PARTIES:	NHR FORSTER PTY LTD (ACN 000 041 734) v PATRICIA MACMICHAEL and ANTHONY JOHN MACMICHAEL
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	TERRITORY JURISDICTION
FILE NO:	AP 29 of 1997 (9615279)
DELIVERED:	21 April 1998
HEARING DATES:	10 – 11 March 1998
JUDGMENT OF:	Kearney A/CJ, Thomas J and Gray A/J

REPRESENTATION:

Counsel:

Appellant:	H. Fraser QC
First and Second Respondents:	S. Southwood

Solicitors:

Appellant:	Messrs De Silva Hebron
Respondents:	Geoff James

Judgment category classification:	C
Judgment ID Number:	GRA98003
Number of pages:	38

GRA98003

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP 29 of 1997
(9615279)

ON APPEAL from the judgment of
Angel J in proceeding No. 133 of 1996

BETWEEN:

NHR FORSTER PTY LTD
(ACN 000 041 734)
Appellant

AND:

PATRICIA MACMICHAEL
First Respondent

AND:

ANTHONY JOHN MACMICHAEL
Second Respondent

CORAM: KEARNEY A/CJ, THOMAS J and GRAY A/J

REASONS FOR JUDGMENT

(Delivered 21 April 1998)

KEARNEY A/CJ

I have had the benefit of reading in draft the judgment herein of Gray AJ. I concur in his Honour's reasons and conclusions, and in the order he proposes.

THOMAS J

This is an appeal from a judgment of Justice Angel given on 29 October 1997, 12 November 1997 and 14 November 1997.

The judgment was an order for specific performance in favour of the respondents for the purchase of a property at 62 East Point Road from the appellant.

The amended Grounds of Appeal are as follows:

"2.1 Erred in law in finding that clause 13 ("the Clause") of the NT Law Society approved Standard Form contract ("the Contract") for the sale and purchase of land, that had been exchanged between the solicitors for the parties, which clause contained an entire and only contract provision, could simply be ignored as being inconsistent with the true intention of the parties;

2.2 Erred in law in proceeding to ignore the Clause in the absence of a claim for rectification of the Contract;

2.3 Erred in law in proceeding to ignore the Clause and thereby finding that the invoice ("the Invoice") delivered by the solicitor for the Defendant to the solicitor for the First Plaintiff formed part of the contract for the sale and purchase of the land in question;

2.4 Erred in law and fact in finding that the parol evidence rule, the rule in *L'Estange –v- Graucob* (1934) 2 KB 394 (sic) and the rule in

Hoyts –v- Spencer (1919) 27 CLR 133 did not apply in the circumstances of this case;

2.5 Erred in law and fact in finding that because the Invoice referred to the second mortgage of $125,000.00 that there was an agreement between the parties for vendor finance in the sum of $125,000.00 over 10 years at the rate of interest referred to in evidence by the First Plaintiff's solicitor ("the Vendor Finance Agreement");

2.6 Erred in law and fact in finding that the mortgage document that had previously been forwarded by the Defendant's solicitor to the Plaintiff's solicitor was intended to be and was taken at the exchange of the Contract to be a composite part of the one transaction; and

2.7 Erred in law and fact in finding that the Vendor Finance Agreement formed an integral part of the contract for the sale and purchase of the land in question and therefore could be specifically enforced.

2.8 *Erred in law and fact in holding that the vendor finance clause was in a form other than that pleaded in paragraph 3(e) of the Amended Defence*."

At the hearing of the appeal the appellant sought to amend the Notice of Appeal with the inclusion of Ground 2.8. The application to include Ground 2.8 was opposed on the ground that the issue was not litigated at trial. It was agreed that the Court would proceed to hear the substantive argument and rule on the application to include an amended ground of appeal at the time of dealing with the substantive appeal.

The appellant seeks the following orders:

"1. That the judgment of Justice Angel made on 29 October 1997, 12 November 1997, and 14 November 1997 be set aside.

2. That the judgment be entered in favour of the Defendant on the Plaintiffs' claim for specific performance in proceedings number 133 of 1996.

3. That the Respondents pay the Appellant's costs of this appeal and the costs of the hearing before Justice Angel."

The background to this matter is as follows:

At all material times the appellant was the registered proprietor of Lot 2855 Town of Darwin, Certificate of Title Volume 265, Folio 027, situate at 62 East Point Road Fannie Bay in the Northern Territory of Australia (hereinafter referred to as "the property").

