Privy Council Appeal No. 9 of 1969

The Loan Investment Corporation of Australasia Limited – *Appellant*

v.

Manus Bonner – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 11TH DECEMBER 1969

Present at the Hearing:
LORD HODSON
VISCOUNT DILHORNE
LORD DONOVAN
LORD PEARSON
SIR GARFIELD BARWICK

(*Majority Judgment delivered by* LORD PEARSON)

The parties entered into a written agreement dated 27th February 1967. It was a composite agreement, providing both for a sale of land and a loan of money by the respondent (Mr. Bonner) to the appellant company (The Loan Investment Corporation of Australasia). It has been decided and is not now disputed that the respondent wrongfully repudiated the agreement and is liable to the appellant company for the breach of contract thereby committed. The sole question now at issue concerns the appropriate remedy. Should an order be made, as desired by the appellant company, for specific performance of the agreement, or should damages only be awarded?

In view of the wide range of the matters discussed in the judgments and the arguments as bearing on the exercise of the equitable jurisdiction of the Court, it is desirable to describe the history of the transaction and refer to some parts of the evidence given at the trial.

Early in February 1967 the respondent, being the owner of two dwelling houses Nos. 5 and 7 Ranfurly Place, Wellington, New Zealand, instructed a firm of land agents, Messrs. R. F. Lochore and Company, to find a purchaser for these houses. Mr. R. F. Lochore, after inspecting the houses, advised the respondent that £11,000 would be a reasonable price for the two of them. The respondent wanted a higher price but was willing to leave part of the price on first mortgage. It can be inferred from the evidence that the price asked for the two houses was £13,300. Two offers were received for the house No. 7 Ranfurly Place, one at a price of £6,500 and one at a price of £6,300, on the basis in each case that part of the money would be left on first mortgage at 7 per cent interest. The respondent was not satisfied with either of these offers considering that both the price and the rate of interest were too low. Mr. R. F. Lochore's son telephoned to Mr. Francis, with whom the Lochore firm had had previous dealings in property transactions, and asked him to come with him to inspect some properties, which included the respondent's two houses. Mr. Francis was the governing director and virtually the sole shareholder of the appellant company. Mr. Francis after a brief and merely external inspection of the two houses said to Mr. Lochore junior "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." They went back to the office of the Lochore firm and informed Mr. R. F. Lochore of the proposed offer, and Mr. Francis asked Mr. R. F. Lochore to draw up the necessary documents, saying that he would sign them on behalf of the appellant company.

Mr. R. F. Lochore drew up a document of offer and acceptance, and his son took it round to Mr. Francis. Mr. Francis signed the document, and drew a cheque for £300 for the deposit on the proposed purchase, and pinned the cheque and a copy of the appellant company's brochure on the document. The brochure was advertising the appellant company's business and seeking to obtain unsecured loans. One of its paragraphs stated:

> "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."

The documents were taken back to the office of the Lochore firm, and the respondent was invited to call there and see them. Having seen them he signed the document of offer and acceptance, which then became the agreement between the parties. There may have been a further deposit of £200 paid in addition to the £300, but nothing turns on that. The agreement was as follows:

"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 purchase 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."

On 6th March 1967 the appellant company's solicitors wrote to the respondent's solicitors, sending a transfer and asking for a settlement statement and promising to have the appropriate deposit note available. Completion, however, did not take place. The respondent's solicitors, when he showed them the agreement which he signed, advised him not to proceed with it. On 23rd March 1967 they wrote to the appellant company's solicitors, saying that they had been instructed to rescind the contract and that accordingly they on behalf of the respondent released the appellant company " or its principal whoever that may be " from all liabilities and obligations thereunder, and they had authorised R. F. Lochore and Company to refund the deposit to the appellant company. That was the repudiation of the agreement. The rest of the correspondence is not relevent to the question now in issue.

The appellant company commenced an action against the respondent, and their Statement of Claim, which was dated 10th May 1967, set out the history of the transaction and the necessary allegations and claimed an order for specific performance or in the alternative, if specific performance could not be had, £1,500 damages. The respondent's defence, in addition to traversing a number of the allegations in the Statement of Claim, alleged that the respondent's acceptance of the offer had been obtained by a misrepresentation, made by Mr. R. F. Lochore, to the effect that the offer was from a member of the Lamphouse Group of Companies. In paragraph 6 it was alleged that Mr. R. F. Lochore held himself out to the respondent to be acting as agent for the said member of the Lamphouse Group of Companies. In paragraphs 13–16 it was alleged that Mr. Lochore was acting as agent for the appellant company and that he made the misrepresentation fraudulently. In paragraph 18 it was alleged in effect that, as the appellant company knew or ought to have known, the respondent had no intention of contracting with them. There was no plea that specific performance of the agreement should be refused on any grounds of hardship or unfairness or oppression apart from the misrepresentation alleged.

At the trial of the action before the Chief Justice of New Zealand evidence was given by (among others) Mr. Francis, Mr. R. F. Lochore and the respondent. Mr. R. F. Lochore utterly denied the alleged misrepresentation: he said that he never mentioned the word " Lamphouse " to the respondent. His evidence was accepted, and the respondent's contrary evidence was rejected. There was some cross-examination of Mr. Francis about his own position and that of the appellant company. He was 22 years old at the time of the trial and he held all the shares in the appellant company except one. Of the appellant company's capital of $202,000 about $74,000 had been paid up. Registered charges against the company amounted to about $65,400. There was a debenture to the Bank of New Zealand for advances. Mr. Francis, when asked whether the appellant company could have produced £11,000

in cash on 7th March, mentioned a property in which they had an equity of £10,000 to £12,000. Otherwise there was no evidence as to the appellant company's assets or as to the value of them or as to the amount borrowed on the security of the debenture. When questioned about his quick decision to make the offer for the respondent's two houses, he gave this explanation:

> "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."

The respondent was previously a building supervisor for the New Zealand Forestry Department, but had been for about three years up to the time of the trial a teacher of mathematics in Wellington.

