

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 1616 OF 2000

BETWEEN

**SUNDAR JOOKOO
DOLLY JOOKOO**

PLAINTIFFS

AND

**KASSINATH SAMAI
RADHIKA SAMAI
SOOBRAJ MAHABIR
TULSA DEOCHAN**

DEFENDANTS

Before The Honourable Mr Justice Stollmeyer

Appearances:

**Mr. G. Raphael for the Plaintiffs
Mr. S. de la Bastide for the Defendants**

JUDGMENT

These proceedings concern a property known as No. 1B Boundary Street, Felicity, Chaguanas. They represent yet another intra-family arrangement for use and disposal of a property gone awry, Sundar Jookoo being a nephew of Kassinath Samai.

The Pleadings

The Plaintiffs claim specific performance of an agreement to buy this property, comprising a 410 square metre parcel of land with a building thereon which is partly residential and partly a mini-mart ("the Property"), certain consequential declarations and orders, and damages in trespass.

The First and Second Defendants counterclaim for possession of the Property, as well as rent and mesne profits arising from the Plaintiffs' use and enjoyment of the Property. For convenience I refer to Mr. and Mrs. Jookoo individually as "the First Plaintiff" and "the Second Plaintiff" respectively, and to Mr. and Mrs. Samai together as "the Samais", but individually as "the First Defendant" and "the Second Defendant".

The Plaintiffs' claim can be summarised as being that they entered into an oral agreement in or about December 1997 with the Defendants for the purchase of the Property and that the terms of that agreement were: a) the Plaintiffs would be let into possession of the Property in January 1998 and would remain in possession until the purchase of the Property was completed; b) the Plaintiffs would pay into the First Defendant's bank account \$500.00 per month towards the purchase price of the Property; c) The Plaintiffs would also pay \$100.00 per month to Ramdass Samai, the First Defendant's father, and that this sum would also be applied to the purchase price of the Property; d) that whatever sums were spent by the Plaintiffs repairing the property would also be applied to the purchase price; e) that the Plaintiffs would obtain a loan for the purpose of paying the balance of the purchase price.

The Plaintiffs further plead that no date was ever fixed for completion of the agreement, that they were let into possession on 5th January, 1998 and that between January 1998 and May 1999 they spent approximately \$41,250.00 carrying out repairs. Their further plea is that as at June 2000 they had paid into the First Defendant's bank account a total of \$15,000.00 and had also paid a further \$3,000.00 to Ramdass Samai, the First Defendant's father, in accordance with the terms of the agreement. On or about the 20th December 1999, say the Plaintiffs, the First Defendant agreed that the amount of \$41,250.00 had been spent on repairs and that by letter of 20th December 1999 addressed to Republic Bank Ltd. acknowledged receipt of this amount.

Thereafter, around the beginning of April 2000 the First Defendant breached the agreement by requesting the Plaintiffs to vacate the Property saying that he was no longer interested in completing the agreement and by letter of 5th April 2000 the First Defendant requested the Plaintiffs to vacate the Property on or before 28th June 2000. On 30th June 2000, say the Plaintiffs, the first, third and fourth Defendants came to the Property with a police officer and, acting on behalf of the fourth Defendant wrongfully entered the Property and attempted to evict the Plaintiff therefrom, the fourth Defendant having claimed that he had purchased the Property from the first and second Defendants.

Finally, they plead that the first, third and fourth Defendants again wrongfully entered the Property on 3rd July, 2000 and attempted to evict the Plaintiffs therefrom as a result of which the

Plaintiffs obtained an ex-parte injunction on 6th July 2000. Finally, the Plaintiffs plead that they are ready and willing to complete the purchase of the property.

The Samais say that there was an agreement for the purchase of the Property but that the Plaintiffs were to occupy it at a monthly rent of \$600.00 per month from 1st January 1998 until the completion of the transaction. They say also that it was an implied term of the agreement that the Plaintiffs would obtain the purchase price of \$165,000.00 and complete the purchase within a reasonable time. In pursuance of this oral agreement, say the Samais, the Plaintiffs were let into possession but did not pay the monthly rent as agreed. The Samais say also that there was no agreement whereby any monies spent by the Plaintiffs on repairs to the Property would be applied towards the purchase price and, further, they deny that any monies were spent to the repair the Property. Further, the monthly rent was not paid as and when it fell due and that the Plaintiffs paid only the sum of \$8,400.00 during the period January 1998 to January 2000.

The Samais plead further that this agreement was varied in July 1998 when they agreed to reduce the monthly rent to \$500.00 but that the Plaintiffs are in arrears of this rent to the extent of \$6,000.00, and that no payments in respect of rent have been paid since 1st August 2000.

The Samais further plead that the oral agreement of 1997 was replaced by a written agreement of 18th December 1999 whereby they granted the Plaintiffs a monthly tenancy of the Property at a rental of \$500.00 per month and that it was agreed that: the tenancy could be terminated by either party at any time after the 1st January 2000 upon giving three months notice to the other; that they granted to the Plaintiffs an option to purchase the Property at a price of \$165,000.00 and that this option would lapse if either Republic Bank Ltd. rejected a loan application made by the Plaintiffs or failed to approve it by a reasonable time, or if the option was not exercised by the Plaintiffs within a reasonable time.

The Samais further plead that Republic Bank Ltd. rejected the application in or around March 2000 and that the First Plaintiff so informed the First Defendant, and that the Samais then gave notice to the Plaintiffs of the termination of the tenancy on or around 4th April 2000. The Samais admit the letter of 5th April 2000 but do not admit that the fourth Defendant purchased the Property. The Defendants deny that the entry onto the Property on 30th June 2000 was wrongful or that it was on behalf of the fourth Defendant.

The Issues

The parties agreed the following issues for my determination:

1. What were the terms of the oral agreement for sale of the said property made between the Plaintiffs and the First and Second named Defendants towards the end of 1997?
2. Was the original oral agreement for sale replaced by a written agreement for sale dated 18th December 1999?;
3. If the original oral agreement for sale was not replaced by a written agreement for sale, then;
 - (a) is the oral agreement for sale enforceable by the Plaintiffs?
 - (b) if the answer to 3(a) is yes, are the Plaintiffs entitled to an order for specific performance?
 - (c) If the answers to 3(a) and (b) are yes, what sum is due and owing as the balance of the purchase price?
4. If the original oral agreement for sale was replaced by a written agreement for sale, then;
 - (a) has the option to purchase the property at the sum of \$165,000.00 set out in the written agreement aforesaid lapsed?
 - (b) if the answer to 4(a) is no, are the Plaintiffs entitled to an order of specific performance of the said written agreement?
5. What were the agreed terms and conditions pursuant to which the Plaintiffs were let into possession of the said property in January 1998?
 - (a) If it was pursuant to a monthly tenancy what sum if any is owed as arrears of rent by the Plaintiffs to the First and Second named Defendants?;
 - (b) if the answer to 5(a) is yes, was the tenancy validly terminated by service of the Notice to quit dated 5th April, 2000 by the First named Defendant?;
 - (c) if the answers to 5(a) and (b) are yes, are the First and Second Defendants entitled to mesne profits and if so what is the quantum?