At all material times the second respondent was a licensed land and business agent and in that capacity entitled to represent sellers and buyers of real property as their agent in consideration of the payment of commissions, if retained for that purpose.

On 18 February 1995, the respondents entered into possession of the property on the basis of an oral agreement with Mr and Mrs Forster, directors acting on behalf of the appellant company, whereby they agreed to purchase the property from the appellant for an amount of $465,000 dependent upon the sale of their former residence at 12 Lampe Street, Fannie Bay.

The respondents agreed to pay a licence fee in respect of their occupation of the property at the rate of $500 per week. There was an agreement that commission due from the appellant to the second respondent could be credited against the purchase price upon settlement.

On 13 February 1996, the appellant's solicitors submitted a draft contract of sale to the respondents indicating a purchase price of $375,000 which price was $90,000 less than had been agreed by oral contract.

The draft contract offered to the first respondent, subject to the guarantee of the second respondent, a vendor's second mortgage over the property to secure a loan from the appellant in the sum of $125,000.00, with interest payable at the rate of 10% per annum. The principal sum was to be repaid within five years of the date of the first mortgage.

On 19 February 1996 the defendant's solicitors submitted a second proposed contract for a purchase price of $465,000 subsequently executed and dated 22 February 1996, together with a Deed of Guarantee bearing the date 19 February 1996 and a memorandum of second mortgage to secure an advance by the appellant to the first respondent of $125,000.

On 20 February 1996, the second plaintiff submitted an invoice for the sum of $90,000 to the appellant in respect of the commission agreement.

On 22 February 1996, a copy of the second respondent's invoice of 20 February 1996 was acknowledged in writing for and on behalf of the appellant upon its instructions by the appellant's solicitor which acknowledgment confirmed the commission agreement.

On 22 February 1996 executed counterparts of the second contract of sale were exchanged by the respective solicitors for the appellant and the respondents. The only other document included in the exchange effected on the 22nd February 1996 was the invoice for the sum of $90,000 to the appellant in respect of the commission agreement. The trial judge found the parties intended to be bound only by the exchange on 22 February 1996.

The respondents asserted that the contract for the sale and purchase of the property was comprised of:

i) the second contract of sale;

ii) the memorandum of second mortgage which was tendered by the appellant's solicitor to the respondents' solicitor on 19 February 1996.

iii) the Deed of Guarantee which was tendered by the appellant's solicitors to the plaintiffs' solicitors on 19 February 1996.

iv) the respondents' solicitor's letter of 20 February 1996.

v) the second respondent's invoice dated 20 February 1996 acknowledging the terms of variation and signed by the appellant's solicitor dated 20 February 1996.

The appellant agreed that documents (i) and (v) were exchanged but do not accept (ii), (iii) and (iv) were part of the contract.

No settlement was effected because the appellant was proceeding on the basis that there was no vendor finance agreement and the respondents were proceeding on the basis that the appellant was providing vendors finance by securing a second mortgage on the property. The appellant's primary case is that there was no vendor finance agreement between the parties.

The appellant's alternative plea is that, if there was any such agreement, as alleged by the respondents, then one of the terms of it was that the first respondent ensure that the first mortgagee's priority be limited to $130,000. This was because the first respondent was intending to borrow money from the Australian Central Credit Union (ACCU), which was to be first mortgagee. This meant the security to be given to the appellant could only be a second mortgage and the appellant wanted to ensure that the second mortgage had some value as security.

The respondents deny there was to be any priority term in respect of the first mortgage. The respondents did not in fact obtain funds from the ACCU but rather from the Australia and New Zealand Banking Group Limited (ANZ). The amount to be provided by the ANZ Bank was $200,000 conditional upon them obtaining a first mortgage over the property. On the appointed date for settlement, the settlement did not proceed. The respondents denied that the tender of $200,000 from the ANZ Bank was in conflict with the final agreement. The respondents asserted it was not a term of any agreement between the appellant and the respondents that any proposed first mortgage over the property, whether to the ACCU or the ANZ Bank or otherwise, be

limited in its priority. The respondents state the first respondent was not obliged to tender such priority agreement at settlement or at any other time.

The appellant argues that the issue relating to the priority term of the first mortgage was litigated at trial and accordingly they should be allowed to amend the Notice of Appeal with the insertion of paragraph 2.8.

The contract, which was exchanged on 22 February 1996, contains the following relevant provisions:

> “Clause G. Purchase Price: $465,000.
> Clause O. Finance – not applicable.
> Clause P. Prior Sale
> (a) Description of Purchasers Property 12 Lampe St, Fannie Bay
> (b) Date for Completion of sale by Purchaser on or before 30th June 1996.
> (c) Minimum Sale Price $267,000.00.”