Before coming to the grounds of decision in the judgments, it is convenient to point out that on the face of the agreement there is a serious uncertainty as to the identity of the purchaser. The offer is stated to be by the appellant company "as agent". In clause 9a it is stated that the loan is to be "personally guaranteed by the purchaser, *Michael G. Francis.*" The "signature of purchaser" is "M. G. Francis as agent". The President of the Court of Appeal in his judgment, after calling attention to these statements, said that no point had been made by the respondent regarding these conflicting statements and throughout the proceedings in the Court below and in the Court of Appeal the respondent's counsel was content to accept the position that the appellant company was the purchaser. The same attitude has been maintained by respondent's counsel in the present appeal. There might still be doubts about the propriety of ordering specific performance of a manifestly uncertain agreement, though perhaps rectification of the agreement might enable this to be done if the necessary procedural steps were taken. However, as in their Lordships' opinion the claim for specific performance should fail on other grounds, it is not necessary to deal further with this question of uncertainty.

The Chief Justice, who tried the action, decided in favour of the appellant company and ordered specific performance of the agreement. His reasons were stated in the following passage:

> "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 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 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 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 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'."

In the Court of Appeal the appeal was allowed by a majority, consisting of the President and Mr. Justice Turner with Mr. Justice Richmond dissenting.

The President cited authorities showing the general rule that a contract to lend money cannot be (or will not be) specifically enforced. *Rogers v. Challis* (1859) 27 Beav. 175; *Larios v. Bonany y Gurety* (1873) L.R. 5 P.C. 346, 354; *South African Territories v. Wallington* [1897] 1 Q.B. 692, 696 and [1898] A.C. 309, 312. He also cited the judgment of Parker J. in *Starkey v. Barton* [1909] 1 Ch. 284, 290 as showing that specific performance can be granted in a case where the contract "is not 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". The President said that in his experience the Courts of New Zealand had 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. He also said "Although there appears to be an absence of authority, I see no reason to doubt that a Court would have jurisdiction to grant specific performance 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 President did not agree with the interpretation placed by the Chief Justice on the agreement in this case. Basing his view mainly on the form of the agreement, the President held that clause 9a (which provided for the unsecured loan of £11,000 on deposit) was to be treated as a separate and distinct stipulation, and fell within the line of authority that an agreement to lend money will not be enforced by a decree for specific performance. He took this view although he agreed that the two provisions (for the purchase and sale of the land and for the unsecured loan of £11,000) were in a sense interdependent. The President went on to consider what the position would be if the contract should be regarded as one and indivisible, and came to the conclusion that even on that construction of the contract a decree for specific performance of the entire contract would be refused and the appellant company would be left with their claim for damages. He cited a New Zealand case decided by Mr. Justice Williams—*Samson v. Collins* (1910) 29 N.Z.L.R. 1163. In that case there was an agreement for the plaintiff to sell to the defendant a motor car for £475 and to lend to her £100, and for the £475 and the £100 to be secured by the execution by the defendant in favour of the plaintiff of a security over the car and certain furniture and effects. The judge having cited *South African Territories v. Wallington* (*supra*), decided that there was an essential and inseparable part of the contract which the Court could not perform, and therefore the plaintiff was not entitled to specific performance. The President also said "If the construction of the contract adopted by the learned Chief Justice had been right then 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." He said that specific performance would be granted as a matter of course in the case of an ordinary contract for the sale of land, but the contract in this case could not be so regarded. He also said that, if he had come to the conclusion that it was within the jurisdiction of the Court to make an order for specific performance of the entire contract, he would have been disposed to favour 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 which the President had placed on the contract. He added " There are a number of very unsatisfactory features about this case which have left me uneasy."

Mr. Justice Turner in his judgment agreed with the President's interpretation of the contract and supported it with additional arguments. He said " 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 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 . . . obligations . . . are severable. Once this point is reached it follows that whether or not the Court decided upon granting specific performance of the appellant's " (i.e. the present respondent'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." Mr. Justice Turner also held 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. After reviewing the evidence, he came to the conclusion that the appellant company decided to enter into this contract for the purchase of land not with the object of becoming owners of a particular piece of real property, to which they attached importance, but simply so as to acquire an unencumbered asset capable of being sold or mortgaged so as to raise finance. He said " 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."

Mr. Justice Richmond, in his dissenting judgment, said, with reference to the authorities relied on as showing that no specific performance of a contract to lend and borrow money can be granted, that " 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 borrower can obtain money elsewhere and, if he has to pay more for it, he may sue for damages." He disagreed with the view of the Chief Justice that the agreement between the parties was 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. He agreed with the President that the parties were bound by the form in which they expressed their contract. He said " It is, in my view, impossible to escape the conclusion that the price being paid by the " (appellant company) " is being paid not only for the land but also for the loan. Put in another way, the " (respondent'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 forming a composite and indivisible undertaking on the part of the " (respondent). " Further, it is not possible to say that either of these undertakings on the part of the " (respondent) " 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. . . .

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." Mr. Justice Richmond came to the conclusion that specific performance of the composite contract should be granted, considering that damages should not be regarded as an adequate remedy because 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, and that the respondent's obligation to make a loan could be specifically enforced as "a contract is not, however, unenforceable merely because it involves a loan". He said "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" (respondent) "arising from the financial position and prospects of the" (appellant company). "In my opinion, however, it would have been necessary for the" (respondent) "to have obtained more detailed evidence as to the financial position of the" (appellant company) "before the Chief Justice would have been justified in exercising his discretion against the" (appellant company) ". . . . 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 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."

In view of the full consideration given to the questions involved in the judgments of the Court of Appeal, their Lordships can state their conclusions fairly shortly as follows.

(1) The contract was a composite contract. In seeking to ascertain what it was composed of, there is a need to recognise and notionally separate the two transactions which were combined in it. One was a transaction of sale and purchase of land at the price of £13,300. The other was a transaction of lending and borrowing £11,000 without security for a term of 10 years with interest in the meantime at 7½%. Each was a principal transaction: neither was subsidiary or subordinate or ancillary to the other. On the other hand the contract was entire and indivisible according to the intention of the parties, as it may be inferred from the provisions of the contract and the relevant surrounding circumstances. Presumably the respondent would not have been willing to make the unsecured loan for 10 years unless he was going to receive the high price that he asked for his land. Presumably the appellant company would not have been willing to pay the high price for the land, unless they were going to receive the unsecured loan for 10 years. The consideration given by the appellant company was a twofold promise (i) expressly, to pay the price for the land and (ii) by necessary implication, to receive the loan and pay interest on it and repay the capital after the lapse of 10 years. The consideration given by the respondent was a twofold promise to convey the land and make the loan.