The Facts

Certain facts were agreed between the parties and are set out in the "Statement of Agreed Facts" filed on 22nd February 2001. While those agreed facts are incorporated in my findings to which I come presently, it is useful to set them out in summary form as follows:

1. the Samais are the owners of the Property;
2. the Plaintiffs and the Samais entered into an oral agreement at the end of 1997 that the Plaintiffs would purchase the Property for \$165,000.00. That oral agreement did not expressly provide a specific date for completion but the Samais agreed to grant vacant possession to the Plaintiffs on 1st January 1998. Pursuant to that agreement the Plaintiffs were let into possession on or about 5th January 1998;
3. During the period January 1998 to January 2000 the Plaintiffs deposited the sum of at least \$9,000.00 into the First and Second Defendant's bank account No. 9103864 but no payments have been made by the Plaintiffs into this bank account since 1st August 2000;
4. The Samais issued a letter dated 20th December 1999 addressed to Republic Bank Ltd. Chaguanas;
5. By letter of 5th April 2000 the First Defendant requested the Plaintiffs to vacate the Property and on 30th June 2000, and 3rd July, 2000 the first, third and fourth Defendants together with a police officer visited the Property and requested the Plaintiffs to vacate it. The Plaintiffs refused and remain in possession of the Property. They obtained an ex-parte injunction on 6th July 2000 restraining the Defendants from entering or remaining on the Property and this injunction was continued on 21st July 2000.

Cross-examination of the various witnesses was to a considerable degree directed to their credibility. In arriving at my conclusions as to the facts, I have taken into consideration that there were inconsistencies in the evidence of both the First Plaintiff and the First Defendant, if not contradictions, and that the evidence on occasion also contradicted the pleadings. Additionally, the Second Plaintiff, while admitting that her husband played the primary role, at the least, in the discussions and negotiations with the First Defendant and was the person who looked after all the family's business affairs, give certain evidence which not only contradicted his, but supported that of the First Defendant. The First Plaintiff's evidence was such that ultimately I came to the conclusion that it was inherently unreliable and, consequently, affected adversely all of his evidence to the extent that I have preferred that of the First Defendant where their evidence differs..

At the beginning of November 1997 the Plaintiffs lived at Makhon Street, Felicita together with their four children. The Property was, and is, owned by the Samais. They had built a house there

in 1984 and lived there until they migrated to Canada in July 1988. The parcel of land on which the house stands is part of a larger parcel and was conveyed to them by deed registered as No. 2308 of 1988. Upon their migration to Canada, the Samais rented the premises to Doy Lallan who in November 1997 was paying to them a monthly rent of \$700.000 by way of depositing same to the Samai's account ("the Bank Account") No. 9103864 at Bank of Commerce Trinidad and Tobago Ltd., Chaguanas Main Road, Chaguanas. Somewhere around the beginning of September 1997 Mr. Lallan informed Mr. Samai that he would be leaving the premises at the end of December 1997. The Samais decided to sell the Property.

During the first week of November 1997 the First Plaintiff spoke with the First Defendant by telephone and they discussed the Property. It is in issue as to whether the First Plaintiff telephoned the First Defendant, or vice versa, and what precisely were the terms of this agreement. As to the first issue, I have come to the conclusion that this initial conversation took place during the first week of November, contrary to the assertion of the First Plaintiff. The evidence of the First Defendant is that this conversation took place during the first week of November and the Second Plaintiff also testified that the first conversation took place in November. There is in evidence, however, a letter of 7th November, 1997 signed by the Samais setting out, albeit erroneously to some extent, the terms of the sale and purchase of the Property. The errors in this letter were subsequently corrected by a second letter, dated 12th December, 1997, written by the Samais at the request of the First Plaintiff. The first of these letters sets out the purchase price as \$125,000.00 and acknowledges receipt of a deposit of \$40,000.00. The second sets out a purchase price of \$165,000.00 and a deposit of \$41,250.00. I am satisfied from the evidence that the First Defendant came to Trinidad only on 25th December 1997. Consequently, I reject the evidence of the First Plaintiff that the First Defendant came to visit him at the Property in December 1997 and suggested a sale of the Property to him at that time. Indeed, this is only the first of many issues in relation to which I am unable to accept the First Plaintiff's version of what took place, as will become apparent. I also accept that this initial telephone conversation was as a result of the First Plaintiff telephoning the First Defendant and not that the First Defendant telephoned him, as the First Plaintiff asserted.

It was agreed that the Property would be sold to the Plaintiffs at a price of \$165,000.00. It is clear from the evidence that there was an agreement that this was to be the purchase price. In cross-examination the First Plaintiff said that there was to be no reduction in the purchase price because of any repairs carried out. He said also that there was to be no reduction of the purchase price to \$125,000.00.

What is in issue is whether the Plaintiffs were to pay a deposit on account of the purchase price in the amount of \$41,250.000 as they claim by way of an agreed amount for repairs to be done on the Property. I will return to this issue in due course.

No date was fixed for completion of the transaction but the Plaintiffs were to obtain a loan so as to be able to complete the purchase of the Property within three to four months. That is the evidence of the First Defendant as well as the Second Plaintiff, contrary to the evidence of the First Plaintiff. It was also agreed that the Plaintiffs would have possession of the Property as of 1st January 1998.

The Plaintiffs sold their property at Makhan Street in which they then resided for \$40,000.00, receiving an initial payment of \$18,000.00 by cheque in late December 1997, and the balance of \$14,000.00 in cash in January 1998.

The Plaintiffs' contention, although not pleaded, is that it was at the suggestion of the First Defendant that they sold their house and utilised these monies, together with their savings of \$8,000.00, towards payment for the repairs to the Property. It is in issue as to whether the First Defendant agreed to this or whether he agreed with the Plaintiffs that there would be no repairs whatsoever to the Property without his prior consent.

A further issue is whether it was also agreed in November 1997 that the Plaintiffs would make payments of \$500.00 per month to the Bank Account as well as an additional amount of \$100.00 per month to the First Defendant's father, Ramdass Samai, on account of the purchase price as the Plaintiffs contend, or whether they were to pay a single amount of \$600.00 per month into the Bank Account by way of monthly rent for the Property until the sale and purchase was completed, as contended by the Samais.

The First Defendant came to Trinidad on 25th December 1997 and met with the Plaintiffs the following day. On December 28th he took delivery of the keys to, and possession of, the Property, from Doy Lallan, having together with Mr. Lallan and the Plaintiffs carried out an inspection of the house. The Plaintiffs moved into the Property on or about 5th January 1998.

I turn now to the issue of whether the monthly payments to be made by the Plaintiffs were by way of rent or on account of the purchase price.

It would seem to me more probable that the First Defendant intended the Plaintiffs to occupy the Property as tenants. First, the Property had been previously tenanted by Doy Lallan and his

family; the First Defendant had been receiving treatment for his kidney problem and, even as far back as late 1997, was in need of funds to pay for this; the amounts which were paid into the Bank Account by the Second Plaintiff were all of \$600.00 each during the period January 1998 to July 1998. It is more probable that this was as a result of a tenancy agreement at a rental of \$600.00 a month as opposed to the Plaintiffs' contention that they were to pay \$500.00 a month into this account towards the purchase price, as well as a further sum of \$100.00 per month to Ramdass Samai, which was also to be applied to the purchase price. There is no evidence to support the plea of any payments being made to Ramdass Samai, nor that there was a further agreement that these monies should also be paid into the Bank Account.