Clause 3(b)(2) states the balance of the purchase price is payable by bank cheque or cash. Clause 13 reads as follows:

> “The Purchaser acknowledges that he has not relied on any representations of the Vendor, the Vendor’s Agent or any other person inducing him to enter into this Contract other that (sic) as set out herein and that he has entered into this Contract after satisfactory personal inspection and investigation of the property and the terms herein constitute the entire and only contract between the parties in relation to the property.”

With respect to the finance clause the contract itself states at item P, (AB769), that this is not applicable. At the end of the contract is a provision

for Special Conditions. There were no special conditions in the contract under this provision.

The other document that was exchanged was an invoice signed by the second respondent who was not a party to the contract. The invoice was for various commissions and was dated 20 February 1996. It was signed by Nicholas Mitaros as solicitor for the appellant on instructions from Norman Henry Forster, a director of the appellant company, and above the execution provision appear the words "I hereby authorise and direct that the sum of $90,000 be deducted from the property settlement of 62 East Point Road at $465,000 on or before 30 June 1996". A copy of this invoice is at AB876. This invoice was under cover of a letter sent from solicitors for the respondents on 20 February 1996 and incorrectly dated 4 February 1996 (AB1170). The letter refers to the $90,000 referred to in the invoice and seeks a confirmation or acknowledgment that the $90,000 will be allowed against the purchase price at settlement. The final paragraph of the letter states:

> "We also take this opportunity to confirm that at settlement NHR Forster Pty Ltd shall provide vendor finance to Patricia Macmichael (sic) to an amount of $125,000 secured by a second registered mortgage over the property and payable by no later than 5 years from the date of settlement."

This letter was not exchanged and was not part of the contract. There is no mention of the interest to be paid on the second mortgage.

The invoice itself also makes reference to a second mortgage but does not specify all the essential terms or seek acknowledgment or confirmation of the second mortgage.

In his reasons for decision his Honour, the trial judge, found that there had been a formal exchange of documents, namely the documents already referred to being the contract for sale signed by both parties and the invoice. His Honour found that the parties intended to be bound upon the formal exchange taking place (*Eccles v Bryant & Pollock* [1948] 1 Ch 93).

His Honour referred to a draft mortgage and to the reference on the invoice to a second mortgage which reads as follows (AB789):

> "2. (2) 26 January 1995 – 28 June 1996
> $11,000 to be treated as Rent and
> in addition to 2nd Mortgage of $125,000
> from 28.6.96"

His Honour stated (AB1244):

> "The invoice document specifically refers to a second mortgage for $125,000. That document formed part of the exchange. The exchange had to be seen, against the background that a mortgage in the sum of $125,000 for signature by the first plaintiff was prepared by the defendant's solicitors and forwarded together with the vendor purchase contract to Mr Parish.
>
> I think it is quite clear on the evidence before me that I find acceptable that there was an agreement for vendor finance in the sum of $125,000 over 10 years at the rate of interest referred to by Mr Parish. That was an integral part of the one transaction."

His Honour further stated (AB1245):

> "The whole, I am satisfied, must be seen as one transaction, the vendor finance part of it being an integral part of it; not, I hasten to say, as collateral within the rule of Hoyts v Spencer. So neither the parol evidence rule nor the rule in Hoyts v Spencer apply, in my view, to the facts of this case.
>
> The invoice contained an acknowledgment signed by the managing director of the defendant company of a credit to be given at settlement of $90,000, together with the reference to the second mortgage of $125,000. As I have said before, that document formed part of the exchange and thus part of the contract. Seen in that light, clause 13 of the vendor purchaser agreement is simply untrue in the sense that it seeks to incorporate the whole and only terms of the contract within the vendor purchaser document itself."

Copy of the mortgage document is set out in full at AB796-806 inclusive. This is the mortgage which his Honour found "to be already forwarded by Mr Mitaros to Mr Parish was intended to be and was taken at the exchange to be a composite part of the one transaction". This draft mortgage refers to a prior encumbrance with Australian Central Credit Union. The respondent in fact obtained funds on a first mortgage from the ANZ Bank. Under item 7 "Calculation of Interest" the statement concludes that the interest and calendar sum will be repayable within four calendar months of the date of advance. Item 9 contradicts this and states:

> "The mortgagor shall repay the principal sum to the mortgagee within five (5) years of the date of registration of this mortgage at the Land Titles Office Darwin."