(2) The interpretation which the Chief Justice placed upon the contract was incorrect. The contract was neither in form nor in substance an ordinary contract for the sale of land with a usual ancillary provision for part of the price to remain on loan from the vendor to the purchaser. It is quite usual for part of the purchase price to remain on loan secured by a mortgage. That is a natural arrangement, as there is good security for the outstanding amount, the vendor in effect retains a partial interest in the property, and he has a solid and readily saleable asset. It is not usual, and indeed it is surprising, that a vendor should be willing to lend to the purchaser for a long period without security an amount equal to the greater part of the purchase price, five-sixths in this case. The form of the contract is a good *prima facie* guide to its nature and character, but ultimately the substance is more important. If a composite contract includes what is in substance and reality a long-term unsecured loan, the loan ought not to be treated, when specific performance is sought, as something different simply by being connected with a sale of land.

(3) An order for specific performance is a discretionary remedy. There are some very firmly established rules for the exercise of the discretion, but none of them covers this case. A mere contract for a loan of money

will not be specifically enforced. An ordinary contract for sale and purchase of land will be specifically enforced. Such a contract will be specifically enforced, even if it includes an ancillary provision for part of the purchase price to remain on mortgage. This last rule might or might not be extended to cover contracts for sale and purchase of land with other ancillary provisions (in the nature of " machinery provisions ") as to the payment of the price, e.g. for payment of the price by instalments—perhaps covered by bills of exchange or promissory notes—or simply for deferred payment of part of the price. Such contracts, whether or not they would be suitable for specific performance, are distinguishable from the present composite contract, in which the long-term (or perhaps one should say medium-term) unsecured loan is not ancillary to the sale of land but is a principal transaction in itself.

(4) There is an obvious objection in principle to granting specific performance of an unsecured loan. It would have a one-sided operation, creating a position of inequality. The borrower obtains immediately the whole advantage of the contract to him, namely the loan itself—a sum of money placed completely at his disposal. The lender on the other hand has to wait and hope for the payment of interest from time to time and for the eventual repayment of the capital. The Court has means of compelling a party to pay a sum of money if he is able to do so. But no writ of attachment or sequestration or other equitable process can compel the borrower to repay the loan, if when the time comes at the end of the period he has not enough assets to enable him to do so. This objection in principle may not prevail in exceptional cases.

(5) This composite contract was predominantly in the nature of a commercial bargain. The appellant company wanted the property not for their own use but for selling, letting, mortgaging and perhaps developing, and they wanted the loan to help in financing their business generally. As has been stated, this is not a mere or ordinary contract for the sale of land, but a composite contract in which the other part, the provision for a loan, is not ancillary but a principal transaction. If the appellant company can show that they have been deprived of a good bargain by the respondent's wrongful refusal to carry it out, they are entitled to proper damages. On the whole, damages are a sufficient and suitable remedy, and the special remedy of specific performance should be refused. The decision of the Chief Justice does not stand in the way, because it was based on an incorrect interpretation of the contract. The decision of the majority of the Court of Appeal should be affirmed.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant company should pay the costs of the appeal.

(*Dissenting Judgment by* SIR GARFIELD BARWICK)

I regret that I am unable to concur in the advice which the majority of their Lordships who heard this appeal propose to tender to Her Majesty; or in their reasons therefor. Her Majesty is to be advised that this appeal should be dismissed. In my respectful opinion it should be allowed and the order of the Chief Justice of New Zealand restored. I shall state my reasons for advising such a course as briefly as possible, though because of the fundamental principles of the equitable jurisdiction of the courts which are involved in the resolution of this appeal, those reasons cannot be shortly stated.

In the reasons proposed to be given by their Lordships, which I have had the advantage of reading, the facts and circumstances of the case and the course of judicial decision to the present time are set out. Consequently, I have no need to reiterate all of them. But I would wish to add my own emphasis to some of the facts which were established before the learned Chief Justice who tried the case and discuss some of the reasons expressed by the majority of the Court of Appeal.

The respondent, when instructing his agent to sell his two properties for a sum considerably in excess of what the agent considered their market value to be, told the agent that he was prepared in the event of sale—presumably at the high price—to leave part of the purchase money, as the agent recalled, on "first mortgage", but as the respondent told the Chief Justice "on unsecured mortgage". He also wanted a considerable rate of interest to be paid on any amount left in the hands of the purchaser. Thus the proposal of the appellant's agent that as one of the terms of the purchase of the land, the respondent should "deposit approximately £11,000 back to my Land Investment Company" was conformable, except as to amount, to the respondent's instructions. On being apprised of the offer to purchase, including the amount of money to be left in the appellant's hands, the respondent accepted it: and, as the agent's wife, who was present at the time, said, "he was quite happy" with it. When making the offer to purchase, the appellant's agent, on his own initiative, furnished for perusal by the respondent a brochure, which not merely advertised the appellant's business but described the particular nature of its activities and the method by which it hoped to finance them, including the solicitation and acceptance from the public of "deposits", i.e. unsecured term loans at interest. This practice of investment companies seems to be well known and understood in New Zealand: the respondent's agent was able in evidence to refer to a standard practice among investment companies in the acceptance of unsecured term deposits and to produce a newspaper advertisement in connection with such a practice. The respondent received the brochure and before acceptance of the appellant's offer to purchase read it through carefully.

Thus a transaction by which the respondent's land was to be transferred in unencumbered fee simple to the appellant against the payment of a relatively small sum of money in cash and the acceptance by the appellant of an obligation to pay £11,000 in ten years' time with interest in the meantime at 7½% per annum payable quarterly was one which the respondent not only understood but with which he was completely satisfied. He accepted the purchaser's proposal consciously under no inducement of any kind and with a complete understanding of what it involved.

However, when, after being advised by a solicitor who evidently disapproved of the making of any such unsecured deposits, he decided that he would not go on with the transaction, he sought to avoid its obligations by asserting, untruly as the Chief Justice who saw him and heard his evidence thought, that he had been induced to accept the appellant's proposal by the misrepresentation of the agent whom he had employed but whom he asserted, again falsely, had put himself forward as the representative of a group of companies which the respondent called the "Lamphouse Group of Companies". The suggested representation was that the appellant was a "member of the Lamphouse Group of Companies". Of this group the respondent agreed in evidence that he knew nothing "except that it was a name and dealt in property". Apparently, according to the agent's evidence, there was a company whose name included the word "Lamphouse" which also accepted term deposits and issued deposit receipts therefor.