Second, in July 1998 it was agreed that these monthly payments would be reduced to \$500.00 per month. The First Defendant's contention with respect to payments made is supported by the payments actually made into the Bank Account, and the Plaintiffs have adduced no evidence to show that either of the monthly payments they say they agreed to make to the First Defendant were either reduced or eliminated. Further, the Plaintiffs pleaded that the payments of \$500.00 and \$100.00 per month respectively had been paid for 30 months but adduced no supporting evidence of having either agreed to pay \$100.00 a month to Ramdass Samai, or any evidence at all that these payments were in fact made to him. The entries in the savings passbook for the Bank Account reflect payments in of \$600.00 each for the period January 1998 to July 1998 and of \$500.00 each, or multiples of \$500.00, during the period July 1998 to December 1999.

Third, there is the aspect of the Plaintiffs' occupation of the Property as from 1st January 2000 based upon a written agreement of 20th December 1999, to which I will come shortly. This provided for a monthly tenancy at a rental of \$500.00 and accords with what the Samais plead, and the First Defendant testifies, was the then existing arrangement with the Plaintiffs for the occupation of the Property.

In the circumstances, I have come to the conclusion on a balance of probabilities that the monthly payments to be made were \$600.00 per month and that these payments were the rent to be paid by the Plaintiffs to the Samais for a monthly tenancy of the Property, such tenancy to continue until such time as the sale and purchase of the Property had been completed.

Having moved into occupation the Plaintiffs claim to have carried out certain works to the Property by way of plumbing, carpentry, electrical and painting works, as well as cutting down a pommecythere tree and spraying for termites.

As to the plumbing work, the Plaintiffs say that they had to employ the services of Vishnu Bhola to unclog the kitchen sink and toilets in January 1998, for which they were charged and paid \$900.00. Mr. Bhola began his examination in chief but this was interrupted on Mr. de la Bastide's objection that he was giving evidence of repairs having been carried out, and the cost of such repairs, despite no such evidence having previously been given by either of the Plaintiffs. I exercised my discretion and on the application of Mr. Raphael gave leave to recall the First Plaintiff so that he could give his evidence on these matters, with Mr. Bhola to complete his evidence thereafter. As it turned out, Mr. Bhola never resumed giving his evidence despite several efforts by the First Plaintiff to have him return. It appears, or so I was told from the Bar table, that Mr. Bhola had suffered a bout of food poisoning and was unable to attend Court. Since he was not cross-examined on any of the evidence which he had given in chief, I have placed no weight on the latter.

The Plaintiffs claimed that they also paid Mr. Bhola to restore the water supply to the house in February 1998 for which he charged, and they paid, \$750.00. I find it passing strange that if, as the Plaintiffs said variously, at the time they moved into the house there was no water supply to the house, or there was no adequate water supply to the house, or that there was no adequate water supply to the kitchen, that they would wait for a over a month before having Mr. Bhola carry out this work. All the more so since he had been there the previous month to unclog the kitchen sink and toilets.

The first Plaintiff said that apart from paying Mr. Bhola for his services he also purchased materials from Ryco Ltd., for this purpose. He purchased $\frac{3}{4}$ " ball valves, PVC pipe, PVC elbows, "T's", unions, and collars for which he paid about \$800.00. At Ryco Limited he dealt with Indra Bahadur who made up the bills and had the materials delivered to the Property, where the First Plaintiff signed for them after checking that all was in order.

In cross-examination the First Plaintiff confirmed that all the repairs he claimed to have carried out were done between January and March 1998 but when referred to the statement in his affidavit of 6th July 2000 filed in these proceedings which says that they were all carried out between the middle of 1998 to the time of swearing his affidavit, he sought to justify this inconsistency by saying that his memory in April 2001 was better than in July 2000 when he swore the affidavit. He also admitted in cross-examination that he did not know exactly what work Mr. Bhola did, because he was not at home at the time. Further, although he claimed that Mr. Bhola changed the connection from the mains to the house, he could not recall exactly what was done, nor whether the mains were on the far side of Boundary Street. He did say, however, that Mr. Bhola did not work in the road.

As to the carpentry work, the Plaintiffs claimed that they paid Ramesh Balgobin, the Second Plaintiff's brother, or brother-in-law, \$800.00 in February 1998 to remove and rebuild some shelves in the mini-mart. The First Plaintiff's evidence is that he bought the materials for this purpose at Ryco Ltd. consisting of plywood, 2" x 4" lumber, 2" x 2" lumber, 1" x 3" lumber, and nails, and that on one bill there were two sets of materials for which he paid approximately \$4,000.00. Again, he dealt with Indra Bahadur who wrote up the bill and arranged for the materials to be delivered to the Property where the First Plaintiff signed for them.

The Plaintiffs then, in March 1999, paid Mr. Balgobin \$1,500.00 for building a storeroom. Again, the First Plaintiff bought from Ryco Ltd. cement, steel rods, cement blocks, all costing approximately \$2,000.00. Again, he dealt with Indra Bahadur who, he says was the only counter attendant there at that time. In cross-examination it came out that there had been no storeroom previously and that this was in fact an addition. I do not find it surprising, however, that the First Plaintiff should claim this as a repair given the nature of his other evidence before me.

Subsequently, in May 1999, the Plaintiffs paid Mr. Balgobin \$750.00 for repairing a pathway, the materials for which were again bought by the First Defendant from Ryco Ltd. where he again dealt with Indra Bahadur.

Bills said to have been issued by Ryco Ltd. for all of these purchases were admitted into evidence through the First Plaintiff for the purpose of showing that they existed, and not as to proof of the matters they set out.

As to the electrical work, the Plaintiffs say that Wayne Guy was paid some \$2,000.00 in February 1998 to carry out a variety of electrical work. He replaced a plug and a breaker for the electric stove, a breaker for the water pump, a defective security light and rewired the eave lights on one side of the house. He also upgraded the cables and plugs in the mini-mart and wired for the first time a chandelier, (it not having previously been wired as came to light in cross-examination). Bulbs were also bought for the chandelier.

The upgrading of the cables and plugs is another example of claiming expenditure on an item which was not a repair.

The First Plaintiff claims to have purchased all of the supplies necessary for these electrical works from Central Electrical Supplies at a cost of approximately \$1,400.00. He dealt there with a salesperson by the name of Gail who did not give to him a receipt at the time. Having said in

cross-examination that not only was the receipt was not given at the time of purchase, but that it was written out by someone called Gail, the First Plaintiff then said that he had made a mistake, and that the salesperson who attended to him was one Joanne who no longer worked there when he returned in either June or July of 2000 to obtain bills. He therefore got Nellie Britton at that time to write out the bills based upon what he told her to include, and that they were dated January 1998. In examination in chief he had made mention of only one bill and the existence of the second bill only came to light when Mr. de la Bastide put to him a prior inconsistent statement appearing in his affidavit filed in these proceedings on 19th July 2000. No bills or receipts to support the First Plaintiff's evidence were tendered.