The mortgage does not contain a priority term. This draft mortgage was sent three days before exchange of contracts.

I agree with the submission by Mr Fraser QC, counsel for the appellant, that the mortgage was not exchanged. I also agree with the submission on behalf of the appellant that the reference on the invoice to a second mortgage is not of itself an agreement about a second mortgage as it does not contain the necessary detail nor is it acknowledged by the appellant or his solicitor. There was a considerable amount of evidence given at trial about an oral agreement between the parties on the subject of the appellant providing vendor finance by way of second mortgage.

On the respondents' own evidence the discussions between the parties about the mortgage had included reference to a deed of priority to ensure that the second mortgage was worth something. Evidence to this effect was given by the second respondent (t/p 262-264). The first draft contract has some special conditions (AB829) which included a condition that the purchaser shall ensure the first mortgage priority is limited to no more than $130,000 plus interest and costs.

In his reasons for decision, the trial Judge rejected the respondents' claim that the contract of sale included oral agreements as to vendor finance which the second respondent alleged he had made with Mr Forster, the appellant's director between 1993 and February 1996.

There was also evidence given at trial about a "side agreement" between solicitors for the parties to overcome what they perceived were difficulties

within the family of the directors of the appellant company. In particular a belief that Mrs Forster would not agree to the provision of $90,000 or the terms of the vendor finance and these provisions would have to be covered elsewhere outside the formal contract that was exchanged. His Honour does not indicate he relied on this discussion to reach his conclusion.

At settlement the respondents tendered $200,000 of the purchase price conditionally on obtaining a first mortgage in favour of the ANZ Bank, not the ACCU. There was no deed of priority.

There were conflicts between the evidence of Mr Forster and the evidence of Mr Macmichael as to whether or not there was ever an oral agreement between them that the appellant would provide vendor finance. Mr Macmichael gave evidence that there was such an agreement. Mr Forster denied ever making such agreement to provide vendor finance.

His Honour found that the parties did not intend to contract in any of these oral agreements. His finding was they intended to contract only on exchange.

Summary of submission by counsel for the respondents

It is the submission by Mr Southwood, counsel for the respondents, that his Honour effectively concluded that there was a contract by exchange between the parties for the sale of 62 East Point Road and that the contract for

sale included an ancillary provision for part of the purchase price to remain on mortgage. So that in effect there was just the one transaction. His Honour determined how the parties were bound and what was their real intention.

On the question of the real intention of the parties to a contract, it is the respondent's submission that it has always been an exception to the parol rule of evidence that you are entitled to take into account the surrounding circumstances in which the agreement is made.

Counsel for the respondents submit that the approach taken by his Honour was in accordance with the decision of *Loan Investment Corporation of Australasia v Bonner* [1970] NZLR 724 at 735:

> "(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."

The first contract was prepared by solicitors for the appellant on the instructions of the second respondent. Under cover of letter from Philip and Mitaros (AB818) dated 13 February 1996 the prepared contract was forwarded to Philip and Mitaros as solicitors for Mr and Mrs Macmichael. I note this letter states inter alia:

> "Accordingly the contract is forwarded to you on the basis that our instructions may in fact differ substantially from the contents of the

enclosed contract. We reserve our right to make amendments to the enclosed contract."

This contract does make reference to vendor finance and that the purchaser shall ensure that the first registered mortgager's priority is limited to no more than $130,000 plus interest and costs and other conditions including the sale of 12 Lampe Street.

Mr Southwood then went into considerable detail outlining the factual matrix or background to the transaction, including discussions between the parties and between the parties' solicitors and various letters which passed between them.

It is the respondents contention that the intention of the parties on exchange was that the land would be sold for the sum of $465,000, the $90,000 was to be deducted and there would be vendor finance for $125,000 plus the $11,000 which is set out on the third page of the invoice. The vendor finance was to be provided in effect at a rate of 10% for a period of five years, and it was provided that the interest and capital would be repaid some time within that period.

The respondents contend that his Honour found the parties, by their exchange, asserted to an agreement or ancillary provision about vendor finance in the terms he states. His Honour looked at the surrounding circumstances in order to determine what was the real intention of the parties and to determine the manner in which they had agreed to be bound. He found on the whole of

the evidence that there was to be a vendor finance provision in the terms of the contract.

Conclusion

I do not accept the submissions put forward on behalf of the respondents that his Honour was entitled to ascertain the intention of the parties in order to determine the terms of the contract.