The pleadings in the case have already been referred to. The only contested fact at the trial was as to the making of the representation. As I have said the respondent was not believed when he said it had been made. A half-hearted attempt was made in cross-examination to obtain an admission by the governing director of the appellant that the appellant was not, or would not by the appointed day for settlement have been, in a position to lay on the settlement table the full balance of the purchase price in cash. This endeavour, as will appear, was, in my opinion, based upon an erroneous view of the written contract into which the parties entered: and in any case was inconclusive. No real examination was had at the trial as to the financial stability of the appellant or as to its

financial prospects. No doubt the company was young and its management optimistic and perhaps venturesome: but no suggestion was made of dishonesty on the part of those responsible for its affairs. I can find no material whatsoever in the evidence on which I could judicially make or support any finding or express any view as to the soundness or the unsoundness of making a deposit with the appellant for such a sum as £11,000 on the terms which the respondent, by no means an illiterate or inexperienced man, found acceptable and to his liking. But as will appear, I would in any case consider a conclusion on that point irrelevant to any issue arising in this case.

No defence of hardship, inequality of position, over-reaching or any other defence of an equitable kind was pleaded or set up at the hearing. At the conclusion of the trial the Chief Justice said that the contract was a valid contract binding the respondent. That finding is not challenged: but the order for the specific performance of the contract was set aside on appeal by the Court of Appeal upon a construction of the writing executed by the parties. The respondent's agent prepared the writing which is set out in the reasons to be given by the majority of their Lordships. Several other reasons for not granting specific performance were also expressed by the majority of the Court of Appeal.

I will express for myself the reasons as I understand them to have been advanced in the judgments of the majority of the Court of Appeal for allowing the appeal to that Court. The actual ground on which the appeal was allowed was, in my opinion, that there were two distinct and separate though "inter-dependent stipulations" entered into by the same writing—one being an agreement for the purchase of the two parcels of land for a price of £13,300 payable in full in cash, the other being an agreement to lend £11,000 without security for a period and at the rate of interest stated. As there could not be specific performance of a mere contract to lend money and as specific performance of the contract to purchase the land for cash had not been sought the majority thought that the appeal to that Court should be allowed.

To my mind and with respect to the contrary view expressed by the President of the Court of Appeal, it is inescapable that the appellant could not have insisted upon performance of the promise to transfer the land without accepting the obligation to retain, and in due course, to repay the sum of £11,000 on the terms agreed. Equally, the respondent could not have insisted on performance of the purchase of the land without leaving £11,000 in the hands of the appellant on the terms set out in the writing. Of course, the respondent could have agreed to transfer the land upon payment of the price in cash in full and the appellant could have agreed so to pay the purchase price. But had the parties done so, they would not, in my opinion, have been performing the agreement on which the appellant sued: they would have made and performed a new and a different agreement. It could not, in my respectful opinion, properly be concluded that there were two separate contracts. My further reasons for thinking so will appear when I discuss the construction of the writing signed by the parties.

Having regard to the reference in the judgment of the Court below to *Heilbut, Symons & Co. v. Buckleton* (1913) A.C. 30, I would add that, in my opinion, the case cannot be regarded as one in which there was one contract collateral to another and supported by the consideration of the making of that other. There was, in my opinion, only one transaction between the parties, which, in my opinion, was a sale and purchase of land upon stated terms. I shall return later to enlarge on that conclusion. Meantime I ought to add that in any case the present is not a case in which it is necessary to consider whether specific performance of a severed portion of the contract can be granted. The only claim was to enforce the contract as a whole and the only defence to the claim to specific performance was that as a whole it ought not to be specifically enforced.

Consequently, the actual ground for allowing the appeal from the Chief Justice taken by the majority of the Court of Appeal is not in my opinion maintainable.

But other reasons were offered by the majority of the Court of Appeal why it might not be proper to grant specific performance, reasons which in the view of the President of the Court of Appeal would have resulted in a reference back to the Chief Justice for the exercise of a discretion whether or not to grant specific performance but which in the opinion of Turner J. would have led to an allowance of the appeal because his Honour concluded that such a discretion was exercisable only against the appellant.

Turner J. expressed the view that even if there were only one contract which was a contract for the sale and purchase of land it ought not to be specifically performed because the appellant:

> " . . . 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*' ".

Turner J. further thought that even if the transaction between the parties was a single contract for sale and purchase of land, specific performance should be refused in exercise of what was claimed to be a residual discretion to refuse specific performance though no presently recognised ground of equity for doing so had been pleaded or made out. I shall return later to discuss these reasons offered by the Court of Appeal as additional to the ground upon which it seems to me the majority allowed the appeal to that Court.

But at the outset the meaning of the contract must be determined. I pass by as, with due respect, entirely irrelevant in this appeal the suggestion that there may have been some uncertainty as to the identity of the purchaser. No question of this kind was raised by either party either in the pleadings or in the presentation of the case at the trial. It is apparent to my mind that there has been a foolish slip made in the typing of the agreement: but desperate and all as this respondent was for a defence, his advisers wisely felt a ground of uncertainty of the contract in this respect not sufficiently stable to warrant them seeking to build a defence upon it.

I turn to the words of the contract in order to ascertain the expressed intention of the parties. This involves a search for the substance of what the parties have expressed. A matter to be observed at the outset is that the agreement is in form an accepted offer to purchase land on stated terms and conditions, the land being described and the amount of the purchase price being fixed. There was clearly but one offer and one acceptance. The offer was conditional and the acceptance of the conditional offer was unqualified. The condition of the offer was not a condition to be performed before an agreement could result: but, a condition to be performed as part of the performance of the transfer of the land offered to be purchased.