As to the painting works, the First Plaintiff claims to have paid one Kissoon some \$1,800.00 to paint the mini-mart in January 1998 and a further \$1,500.00 to paint the house the following month. In relation to this claim, he was shown the valuation of Lynden Scott and Associates Ltd. of 25th February 2001, which was included in the agreed bundle of documents which came into evidence, and which recommends that the building be painted. The First Plaintiff's response to this was that he didn't think that the building " was looking that bad" in February of 2000.

The Plaintiffs also claim to have paid Baran Mahabir \$400.00 in May of 1998 to cut down a pommecythere tree, supposedly on the advice of the First Defendant who said it had termites. The First Defendant denied that he knew of any pommecythere tree on the Property. A receipt dated 6th May 1998 for \$400.00 was admitted into evidence but Baron Mahabir did not himself give evidence.

Finally, the First Plaintiff said that a Mr. Kassieram was paid \$2,300.00 in March 1998 to carry out spraying for termites and that he got a receipt in February 1998. He says also that there was a second payment of approximately \$3,000.00 for which he got a receipt in March of 1998. Mr. Kassieram did not give evidence.

The Plaintiffs plead that they agreed with the First Defendant that they would be permitted to carry out repairs to the house and that the monies so spent would be credited towards the purchase price of the property and, more particularly, by way of a deposit. The First Plaintiff says in cross-examination that this was an "open ended" arrangement with no limit being placed on the expenses, although an amount of \$40,000.00 was discussed at some time. His further evidence is that the final figure of \$41,250.00 was only arrived at in December 1999 when he went through all of the bills and receipts and came up with this figure.

I have several difficulties in accepting this evidence.

First, it is apparent that from the outset, when the letters of 7th November and 12th December 1997 were written, that this figure of \$40,000.00, or \$41,250.00 was very clearly in the mind of the First Plaintiff.

Second, it is apparent that he chose to treat all of the expenditure on the Property as repairs as, for example, in the case of the additional storeroom, which cannot by any stretch of the imagination be regarded as a repair, as well as the upgrading of the cables and plugs in the mini-mart.

Further, while I accept that on moving into a previously tenanted house there will be work to be done, I do not accept that an inadequate or non-existent water supply would be remedied one month after a malfunctioning waste disposal system is fixed. It would be entirely consistent to have both done at the same time. Indeed, without water coming in, there would be no way to determine that any blockages existed in the waste disposal system. And if the First Plaintiff's evidence as to the sale of their own house is accepted, there would have been no shortage of funds for all these repairs to be carried out. Indeed, all of the repairs claimed could have been carried out in a matter of weeks or months, instead of over a year as the Plaintiffs say.

Mr. Balgobin, for example, issued receipts to the First Plaintiff on 21st February 1998 for \$800.00 in respect of the replacing of the shelves; on 19th March, 1998 for \$1,500.00 in respect of constructing the storeroom; and on 24th May 1999 for \$750.00 in respect of the repairs to the pathway.

Yet further there is the issue of whether these monies were actually in fact spent. Of the various persons who were said to have carried out work, only Mr. Balgobin gave evidence at the trial. He appeared to be in some doubt, and his evidence varied accordingly, as to whether the mini-mart was on the northern or western side of the house and he said that when repairing the pathway he had to build a 21/2 foot high retaining wall because the pathway was undermined by a broken drain. He also said that the shelving took him four to five days to complete with the assistance of two men, the number of shelves replaced being four, while the storeroom, again with the assistance of two men, took him some eight to ten days to construct. Similarly, he says that the pathway was repaired with the assistance of two men although he does not give the length of time which this job took to complete. In all of this, and having spent all of this time at the Property, he could give no idea as to the condition of the paint work, nor even as to the colour of the house.

Mr. Bhola as I have said, did not finish his examination in chief and was not cross examined and I have therefore placed no weight on his evidence. None of the other contractors gave evidence at the trial.

There is, however, the further matter of the materials which the First Plaintiff claims to have bought.

As to the materials supposedly purchased from Ryco Ltd., Mr. Ryan Naipaul, Managing Director and shareholder of this company, gave evidence that he managed the day to day running of the business from its inception in April, 1990. At that time the company operated what he called "...a full general hardware..." but in 1995 the company started to import foodstuffs and stopped stocking and selling heavy hardware materials. It did, however, continue retailing paint and small hardware items until January 2000 when it ceased retailing hardware items altogether.

After 1995 Ryco Ltd. did not sell any type of building steel, cement, BRC wire, load fill, load gravel, red blocks, lumber, galvanise, plastering sand, plywood, white pine lumber, toilet sets, form ply, ½ "ply wood, ¾" ply wood, 1" x 3" x 12" lumber, ½" and ¼" steel rods, or aluzinc galvanised sheeting. These items form a substantial number of those which First Plaintiff claimed he purchased and which are listed on the bills which came into evidence. Further, in examination in chief the First Plaintiff said that the bills were written up at the time of the purchase and that when the materials were delivered to the Property he signed the bills as having received the materials. Mr. Naipaul's further evidence was that while Indra Bahadur worked with Ryco Ltd. as a billing clerk in 1998 and 1999, and that he recognised her handwriting on these bills, he denied that she had the authority to supply to a customer items which Ryco Ltd. did not stock, but which could be obtained from another source and, also, that she in fact did so. Finally, he said that he had checked his company's records but could not find amongst the duplicate sales bills copies of those which had been admitted into evidence through the First Plaintiff, although he had been shown copies of them previously by the First Defendant in the year 2000. I am satisfied from the evidence that the First Plaintiff did not in fact obtain these bills in 1998. He did so subsequently.

As to the materials bought from Central Electrical Supplies, the First Plaintiff became noticeably agitated when pressed for details on his relationship, if any, with Nellie Britton with whom he had worked for perhaps one year at some time in the past. In addition, Jean Dindial, who is the Manager of Central Electrical Supplies gave evidence on behalf of the Samais. This business is owned by her and her husband, and she has been responsible for the day to day running of the business for some 23 years. In her evidence she said that no two tax invoices issued by her

company would have the same number, all of them being issued in sequential numbering order, and when shown copies of the tax invoices exhibited to the First Plaintiff's affidavit of 19th July 2000 she said that in relation to the tax invoice No. 36300 she had located the duplicate in her company's records but that it was blank. Further, she said that she had located the duplicate of the other tax invoice, No. 35475, but that it had only one item written on it which was a 2-pin male plug at a cost of just over \$2.00.

A further aspect of these repairs and their cost supposedly representing the deposit paid on account of the purchase price, is that they were never brought to the attention of either of the banks which were approached by the First Plaintiff when he applied for a loan to fund the purchase, nor was either bank told that the deposit supposedly paid in account of the purchase price had not been paid in cash.

It is clear from the First Plaintiff's evidence that he knew very well that Republic Bank Ltd. was prepared to lend him only 75% of the purchase price and required him to provide the other 25% i.e. \$41,250.00 hence his request to the First Defendant for the letter 12th December of that year.

In cross-examination it was put to him:

"The reason why the figure of \$41,250.00 arose for a deposit was because Republic Bank Ltd. required you to come up with that sum. It was nothing to do with the bills. Is that correct.

Answer: Yes Sir.

Question: You agree.

