appellant made the wrongful rejection of evidence a ground of this appeal. In these somewhat unsatisfactory circumstances, it seems to me that in this Court the matter can only be dealt with on the evidence as it stands. In the light of that evidence I
20 feel quite unable to say that the learned Chief Justice failed to exercise his discretion or exercised it in a way which can be regarded as wrong in law.

There is one other aspect of the case to which I think it desirable to refer in some detail. No suggestion was made to us by Mr Cahill that the respondent would be willing to accept specific performance as to the land
25 only and damages as to the loan. The question arises whether the respondent ought to have been content with such a remedy. If it should then it cannot complain as being left entirely to its common law remedy for damages. The matter may fairly be tested by asking the question—Would the Court have thought it just to decree specific performance in relation to
30 the land only if the respondent had indicated that it was prepared to submit to a judgment in that form if the Court saw good reason to refuse specific performance of the entire contract ?

In *36 Halsbury's Laws of England*, 3rd ed. 351, the statement is made that " The Court may enforce specific performance of one part of
35 " the contract and award damages for breach of the remainder ". The cases cited in support of this proposition show that this jurisdiction is derived from Lord Cairns's Act (which is in force in New Zealand—*Ryder* v. *Hall* (1908) 27 N.Z.L.R. 385; 7 G.L.R. 442 (S.C.); 8 G.L.R. 521 (C.A.)). They are not, however, helpful as to the basis on which the Court's
40 discretion to award damages in lieu of specific performance should be exercised in a case such as the present one. *Soames* v. *Edge* (1860) John 669 ; 70 E.R. 588 and *London Corporation* v. *Southgate* (1868) 17 W.R. 197 were both cases in which the plaintiff was willing to waive performance of a part of the contract which was of too uncertain a nature for the Court
45 to enforce. They are basically of the same nature as *Whittle* v. *Carrol* (1901) 19 N.Z.L.R. 716 : 3 G.L.R. 218 where the plaintiff waived performance of an unenforceable but severable part of the agreement. In that case (at p. 720) the question of damages was reserved. Reference may also be made to *2 Williams on Vendor and Purchaser*, 4th ed. 1046, and to the various
50 authorities there cited. I do not myself think that these cases have any application to the present case. It is easy to understand that the Court, when confronted with a contract the entirety of which it *cannot* enforce, will do its best to assist a purchaser, who is willing to waive the unenforceable part, as against a defaulting vendor. In the present case, however,

the question would be whether the Court is prepared to assist a defaulting vendor as against a purchaser who does not wish to waive any part of the performance of an entire contract all of which *can* be enforced by the Court.

The discretion under Lord Cairns's Act is an unfettered one. I doubt whether it can be exercised at all in respect of one part only (of an essential kind) of an indivisible contract. If it can, then I myself would not have exercised that discretion in the present case unless satisfied that the respondent would in truth and fact (as opposed to legal fiction) be placed, from a business point of view, in substantially as good a position as if he had obtained actual performance of his bargain. I could not feel so satisfied. There is, indeed, no evidence that the respondent would be able to obtain an *unsecured* loan of £11,000 from other sources at all. There would be too grave a risk of injustice in arbitrarily depriving the respondent of some of the fruits of its composite bargain. I think it fair to say (using the language of Owen J. in *Fell* v. *New South Wales Oil & Shale Co.* (*supra*)) that if the respondent had to go into the market to raise an unsecured loan of £11,000 elsewhere the whole character of the contract would be altered. It was the bargain as a whole that attracted Mr Francis. Why should his company not be allowed to enjoy it ?

I conclude that the respondent ought not to be deprived of the benefit of the decree made by the Chief Justice because it might possibly have chosen to seek a hybrid remedy of a much less satisfactory nature.

As regards the question of "mutuality" and "readiness and willing- "ness" I agree with the views already expressed by the President and by Turner J. I should add, however, that in my view there was sufficient evidence before the Court to justify a finding that the respondent was ready and willing to perform its part of the contract. Actual tender of performance was, of course, waived by the appellant when he repudiated the contract.

For my part I would dismiss this appeal.

Appeal allowed.
Case remitted to the Supreme Court to assess damages for breach of contract.

Solicitors for the appellant : *Treadwells* (Wellington).
Solicitors for the respondent : *Devine, Crombie and Cahill* (Wellington).

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD.

I, GERALD JOSEPH GRACE, Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 51 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing: 10
AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this th day of April 1969. 20

G.J. GRACE
Registrar

L.S.

IN THE PRIVY COUNCIL

No. 9 of 1969

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION OF AUSTRALASIA LIMITED

Appellant

AND

MANUS BONNER

Respondent

RECORD OF PROCEEDINGS

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