The offer to purchase is made subject to Clause 9a of the offer, i.e. to the "deposit" on settlement by the respondent of the stated sum of money. The date for settlement is the date on which the respondent as

a vendor must make and transfer a title to the land in fee simple in possession free of encumbrances. The title to the land apparently was held under the *Land Transfer Act*, 1952 of New Zealand. In conveyancing practice, on the settlement day, title having been established the respondent would be required to produce a duly executed memorandum of transfer of the land to the appellant and the appropriate certificate of title and to place the appellant in possession of the land. What did the contract provide that the respondent should receive that day in exchange for that memorandum and certificate, provision having been made for the payment of a deposit? Clause 3 of the offer provided " the balance of the purchase price shall be paid 7th March 1967 ", which was the day of settlement. But Clause 3, like all the other terms of the offer was subject to Clause 9a, i.e. to the " deposit *on settlement* " of the agreed sum of money. What meaning is to be given to the word " deposit " in these circumstances?; and what meaning is to be given to the word " paid " in Clause 3, which does not call in express terms for payment in cash? The word " pay " can, of course, be satisfied otherwise than by the delivery of cash or cheque. If on settlement the appellant handed over £2,000 in cash and a deposit receipt acknowledging its indebtedness to the respondent for the stated sum on the stipulated terms, along with a guarantee by Michael Francis of the payment of such sum at the time and in the manner stipulated, including the payment of interest meanwhile, would not the appellant have tendered payment of the balance of the purchase price for which Clause 3 called?: and would not the respondent by accepting that tender have " deposited " with the appellant the agreed sum in the agreed terms? In my opinion, the payment for which Clause 3 read with and subject to Clause 9a called was such a tender. Equally, in my opinion, the deposit for which Clause 9a called was the acceptance at the moment of settlement of the appellant's deposit receipt, evidencing its promise to pay £11,000 in the stated terms. This was both the form and the substance of the conditional offer accepted by the respondent. This is not, in my opinion, merely to state the effect of the carrying out of the conditional promise to pay the purchase price. It is what the promise itself properly understood requires. Put another way, and viewed from the vendor's side, the respondent's promise is to transfer the land upon receipt of the cash difference and the appropriately acknowledged and guaranteed promise of the purchaser to pay £11,000 as stipulated, thus leaving in the hands of the appellant, as purchaser of the land part of the money which but for the paramount condition of Clause 9a of the agreement would have been payable to the vendor on settlement. It is no departure, in my opinion, from either the form or the substance of the agreement between the parties to say, as the Chief Justice said, that there was in the agreement to purchase the land a promise that part of the purchase money remain on loan with the purchaser. That expression does describe a provision by which the vendor accepts a promise to pay money as upon a loan in satisfaction of part of the purchase price. Had the purchaser not been an investment company seeking money on deposit from the public and issuing deposit receipts as evidencing the promise to repay the amount deposited, no doubt the transaction would have been expressed in such a way that the £11,000 was described as the balance of the purchase money payable as stipulated, no vendor's lien being available in New Zealand. But because of the nature of the purchaser's business the same result was to be attained by evidencing as a " deposit " the promise to pay so much of the purchase price as was not to be paid over in cash on settlement. With great respect to those who entertain a different view I am of opinion that there was here but one transaction expressed in one agreement and that it was essentially a contract for sale and purchase of land, one of the terms being that £11,000 should be left in the purchaser's hands to be regarded as a " deposit " upon the stipulated terms. I am quite unable to regard the transaction as in substance or in form an agreement for an unsecured loan to which in some fashion a purchase of land was tacked on, almost as it were, as an inconsequential accessory. It is true that the legal basis on which the money was to remain in the appellant's hands was that of loan: but that is not the same thing as saying that the respondent

agreed to lend the appellant money in the sense that the respondent on settlement was to produce and hand over any money. As I mention later the order for specific performance of this agreement, in my opinion, would not order the appellant to pay to the respondent more in cash than £2,000 nor would it order the respondent to pay or to lend any money to the appellant.

But it is said that if the parties entered into one contract and not two independent contracts, the contract was a "composite contract" with two separate transactions comprehended within it, each of which is a principal transaction and neither of which is subsidiary, subordinate or ancillary to the other. With due respect I do not understand how the conditional offer when accepted can result in two contracts or two transactions: and particularly two principal transactions. No doubt the legal basis of the "deposit" in this case was that of money lent which would be the appropriate cause of action on which the money would be recovered. It would also be true that after the sale and purchase had been concluded there would remain the relationship of borrower and lender between the appellant and the respondent. But neither of these circumstances, in my opinion, require or justify the conclusion that the offer which was accepted was other than an offer to purchase the properties on terms which included the condition that the appellant should not be called upon on settlement to pay the balance of the purchase price in full in cash. The specification of the legal mechanism by which that result was to be achieved did not, in my opinion, convert a single transaction into two transactions.

Having regard to some expressions in the judgments of the majority of the Court of Appeal, it is now necessary to examine again what is the basis for an order for specific performance rather than an order for the payment of damages.

Vice-Chancellor Kindersley in *Falcke v. Gray* (1859) 4 Drew 651; 62 E.R. 250 a case in which he granted specific performance in relation to a contract to purchase chattels, said this:

> "What is the difference in the view of the Court between realty and personalty in respect to the question whether the Court will interfere or not? Upon what principle does the Court decree specific performance of any contract whatever? Lord Redesdale in *Harnett v. Yeilding* (2 Sch. & Lef. 549) says: 'Whether Courts of Equity in their determinations on this subject have always considered what was the original foundation for decrees of this nature I very much doubt. I believe that from something of habit, decrees of this kind have been carried to an extent which has tended to injustice. 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'. So that the principle on which a Court of Equity proceeds is this. A court of law gives damages for the non-performance, but a Court of Equity says 'that is not sufficient—justice is not satisfied by that remedy'; and, therefore, a court of Equity will decree specific performance, because a mere compensation in damages is not a sufficient remedy and satisfaction for the loss of the performance of the contract."