Answer: Yes Sir".

This was the reason underlying the First Plaintiff's request for the correcting letter of 12th December 1997. It also goes contrary to his previous evidence, and the Plaintiffs' plea, that the sum of \$41,250.00 was to be spent on repairs and applied towards the purchase price.

On balance, I have come to the conclusions that, first, there was no agreement that the Plaintiff would be allowed to carry out such repairs as they saw fit and, second, that there was no agreement that the cost of any repairs actually carried out would constitute a deposit on account of the purchase price, or be applied or credited to the purchase price. I find it improbable that the Samais would agree to, effectively, reducing the purchase price, and the evidence is clearly that the purchase price was not to be reduced. The First Plaintiff says on the one hand that the repairs were "open-ended", but then goes on to say that he added up the bills with the first Defendant in

December 1999. This, clearly was at a time when he did not have at least some of these bills. There is also no evidence of this accounting exercise having taken place. And if he arrived at the total only in December 1999 how then does the very same, the precise, figure of \$41,250.00 appear in correspondence in December 1997.

It is clear to me that these two letters of 7th November 1997 and 12th December 1997, as well as the letter subsequently written on the 20th December 1999, to which I will come shortly, were written to assist the Plaintiffs in obtaining a loan to purchase the Property and were not intended to, nor did they acknowledge the receipt of a deposit or a payment on account of the purchase price. At the time of the earlier letters, no money had been spent on repairs, and there was no agreement as to how much would be spent. Additionally, the third letter makes no mention, nor does it take into account, any monies paid by the Plaintiffs into the Samai's Bank Account.

I have already made reference to my conclusions in relation to these letters. There is, however, a fourth letter which was supposedly signed by the First Plaintiff and which was the subject of much contention. This is a letter supposedly dated and notarised 10th February 2000 (exhibit "KS3") signed by the First Plaintiff and the Samais which reads: "This will confirm that we, the undersigned, Kassinath Samai and Radhika Samai to date have not received any deposit or any other monies from you [i.e. Sundar Jookoo] towards the payment of [the Property]....."

I doubt that this letter was signed on 10th February 2000 as the First Defendant testified. Indeed, I do not accept his evidence as to this. The First Plaintiff, on the other hand, does not deny that his signature is on this letter. On close examination, this letter is also seen to bear the date "November 27 1998" which has been covered with "liquid paper" or "white out". While the date(s) on which it was signed by the First Plaintiff and the Samais respectively may be in doubt, my conclusion is that they did sign it at some time. Further, I am satisfied that the purpose of this letter was to demonstrate, should the need arise, that no deposit had in fact been paid by the Plaintiffs, contrary to what is said in the letters of 7th November 1997, 12th December 1997, and 20th December 1999.

I have therefore concluded that there was no agreement that the cost of repairs was to be applied or credited to the, purchase price.

It was submitted on behalf of the Plaintiffs, as I understand it, that their savings and the sales proceeds of their house totalling \$40,000.00 were to be used for the repairs and that this was on the advice and agreement of the First Defendant; which he denies. I am not persuaded, on the evidence, that this agreement was made. It is more probable that the availability of this amount

for making up the full purchase price was made known to the bank, resulting initially in a loan application for \$125,000.00. It had been agreed that no deposit would be paid in cash, and that the whole purchase price would be paid on completion. It is more probable that the Plaintiffs then utilised these funds, or some of them, on the Property of their own volition, not by way of agreement with the Samais.

Returning to 1997 and the issue of the Plaintiffs obtaining a loan, the First Plaintiff approached his bankers in November 1997 in an effort to do so. He then contacted the First Defendant by telephone asking that the purchase price set out in the letter of 7th November 1997 be corrected to read \$165,000.00 and that the deposit be corrected to read \$41,250.00, saying that this is what the bank wanted. The letter of 12th December 1997 setting out these amended figures was signed by the Samais and sent to the First Plaintiff who then returned to Republic Bank Ltd. Sometime in March, or perhaps April, of 1998 he was told by the bank that the application had been rejected because it required sub-division approval from the Town and Country Planning Division of the Ministry of Planning. It will be recalled that this parcel of 410 square metres was part of a larger parcel. It also appears that the bank wanted to see approved building plans for the house.

Although not pleaded, the issue was raised during the trial of whether the Samais were under an obligation to obtain approval for sub-division. There is no evidence that this was an agreed term or condition of the agreement, nor is it in my view to be implied. Further, if there was any such obligation on the Samais, then the Plaintiffs issuing the Writ herein clearly waived any such requirement (see *Balbosa v. Ali* [1985] 37 WIR 447).

The First Defendant returned to Trinidad at the end of June 1998. He had been in frequent contact with the First Plaintiff in the meantime, enquiring about the progress of the loan and as to whether payments were being made to the Bank Account. On his return on late June he met with the First Plaintiff. He visited the Property, and attended a prayer meeting there. He says that it was agreed that the payments being made into the Bank Account would be reduced from \$600.00 to \$500.00, he having observed that payments for the period January to June 1998 were in arrears and that he was asked by the First Plaintiff to reduce the payments by \$100.00 per month because he had recently lost his job. An examination of the savings pass book for the Bank Account reveals that only four payments of \$600.00 had been made up to that time and that they had not been paid at regular intervals. In the event, payments made into the Bank Account after the First Defendant returned to Canada in the third week of July 1998 are all of \$500.00, or multiples of \$500.00, and can best be described as infrequent, the first payment of \$1,000.00 being made on 30th April, 1999.

After the First Defendant returned to Canada in the third week of July he maintained contact with the First Plaintiff on a frequent basis. He then returned to Trinidad on 7th December 1999 because

he had by that time become, as he put it, "fed up" having been told almost continuously that the loan was "in process".

He met with the Plaintiffs and discussed the sale of the Property, telling them that he was going to sell it, to which the Plaintiffs responded by asking him to give them a last opportunity to raise the money. The First Defendant agreed. He was, he says, by this time in great need of the money because he had suffered for some years from a kidney ailment and had to raise money for a kidney transplant. The Plaintiffs and the First Defendant met at Republic Bank Ltd., Chaguanas on 20th December that year. They spoke with a Ms. Lystra King, a Loans Officer, about the loan, and she asked that a letter be written "updating" the arrangement between the Plaintiffs and Samais. There is a great divergence of evidence as to precisely what took place on the 20th December both at the bank and thereafter. There is no contention, however, that the letter of that date addressed to the bank by the Samais was written and given to Ms. King.

The First Plaintiff's version of the events of that day emerges entirely from his cross-examination. First, he appeared confused as to whether he had made this application to Republic Bank Ltd. or to Republic Merchant and Finance Bank Ltd.

The First Plaintiff then says that he went to the bank because the First Defendant asked him to go with him to find out about the progress of the loan. He first denied having told him then that the application to Republic Bank Ltd. in 1997 had been rejected, but then almost immediately afterwards admits that that application was rejected around the middle of 1998. He says that he met the first Defendant at the bank, but says almost nothing more than that. It is significant that towards the end of his cross examination Mr. de la Bastide put to him.

*"On that afternoon you entered a written agreement for the sale and rent of that house with the first Defendant
Answer: Yes I did."*

The Second Plaintiff's account of events at the bank on that day in examination in chief was that the bank did not ask for any documentation. She then says, however, that the First Defendant signed it (the letter of 20th December 1997) at the bank and then said he was going to get his wife to sign it, she being in the car outside. She says that the First Defendant then came back into the bank and gave Ms. King the document, after which they all left the bank. She says the First Plaintiff then went to work, that she went home, and that the First Defendant went his way. In cross-examination, however, she came to admit, after being pressed and contradicting herself, that

the bank had asked for this further document because it wanted an update in writing, and that it was written by the First Defendant.

The First Defendant's version of those events is that he went to the bank with his brother, Naresh Samai, and waited outside until the First Plaintiff arrived, as well as the Second Plaintiff. They then went into the bank and met with Lystra King, who was not satisfied with the documentation she either had or was given. He said she wanted the letter relating to the down payment to be renewed because what she had was outdated, referring to the letter of 12th December 1997 and that Ms. King wanted this new letter signed by both Mr. and Mrs. Samai. Mrs. Samai was not in Trinidad and the first Defendant asked Ms. King if he could sign it on behalf of Mrs. Samai. She responded that she would accept that, being aware that Mrs. Samai was not in Trinidad, the First Defendant having told her this. The First Defendant says that both Plaintiffs were present when he told Ms. King this, and that he then wrote out the document at a table at the side of the room, signed it and brought it back for Ms. King.

I accept that evidence in preference to that of the Second Plaintiff, given her admissions in cross-examination.

It is clear to me that at this juncture there was still agreement between the parties that the Property would be sold and that the terms had not changed. The letter of 20th December 1999 was written by the Samais to assist the Plaintiffs in their attempt to get the necessary loan.

As to the events after leaving the bank, both Plaintiffs denied that there was any meeting at the Property later that day. All of this comes out in cross-examination. The First Plaintiff, however, admitted that he met with the first Defendant that afternoon, without saying where, and that he entered into a written agreement with him for the sale and rent of the house. He was shown the document headed "This Tenancy Agreement" admitted subsequently as exhibit KS2 and said that the signature under the word "tenant" on the last page "...appears to be mine", but denies that he signed the document and that that is his signature.

The First Defendant's evidence is that after leaving the bank he went with the Plaintiffs to the Property. The reason for him doing so, he says, was that he told the First Plaintiff he wanted him to sign a written agreement "*for the time of getting the loan*" and that he had told the First Plaintiff this at while they were at the bank.

The First Defendant says that he had brought "This Tenancy Agreement" with him from Canada and that he and the Plaintiffs agreed with what he wanted to go into the agreement. In essence it

was that there would be a tenancy of the Property at a rent of \$500.00 per month; the Plaintiffs would have an option to buy the Property; and that if the Plaintiffs did not get the loan, then the First Defendant could sell the Property to whomsoever he chose. If, on the other hand, they got the loan from Republic Bank Ltd., then the Samais would sell the Property to the Plaintiffs at a price of \$165,000.00. Having written out this agreement, he says that he gave it to the Plaintiffs to read, which they did, and that the First Plaintiff then signed it in front of the First Defendant, his brother Naresh Samai and Tulsa Deochan, the fourth Defendant.

Mr. Deochan was there, says the First Defendant, because he had telephoned him before leaving the bank and told him to meet him at the Property. His brother Naresh was there because, having dropped the First Defendant at the bank earlier on, he had gone to Boundary Street to visit their sister who lived next door to the Property. The document came into evidence, as I have said, through the First Defendant and without objection from Mr. Raphael. I found this remarkable considering the evidence of the Plaintiffs, as well as Mr. Raphael's earlier indication during the trial that this document had been the subject of an examination by a document examiner whom he might wish to call as a witness. Indeed, it was accepted that this examination had been requested and had taken place.

I admit that I have had difficulty in deciding this issue. On balance, however, I find it more probable that the First Defendant would ask the First Plaintiff to sign a document, or something, which would impose some form of deadline for completing the transaction, given all that that had gone before. Further, the First Defendant admits to signing a document that afternoon. The document in question was examined on his behalf by a forensic document examiner, who ultimately was not called upon to give evidence. I have also observed that the First Plaintiff's signature on this document is very similar, at the least, in appearance to the naked eye as his signature on Exhibit K.S.3 (the letter supposedly dated and notarised 10th February 2000) as well as on document 9 of the Agreed Bundle in evidence, to which I will come shortly. I have therefore come to the conclusion that this document was in fact signed by the First Plaintiff on that day. Further, it sets out a valid and binding agreement between the First Plaintiff and the Samais.

Essentially it is the last two pages of this document which set out the terms of the agreement. They are handwritten by the First Defendant. Its terms are that First Plaintiff is to occupy the Property on a monthly tenancy at a monthly rent of \$500.00. No additions are to be made to the Property during the period of occupation. The First Plaintiff is to vacate the Property on three months notice and is to remove nothing when leaving. This obviously caters for the First Plaintiff not completing the transaction. This tenancy was to begin on 1st January 2000. This is a proper inference to be drawn from the words: "This tenancy agreement can cancel anytime with three

month notice. From Jan. 1st 2000 onwards". Additionally, Page 1 of this document describes the Property briefly, and also gives the commencement date of the tenancy as 1st January 2000, going on to say that the tenancy is for 6 months. It grants to the First Plaintiff an option to purchase the Property at the price of \$165,000.00. It refers to the loan application made to Republic Bank Ltd. and sets out clearly that if this bank does not grant the loan, then the Samais are liberty to sell to whom they please at a price of \$175,000.00.

The First Defendant left Trinidad the following day, 21st December 1999, and returned to Canada. Republic Bank Ltd. rejected this loan application and so informed the first Plaintiff in April 2000, as he admitted in cross-examination, and he informed the First Defendant of this when he received that news. The date he gives of receiving notice of rejection contradicts his evidence in chief where he says that he made a third loan application to First Citizens Bank Ltd. in January or February 2000 after Republic Bank Ltd. rejected the loan application. It is yet another contradiction in his evidence.

The First Defendant says when the First Plaintiff gave him this news he said also that the First Defendant could go ahead and sell the Property to whomsoever he chose. The First Plaintiff denies this, but I find this to be more probable given the length of time which had elapsed since the parties had first entered into an agreement, the repeated failure of First Plaintiff to obtain a loan, and the agreement of 20th December 1997.

I have therefore come to the conclusion that the option granted under this agreement lapsed when the loan application was rejected by Republic Bank Ltd. in March or April 2000.

The First Defendant says that a third loan application was then made to First Citizens Bank Ltd. in January or February of 2000. Mr. Richard Allan, who is a Customer Account Representative in the Credit and Risk Department of First Citizens Trust and Mortgage Bank Ltd., gave evidence which flatly contradicts this. Mr. Allan said that the Plaintiffs' loan application was first made to the Chaguanas branch of his company in October 2000 to one of the bank's employees there, Mr. Sewraj, who referred it to Mr. Allan. Mr. Allan has been dealing directly with the Plaintiffs, principally the Second Plaintiff, from somewhere around December 2000.