In my respectful opinion. Lord Redesdale's explanation of the expression "damages is not an adequate remedy" which is quoted by the Vice-Chancellor is appropriate to the present case when he says that it means that an award of damages would not put the plaintiff "in a situation as beneficial to him as if the agreement were specifically performed". It is because in general an award of damages for the non-performance of an agreement to lend money whether on security or not does place the intended borrower in as beneficial position as he would have been in had the promise to lend the money been performed, that specific performance is in general refused of a contract to lend

money. It is not refused, in my opinion, because the Court cannot supervise the re-payment of the money lent or because of any supposed inequality between the position of the lender and the borrower in the case of an unsecured loan or of any difficulty in ordering the payment of money. It is solely, in my opinion, because, in general, damages will place the plaintiff seeking to enforce the promise to lend in as beneficial position as he would have been had the money been lent to him on the agreed terms. However, though generally this is the position, in my opinion, it is erroneous therefore to conclude that a contract to lend money can never in any circumstances be ordered to be specifically performed. In this connection see *Rogers v. Challis* (1859) 27 Beav. 175; 54 E.R. 68; *Larios v. Bonany Y Gurety* (1873) L.R. 5 P.C. 346 and *South African Territories v. Wallington* [1898] A.C. 309. None of the reasons offered for refusing specific performance in these cases lend colour, in my opinion, to the proposition that equity will never in any circumstances order specific performance of an agreement to lend money: nor, and perhaps this is more significant in this case, to the proposition that equity will not grant specific performance of a contract otherwise specifically enforceable merely because one of its terms calls for a loan of money by one of the parties to the other. The Courts of Equity last century found that whilst an agreement to sell consols would not be specifically performed because of their ready availability in the market, specific performance would be granted of a promise to sell shares in a company which were not so readily available. They did so because a mere difference in price reflected in an award of damages did not do justice in the circumstances. The possession of the particular shares was an advantage which a money verdict did not necessarily replace; see *Duncuft v. Albrecht* (1841) 12 Sim. 189; 59 E.R. 1104.

No doubt the general assumption is that damages for breach of a mere promise to lend money adequately compensates the would be borrower. But, in my opinion, that assumption of fact is not necessarily of universal validity and, again in my opinion, must yield in any case when in fact in the particular circumstances damages would not do justice between the parties. So it seems to me that equity in the more complicated situations of the modern world may well yet find an occasion when justice can only be done in relation to a contract merely to lend money by ordering its specific performance. But whatever the position as to a promise which is no more than a promise to lend money, I can see no reason in principle why the presence of a term in a contract that money shall be advanced itself calls for a denial of the remedy of specific performance. Still less can I see any departure from principle in ordering specific performance of a contract to sell or purchase land where one term of the purchase is that money shall be left in the hands of one of the parties to be payable to the other on the basis of money lent rather than as a balance of purchase money. There is, as I have said, no difficulty whatever in ordering specific performance of an obligation to pay money; see for example *Beswick v. Beswick* [1966] 1 Ch. 538 (Court of Appeal) at p. 555 and pp. 560–1 and the cases there cited and examined, and see also that case in the House of Lords [1968] A.C. 58. See also *Beech v. Ford* (1848) 7 Hare 208; 68 E.R. 85 which is an example of specific performance of a promise to pay money where equity would give a better remedy than the court of law. But I should add, that as I interpret the contract between the parties, specific performance at the instance of the appellant does not involve an order for the payment of money by the respondent. The order in specific performance, in my opinion, would be that the respondent transfer and place the appellant in possession of the land on the tender of £2,000 accompanied by the appellant's promise, appropriately guaranteed, to pay £11,000 as stipulated, that promise to be evidenced by a deposit receipt in favour of the respondent.

Reliance was placed by the Court of Appeal on a decision of Williams J. in *Samson v. Collins* (1910) 29 N.Z.L.R. 1163; 13 G.L.R. 95 for the proposition that the presence of a term in a contract otherwise specifically enforceable of a promise to lend money required a refusal of the decree.

The plaintiff in that case had sold a secondhand motor car to the defendant for £475 and as a term of the purchase had agreed to lend the defendant £100, it being agreed that the defendant should give security over the motor car for the price of the car and the amount advanced. The car was delivered to the defendant but the sum of one hundred pounds was not advanced by the plaintiff. The defendant repudiated the contract on the ground of fraud inducing it. The plaintiff sued for specific performance of the agreement to give security or for damages in the alternative. Williams J. decided against the defendant on the facts but had this to say on the question of 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 then, as the defendant has received the motor car specific performance might be decreed: *Taylor v. Eckersley* (2 C.D. 302). 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* ([1897] 1 Q.B. at page 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 whether the loan is to be on security or without security, or whether the loan is to be for a fixed 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 contract remains executory. As was said by Lord Romilly, M.R., in *The Merchants' Trading Company v. Banner* (L.R. 12 Eq. at page 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 which the Court cannot specifically perform. I am therefore of opinion that the plaintiff is not entitled to specific performance."

It does not appear from the report of the case whether or not the plaintiff offered to advance the agreed sum, or agreed to submit to an order for the payment of such sum if the defendant insisted upon it. The finding that "there was one entire and indivisible contract" raised immediately, so far as concerned the grant of specific performance, the question whether damages would be an adequate remedy for the non-performance of the agreement as a whole. If it be right to conclude that damages would not be an adequate remedy for any part of the entire contract, then, as it seems to me, damages cannot be an adequate remedy for non-performance of the contract as a whole. Justice then requires the making of an order for specific performance. That that performance involves the loan of money, cannot, in my opinion, form an independent reason for refusing the order.

It seems to me, with due respect, that when Williams J. said that there was "an essential and inseparable part of the contract" meaning the agreement to lend £100 "which the Court *cannot* specifically enforce", he overstated the position as to specific performance of an agreement to lend money. It is not the position, in my opinion, that such a contract falls within that class of contract which a court *cannot* specifically enforce because for example, it involves personal services, or its terms are such that the court cannot supervise their execution. The position, in my opinion, is simply that the court will not grant specific performance because in general damages are an adequate remedy for the non-performance of the contract. As I have indicated, the court can and

does order the payment of money. There is nothing inherent in the promise to lend which, in my opinion, places specific performance beyond the court's capacity. But Williams J. treated the contract as if some part of it *could* not be enforced by the Court, hence his reference to Lord Romilly's decision in *The Merchants' Trading Company v. Banner* (1871) L.R. 12 Eq. 18. But, in any case, in the case before him, the Court would not have been required to order the loan of the money. It must, in my opinion, have been for the plaintiff seeking specific performance to have offered to advance the money as a condition of obtaining an order for specific performance. Failing such an offer, specific performance would properly have been refused, because having regard to the judge's finding as to the entirety of the contract, to order the giving of a security only for the price of the car would not have been to enforce the contract as a whole. That finding precluded specific performance as of a severable part of the agreement because there was no such part. Thus the actual decision in *Samson v. Collins* (*supra*) may be supportable on the facts but not, in my opinion, for the reason that an order for specific performance of a contract otherwise specifically enforceable must be refused because one of its essential terms was a promise to lend money.