Both Plaintiffs sought to have me believe that this particular loan application had been approved. They were very careful in their evidence, particularly the First Plaintiff, to say that the loan had been approved, but the First Plaintiff stopped short of saying that the bank had agreed to disburse the funds. This was in light of the fact that First Citizens Trust and Mortgage Bank Ltd., like Republic Bank Ltd. previously, required sub-division approval, which the Plaintiffs admitted had

not been obtained up to the time of the trial. I found their evidence that the loan had been approved and the implication that the funds were available difficult to swallow, and Mr. Allan put the seal on this is sue when he said that his bank had never agreed with the Second Plaintiff to disburse the monies and thereafter obtain the sub-division approval, as she had said. He made it clear that the application had conditional approval only, and that the bank's attorneys had carried out searches which revealed the need for the sub-division approval. As he expressed it: "*At present the loan is basically on hold awaiting sub-division approval. As things stand now the bank is not willing to disburse the funds. We are awaiting two things. The outcome of this case and sub-division approval. Whatever the outcome of the case may be, the bank's position is that we must have sub-division approval to proceed with the transaction*".

The upshot of all this is that there is no evidence before me that the Plaintiffs are in a position to complete the transaction, whatever amount may be due to the Samais on account of a purchase price. Indeed, they are patently unable to do so. There is no plea or evidence of any tender of the purchase price, nor of any tender of a conveyance of the Property.

In the event, the First Defendant issued a notice to quit addressed to the First Plaintiff dated 5th April 2000. The notice effectively required the First Plaintiff to vacate the Property by no later than June 28th 2000. On or about 28th June 2000, the First Defendant went to the Property and spoke to the Second Plaintiff, the Plaintiffs still being in occupation. He returned on the 30th June with the Third Defendant, a bailiff, and the Fourth Defendant with the intention of having the Plaintiffs vacate the Property. They returned on 3rd July with the same purpose in mind, when it was agreed that the First Plaintiff would have further time to vacate the Property. This is supported by the document in evidence as document 9 of the Agreed Bundle, countersigned by the First Plaintiff and obviously evidencing his agreement. The First Plaintiff did not vacate the premises as he had clearly agreed to do. The Plaintiffs, however, instituted these proceedings on 6th July 2000 and obtained on the same day *ex-parte* an injunction, *inter alia*, restraining the Defendants from entering the Property.

As to the notice to quit of 9th April 2000, it is clearly not given in accordance with the terms of the agreement of 20th December 1999 which requires three months notice. The document of 3rd July 2000, however, clearly supports the evidence of the First Plaintiff that on this date the Plaintiffs were given additional time to vacate the Property. There is no evidence that the First Plaintiff was pressured into counter-signing this letter by anyone or the events of that day. It came into evidence by consent as part of the Agreed Bundle and although it is not referred to in the *viva voce* evidence, I have given it such consideration and such weight as I have thought appropriate. In my view, it evidences the First Plaintiff's agreement to vacate the Property by 9th July 2000. In my view, the tenancy enjoyed by the First Plaintiff of the Samais clearly came to an end on 9th

July. The tenancy was effectively surrendered by the First Plaintiff. The Plaintiffs, however, remain in occupation and have paid nothing for the use and occupation of the Property since that time.

The Plaintiffs' Claim

It was submitted that the Plaintiff's case is that there was an oral agreement for the sale and purchase of the Property evidenced by the letters of 7th November 1997, 12th December 1977 and 20th December 1999, and that the written agreement of 20th December 1999 can only be regarded as a tenancy agreement coupled with an option to purchase. Assuming, of course, that I should hold that this agreement exists.

I have already come to the conclusion that the written agreement of 20th December 1999 is valid and effective. Further, this agreement was intended by the First Defendant to replace, not merely vary, the then existing oral agreement and I hold that it did so.

There was a mutual abandoning by the parties of their respective rights under the oral agreement, which was one of sale and purchase, and a tenancy. It was replaced with a new agreement which merely gave the First Plaintiff a tenancy with an option to purchase which in my view is a fundamental change from the previous position. It reflected the intention to substitute a new agreement which was fundamentally inconsistent with the prior agreement (see *Chitty on Contracts* 26th Ed. Vol. I para. 23-028). An option to purchase, even if coupled with a tenancy, is a far cry from a contract to purchase. An option to purchase a property is not a contract. It is an irrevocable offer which must be accepted in exact compliance with its terms in order to be turned into a binding contract (see *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.* [1968] AER 104 at 107). It gives the grantee of the option no interest in the property in question.

Each party gave up its right under the contract of sale and purchase. There was rescission of the original contract, the oral agreement of November 1977, not a variation, because the new terms of the written agreement would enable either party to sue on it without reference to the oral agreement (see e.g. *Morris v. Baron & Co.* [1918] A.C.1, referred to in *Chitty* at para. 23-029). There having been rescission of the oral agreement, specific performance of it cannot be ordered (see *Fry on Specific Performance* 6th Ed. page 477). The option granted under the written agreement of 20th December 1999 was never exercised. Indeed, the Plaintiffs were not then, nor

are they now, in a position to exercise it. It lapsed when Republic Bank Ltd. rejected the Plaintiff's application for a loan. This state of affairs was made known to the Samais.

Plaintiffs are required to show that they have performed all their express and essential obligations under an agreement if they are to succeed in a claim for specific performance, or that they have tendered performance, or that they are ready and willing to perform those obligations. If a plaintiff is in breach of its own obligations and cannot show that it is ready and willing to carry out those obligations, then it cannot successfully maintain a claim for specific performance (see *Fry* pages 435-436).

It is clear that the Plaintiffs here have not performed all of their express and essential obligations. Under the written agreement of 20th December 1999, whatever else they may have or have not done (they have not, for example, paid the agreed monthly rents), it is incontrovertibly the case that they have failed to obtain a loan from Republic Bank Ltd. Further, and more to the point, they have not raised the purchase price from First Citizens Trust and Mortgage Bank Ltd. as they claim to have done. Indeed, not only had they failed to raise the required funds to pay the purchase price by the time of issuing the writ, but they had not done so at the time of the trial. Further, there is no evidence that they have made any further efforts to do so, nor that they intend to make any further efforts.

Similarly, they are unable to show that their failure to complete the transaction is due to any act or omission on the part of the Samais.

Accordingly, any claim by the Plaintiffs claim for specific performance of the written agreement of 20th December 1999 must fail.

I should add that if I were to be erroneous in concluding that this written agreement of 20th December 1999 replaced the then existing oral agreement and that the latter was therefore still subsisting, then my conclusion that the Plaintiffs' claim for specific performance must fail would be no different.

The oral agreement did not fix any completion date. A reasonable time for completion is therefore to be implied. Completion was predicated upon the Plaintiffs obtaining a loan for this purpose.

I do not think it necessary for me to establish what may be a reasonable time for obtaining such a loan, although the evidence of the Second Plaintiff and the First Defendant is that this was to be accomplished within three to four months. If, however, I am required to make such a finding, then

it would be on the basis that it is well known and accepted in this jurisdiction that contracts for the sale and purchase of real property usually provide a period of 90 days for completion, this being accepted as the time taken to investigate the title, and arrange financing. In some instances, a period of a 120 days will be provided for. I accept, however, that no date having been fixed for completion in the instant case, and completion being "tied" to obtaining a loan for which no deadline had been imposed, that the contract is unenforceable (see *Johnson v. Humphrey* [1946] 1AER 460).