In my opinion, once the contract is seen as a contract for the purchase of land on the stated terms, the case for specific performance is unanswerable. The passage in Vol. 36 of *Halsbury's Laws of England*, 3rd Ed. p. 264 cited by the Chief Justice, in my opinion, correctly states the law.

The basic reason for the conclusion that there should be an order for specific performance is that an award of damages will not put the appellant in a situation as beneficial to him as he would have occupied had the agreement to purchase the land on those terms been carried out: that is to say, that damages will not compensate for the non-performance of the whole of the terms of the contract. If the agreement is performed the appellant will have the land which in general is an appreciating asset certainly in places such as New Zealand (as to which possibility there was positive evidence in the case) against a very small outlay of cash, have a lengthy time in which to pay what was, in my opinion, in substance the balance of the purchase price. Indeed, I suspect that it is because of the singular advantage which performance of the contract as a whole would be to the appellant that there has been the noticeable reluctance to award specific performance. But the dominant reason for holding that damages cannot be a sufficient remedy is that the subject matter of the agreement was in whole or in part the transfer of land.

In this connection, it is said that because the appellant wanted the land as an asset to be sold or to be used as security for the raising of money it had no such peculiar or special value to him as justified specific performance. In my respectful submission this statement misconceives what was said by Sir John Leach in *Adderley v. Dixon* (*supra*) and the basis upon which specific performance of contracts for the sale and purchase of land apart from equitable defences is granted almost as of right. Lord Hardwicke in *Buxton v. Lister* (1746) 3 Atk. 383; 26 E.R. p. 1020 said:

> "As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade."

This to my mind gives the key to what Sir John Leach said in *Adderley v. Dixon* (*supra*). The plaintiff by selecting any piece of land for purchase thereby and without more manifests what Lord Hardwicke calls his "liking to the land" or as Sir John Leach said his "peculiar and special value" in it.

What Lord Justice Rigby said in *In re Scott and Alvarez's Contract. Scott v. Alvarez* [1895] 2 Ch. 603 at p. 615 is also in point:

> ". . . Now, the foundation of the doctrine of specific performance was this, that land has quite a character of its own, that the real meaning between the parties to a contract for sale of land was not that there should be a contract with legal remedies only, and that the purchaser should get the land, and should not be put off in an ordinary case by offering him damages. That is the main part of the doctrine of specific performance—that the purchaser is actually to get the land; . . ."

See also *McIntosh v. Dalwood* 30 S.R. (N.S.W.) 415 at p. 418, a passage cited by Richmond J. in the Court of Appeal. The authorities and established principle do not mean, in my opinion, that only those who want the land for some reason over and above the fact that it is land can have specific performance of the contract. Otherwise, for example, developers who buy land merely as a means of profit making or a person who having bought land has already subsold it before suit could not have specific performance. In my opinion, the doctrine suggested would be subversive of established rules of equity as to the grant of specific performance of contracts for the sale of land, as well as introducing unjustifiable uncertainty into dealings in land. No two pieces of land can be identically situated on the surface of the earth. When a buyer purchases a parcel, no other piece of land, or the market value of the chosen land can be considered, in my opinion, a just substitute for the failure to convey the selected land.

As is pointed out in *Fry on Specific Performance* 6th Ed. (1921), p. 209 in relation to the inadequacy of damages for non-performance of a contract for the sale of land:

> ". . . whilst the Court can ascertain the former (inadequacy of the purchase money when it is asserted by the vendor) by a reference to the general market value of such property, it has no satisfactory means of determining what represents the money value to a particular individual of a particular estate."

As I have the misfortune to dissent in this case I have taken the opportunity to refresh my recollection over a very wide area of law relating to various aspects of the equitable doctrines as to specific performance. I feel able to say that there is no case in the books which lends the least colour to a suggestion that a plaintiff in specific performance can be defeated by a defendant demonstrating that the plaintiff has no interest in the purchase of the land but as a vehicle for the making or obtaining of money. Perhaps the cases as to hardship as a defence to a suit for specific performance to which I will later refer in another connection have a bearing on the point: for a plaintiff who has bought at an under value can easily be said only to be interested in profit making in buying the land. But the Courts of Equity have not yielded to mere inadequacy of price as a defence to a suit for specific performance. There has always been some other element to attract the equitable discretion to refuse the decree. Accordingly, in my opinion, the motives of the appellant in entering into this purchase are, in my opinion, irrelevant to the question whether, regarding the contract as one for the sale and purchase of land, an order for specific performance should be made. If the promise be to convey land, there is in my opinion, no further question of fact as to whether or not the promisee has some other interest in the subject matter beyond the fact that it is the land he has selected for purchase.

Then it is said that there remains in a Court of Equity a general discretion to refuse specific performance although the contract be valid at law, though damages are not an adequate remedy and there is no equitable ground falling within any of the known categories or as it was said "settled principles" of equity for refusing the decree. In my respectful opinion, there is no such general discretion in such circumstances. It is of course true that specific performance is never strictly as of right

but always as of discretion: but from the earliest times that discretion has been said to be a judicial discretion and to be hedged round and to be governed by well settled rules for its exercise. Because of the importance of the suggestion made in the judgment of the Court of Appeal and some of the submissions made before their Lordships I recall some of the principal statements in the books about the nature of this discretion.

In *Lamare v. Dixon* (1873) L.R. 6 H.L. 414 Lord Chelmsford at p. 423 said:

> ". . . the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles".

In *Buckle v. Mitchell* (1812) 18 Ves. 100; 34 E.R. 255, Sir William Grant, Master of the Rolls, said at p. 111 (p. 259):

> ". . . Equity does not in every case lend its aid to carry a contract for a purchase into execution: but it does not arbitrarily execute one contract, and refuse to execute another. Some ground must be laid to prevent the party from obtaining in his case, the assistance which the Court usually gives in cases of the same general description".

Sir John Romilly, Master of the Rolls, in *Haywood v. Cope* (1858) 25 Beav. 140; 53 E.R. 589 said at p. 151 (p. 594):

> ". . . the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done: what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised".

and he quotes Lord Eldon in *White v. Damon* (1802) 7 Ves. 30; 32 E.R. 13 where Eldon said at p. 35 (p. 15):

> ". . . I agree with Lord Rosslyn, that giving a specific performance is matter of discretion: but that it is not an arbitrary, capricious. discretion. It must be regulated upon grounds, that will make it judicial."

His Lordship also quoted the judgment of Sir Thomas Clarke, Master of the Rolls, in *Burgess v. Wheate* (1757–59) 1 Eden. 177; 28 E.R. 652 at p. 214 (p. 666):

> "'. . . And as it is said in *Rooke's* case, 5 Rep. 99b, that discretion is a science not to act arbitrarily according to men's wills and private affections; so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.' This description is full and judicious, and what ought to be imprinted on the mind of every judge."

Perhaps the greatest temptation to depart from this doctrine was offered in connection with the hard bargain cases when it was sought to set up inadequacy of price as a sufficient reason for refusing specific performance. Sir John Romilly in *Haywood v. Cope* (*supra*) did not think mere inadequacy or excessive value was a ground for refusing relief. His Lordship said at p. 152 (p. 594):

> "If, therefore, in a case of this description, I were to say that according to my discretion I ought to leave these persons to their

> action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favourable to one party, and very unfavourable to the other. . . . The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, cannot be a ground for exercising or regulating the discretion of the Court when all the facts which were then in existence were known to both parties. I can understand that the Court will exercise a discretion, and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person, who has entered inadvertently into it, to commit a breach of duty, such as where trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the Court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the Plaintiff to make an abatement in respect of it, but that is a totally different matter, one which is in the *forum* of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract . . . "

These citations apart from the statements of basic principle which they contain are not without use in connection with the facts of the instant case and the suggestion that for some reason not conforming to settled principle specific performance should be refused. In the present case, as I have already remarked, the bargain as expressed was the bargain of the parties. There were no relevant facts then existing not known to the respondent. There were no facts upon which any of the known equitable defences to specific performance could be made out nor was there any attempt to make any of them out. As well as I can understand the argument for the respondent, and with great respect, the facts to which Turner J. refers in his judgment reported in (1968) N.Z.L.R. 1025 at p. 1044, the case put for the exercise of discretion against specific performance amounts to no more than this, that although the respondent knew the general nature of the purchasing company and of its business, though little of its financial standing, and was content to allow £11,000 of what would have otherwise been payable to him as purchase price to remain in the hands of the appellant for a long period of time at interest without security, the Court, unable as I think to conclude judicially anything as to the stability or the prospects of the purchaser company, ought to regard the agreement as unsatisfactory from the respondent's point of view in that it involved a hazard with respect to the repayment in due course of the £11,000: therefore the Court should withhold the remedy of specific performance. In my respectful opinion, there is no warrant whatever in the law for such a course. To refuse specific performance for such a suggested reason is not, in my respectful opinion, an exercise of judicial discretion. It falls again in my respectful opinion, into the class of case put outside such a discretion by the cases from which I have cited.

It is then said that this agreement is not a "usual" agreement for the sale and purchase of land. I suppose the form of such agreements which is most commonly seen is that of a single sale and purchase for cash. But whether usual or not, a contract for the sale and purchase of land will be specifically enforced, in my opinion, not because it is a "usual" contract, but because damages are not an adequate remedy, justice thus requiring specific performance: and if damages are not an adequate remedy for the non-performance of the whole contract, specific performance will not be refused in my opinion simply because what the parties have themselves agreed upon is unusual in the experience of others.

Finally, I would like to deal with an argument which asserts that the circumstance that the Court could not at this time see that it would in due course be able effectively to enforce the repayment of the sum of £11,000 according to the terms agreed upon by the parties is a reason for refusing specific performance of the contract between the parties. But, in my opinion, there is no question of further supervising the performance of the contract than the making of an order that upon the tender of a sum in cash and a deposit receipt conformable to Clause 9a of the contract the respondent will execute and hand over the appropriate transfer of the land and the certificate of title thereto along with possession of it. No question of the Court's supervision of the repayment of the loan involved in the transaction arises or, in my respectful opinion, can arise. To my mind the validity of the suggestion can be tested very simply. Suppose the contract had provided that the balance of purchase money would be payable in ten years with interest in the meantime with no vendor's lien. There could have been, in my respectful opinion, no doubt whatever that the Court would not refuse specific performance because it could not be assured that the vendor would necessarily recover the balance of his purchase price in ten years' time. Nor would it refuse such an order because of any supposed inequality of position in the vendor and purchaser in such a case. The proportion of the final payment would not, in my opinion, affect these conclusions. The respondent was satisfied with the agreed consideration and the manner of its satisfaction. I am unable to regard the resultant relationship as unequal in any relevant sense. But in any case, in my opinion, it is not for a Court, if the respondent is in an unequal position, not the result of inequitable conduct, to endeavour to protect him by denying the appellant the land which it has purchased. It cannot rest, in my opinion, with a court to say that the parties bargain, valid at law and not vitiated or tainted by any known defect or matter of equitable defence, is unsatisfactory or that in those circumstances where an unsecured promise to pay a sum of money is involved there is any relevant inequality between the parties arising out of that bargain consciously made.

The endeavours of the past to defeat a claim for specific performance on the ground that the subject matter of the contract was speculative or that its performance involved a party in a speculative situation support, in my opinion, if support is really needed, that such a power does not rest with a court.

In *Cheale v. Kenward* 3 De G. & J. 27; 44 E.R. 1179 it seems to have been suggested to Lord Chelmsford, that specific performance ought not to be granted of an agreement to accept the transfer of railway shares on which nothing had been paid on the ground that the value in the shares was speculative. His Lordship said this at p. 30 (p. 1180):

> ". . . The Plaintiff was the owner of ten specific shares, which was so much property in his hands, subject to certain liabilities. Whether this would be valuable or valueless at the time of the agreement no one could tell. The value was merely speculative, and persons' ideas differ very much about speculations. But the Plaintiff was willing to divest himself of the shares, and to relieve himself from his liabilities; and the Defendant was willing to take the chances of the speculation, and to undertake those liabilities."

His Lordship thought there was good consideration and mutuality and he thought specific performance was available.

In my opinion, none of the reasons suggested for denying specific performance in this case are valid. It is in reality a simple case of a sale and purchase of land which includes what might to some be thought an unusual term but which both the parties found acceptable. I agree with the conclusion reached by Richmond J. and, in my opinion, the order of the Chief Justice was right and should be restored.

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In the Privy Council

THE LOAN INVESTMENT CORPORATION
OF AUSTRALASIA LIMITED

v.

MANUS BONNER

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