Further, and if the oral agreement were to be held enforceable, it is unconscionable in my view to expect a vendor to wait for over two years for completion, particularly where that vendor has done nothing to contribute to the delay. Indeed, it is clear that the vendors in the present case assisted whenever and in whatever fashion they were requested, and cannot therefore be penalised for their assistance and forbearance. The Plaintiffs on the other hand, failed to meet their obligations under the oral agreement, not the least by failing to pay the agreed monthly amounts, whether by way of rent or otherwise. Further, they did nothing to push matters along after their first loan application was rejected and until such time as the vendors prodded them into action. The Samais did not seek then, as they might well have done, to rescind the contract. In my view, the Plaintiffs delayed unconscionably. They have not come to equity with clean hands as they are required to do. Their delay was so prolonged as to deprive the Samais of substantially the whole benefit they were intended to receive under the oral agreement, and they were consequently entitled to regard themselves as discharged from their obligations thereunder.

In those circumstances, the Samais, having been told in April 2000 that the loan application of 20th December 1999 had been rejected, were entitled to treat the contract as being at an end despite not having served any notice to complete. Further, it was not necessary in the circumstances for the Samais to serve a notice on the Plaintiffs making time of the essence (see *Farrant v. Olver* [1922] AER Reprint 783, referred to in *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] 3 AER 782 at 787g).

The Samais are quite clearly to be regarded as having properly treated the contract as having to come to an end. In the circumstances, and for these reasons, the Plaintiffs claim for specific performance of the oral agreement would fail.

Finally, I do not accept that this is a proper instance, as was submitted on behalf of the Plaintiffs, for a Court to make an order for specific performance of the oral agreement with consequential directions for completion of the purchase as in *Hashan v. Zenab* [1960] AC 316. There is nothing in the instant case which in my view justifies the intervention of a court of equity. The time for

performance by the Plaintiffs has long passed, and there is no indication that they will be able to perform their obligations under the oral agreement.

The Plaintiffs also claimed a declaration that they are entitled to remain in possession and occupation of the property. I do not accept this. Any question of the effectiveness of the notice to quit aside, there is the countersigned letter of 3rd July 2000 by which the First Plaintiff agrees to vacate the Property by 9th July.

No submissions were made as to the Plaintiffs' claim in trespass. Such a claim must clearly arise out of the Second Defendant's visits to the Property at the end of June and the beginning of July 2000. The Samais, or the First Defendant, were landlord to the Plaintiffs and these entries on to the Property were for the purpose of recovering possession. The notice to quit on 5th April 2000 does not specify the required three month period at the end of which the Plaintiffs were to deliver vacant possession. That three month period was, in my view, to be three clear months expiring the end of a calendar month, the tenancy in question having commenced on 1st January 2000. The notice was ineffective, and the entries on to the Property on 30th June and 3rd July 2000 were therefore unlawful and constituted acts of trespass. There were two acts of trespass, but I do not find that they were in any way *mala fides*. The third and fourth defendants were there at the behest of the Second Defendant.

The Defendants' Counterclaim

The counterclaim is, despite the manner in which it is pleaded, that of the First and Second Defendants, the Samais. The Third Defendant obviously has no claim against the Plaintiffs based on the pleadings and the evidence, and the position of the Fourth Defendant is the same.

It is clear that the Samais are entitled to possession of the Property, if not by the expiry of the notice to quit, then by the First Plaintiff agreeing to vacate it by 9th July 2000.

Rent was payable at the rate of \$600.00 per month for the period January 1998 to July 1998, and thereafter at the rate of \$500.00 per month. Payments totalling \$3,600.00 were made during the period January to July 1998 i.e. in respect of six months rent, and further payments totalling \$6,000.00 were made during the period July 1998 to December 1999 i.e. in respect of a further 12 months rent. These payments are reflected in the savings passbook for the Bank Account.

Consequently, there is a shortfall of 6 months rental for the period July 1998 to December 1999 i.e. \$3,000.00. Further, no payments were made by the Plaintiffs with respect to the period 1st

January 2000 to 9th July 2000, and no payments have been made in respect of the Plaintiff's use and occupation of the Property after 9th July 2000. There being no evidence as to what rent or rents might be obtained from that date, an award of mesne profits should therefore be based on that monthly figure. There is to my mind little if anything to be gained by attempting to pro-rate the Plaintiffs' occupation of the property in July 2000 as between rent up to the 9th and mesne profits thereafter for the purpose of calculating what is to be paid by the Plaintiffs. Purely for convenience, therefore, I will base my calculations on rent being payable to 31st July.

In summary, I determine the issues placed before me as follows:

1. The oral terms of the agreement for sale were that: the purchase price was to be \$165,000.00; that no deposit was to be paid in cash or otherwise; that the entire purchase price would be paid at completion; and that completion was to take place within a reasonable time, some four months after the agreement was arrived at in the first week of November 1997;
2. The oral agreement was replaced by a written agreement of 20th December 1999;
3. The third issue placed before me does not arise for determination.
4. The option contained in the written agreement of 20th December 1999 has lapsed;
5.
 - a) The Plaintiffs were let into possession of the Property in January 1998 on a monthly tenancy at a rent of \$600.00 per month, such tenancy to continue until completion of the contract for the sale and purchase of the Property;
 - b) The Plaintiffs owe to the First and Second Defendants the amount of \$6,500.00 as arrears of rent and for mesne profits to 31st July 2000;
 - c) The tenancy was not validly terminated with effect from 28th June 2000 by the notice to quit of 5th April 2000;
 - d) The First and Second Defendants are entitled to mesne profits at the rate of \$500.00 per month from 1st August 2000.

Disposition

1. The Plaintiffs' claim for specific performance is dismissed.
2. There will be judgment for the Plaintiffs on their claim in trespass.
3. The Defendants will pay to the Plaintiffs damages in trespass in the sum of \$750.00.
4. There will be judgment for the First Defendant and Second Defendant on the counterclaim.
5. The Plaintiffs are to deliver up possession to the First Defendant and the Second Defendant of the property known as No. 1B Boundary Street, Felicity, Chaguanas being

all and singular that piece and parcel of land described in paragraph 1 of the Writ of Summons in these proceedings together with all buildings thereon.

6. The order for possession above is suspended until 30th September 2001, and the writ of possession is not to be executed before that date.
7. The Plaintiffs are to pay to the First Defendant and the Second Defendant the sum of \$6,500.00 as arrears of rent and for mesne profits for the period August 1998 to 31st July 2000 and the further sum of \$7,000.00 as mesne profits for the period 1st August 2000 to 30th September 2001, this being the date on which possession is to be delivered up.
8. The Defendants are to pay one-half of the Plaintiffs' costs of the claim.
9. The Plaintiffs are to pay the First and Second Defendants' costs of the counterclaim.
10. There will be a stay of execution for 28 days with respect to the amounts to be paid by the Plaintiffs and the Defendants respectively as ordered above.
11. The injunction granted to the Plaintiffs on 6th July 2000 and continued on 21st July 2000 is discharged.

20th July 2001

C.V.H. Stollmeyer
Judge