The Court looks to the contract to determine the intention of the parties. I agree with the submission of Mr Fraser QC, counsel for the appellant, that clause 13 of the contract excludes evidence of prior negotiations and alleged terms outside the written contract.

The only two documents which formed the exchange were the contract for sale and the invoice. I am not persuaded the invoice is anything more than an authorisation on behalf of the vendor that the sum of $90,000 can be deducted from the purchase price. It does not include an agreement for a second mortgage by way of vendor finance. None of the essential details of any such second mortgage are referred to or acknowledged. There is no ambiguity either in the contract of sale or the invoice. These two documents form the entire contract which was exchanged between the parties. There being no ambiguity, evidence as to surrounding circumstances is not admissible.

I apply the rule as expressed by Mason J in *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1981) 149 CLR 337 at 347-348:

> "The broad purpose of the parol evidence rule is to exclude extrinsic evidence (except as to surrounding circumstances), including direct statements of intention (except in cases of latent ambiguity) and antecedent negotiations, to subtract from, add to, vary or contradict the language of a written instrument (*Goss v. Lord Nugent* (1833) 5 B & Ad. 58, at pp. 64-65 [110 E.R. 713, at p. 716]). Although the traditional expositions of the rule did not in terms deny resort to extrinsic evidence for the purpose of interpreting the written instrument, it has often been regarded as prohibiting the use of extrinsic evidence for this purpose. No doubt this was due to the theory which came to prevail in English legal thinking in the first half of this century that the words of a contract are ordinarily to be given their plain and ordinary meaning. Recourse to extrinsic evidence is then superfluous. At best it confirms what has been definitely established by other means; at worst it tends ineffectively to modify what has been so established."

and at p352:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. ….."

The contract for sale and the invoice constitute the only contract and are complete in themselves. This does not include an agreement for a second mortgage by way of vendor finance. There is support for this conclusion in that at settlement it was found necessary to make amendments to the draft second mortgage before it was executed by the purchaser. There is no

evidence that there was ever an agreement as to the essential terms of such second mortgage.

I have come to the conclusion that the appellant must succeed and that the order for specific performance should be set aside.

Having reached this conclusion, I have not considered it necessary to make findings on the appellant's alternative case that even if the exchange of documents did include vendor finance it must be subject to the purchaser limiting the priority on the first mortgage to $130,000. I will, however, deal with the application to amend the Notice of Appeal in terms of paragraph 2.8 of the Amended Notice of Appeal. The application to amend was opposed by Mr Southwood for the respondent, on the basis that this point had not been raised before the trial judge.

Mr Fraser has identified the passages in the transcript of evidence pp586-7, where this matter was raised and submissions made by Mr Reeves QC in the course of a final address to his Honour. The alternative case was pleaded in paragraph 3(e) of the defence.

I accept Mr Fraser's argument that the point was clearly raised at the time of the trial and I would grant leave to amend the Notice of Appeal in the terms set out in paragraph 2.8 of the Amended Notice of Appeal.

In respect of the substantive appeal I would allow the appeal. I would make the following orders as sought by the appellant:

1. That the judgment of Justice Angel made on 29 October 1997, 12 November 1997, and 14 November 1997 be set aside.

2. That the judgment be entered in favour of the defendant on the plaintiffs' claim for specific performance in proceedings number 133 of 1996.

3. That the respondents pay the appellant's costs of this appeal and the costs of the hearing at first instance.

GRAY A/J

This is an appeal from an order for the specific performance of a contract for the sale of land. The order was made by Angel J on 18 November 1987. The parties to the contract were N.H.R. Forster Pty Ltd as vendor and Patricia Macmichael as purchaser. The subject matter of the contract was a residence at 62 East Point Road, Darwin and the agreed purchase price was $465,000. The directors of the vendor company were Mr and Mrs Forster. The purchaser's husband, who was joined as a plaintiff, was also active in the negotiations which led to the contract. I will hereafter refer to the parties to the contract as "the vendor" and "the purchaser". The purchaser's husband had done work for the vendor. At the time the contract was made there was a sum of money owing to Mr Macmichael by the vendor. In a document exchanged between the

parties, the vendor acknowledged that $90,000 was owing by the vendor to Mr Macmichael and that such sum could be deducted from the amount payable under the contract by the purchaser. This explains Mr Macmichael's joinder as a plaintiff

The order appealed against provided that the vendor advance to the purchaser the sum of $125,000 as part of the purchase price and that such advance be secured by a second mortgage of the property to be executed by the purchaser in favour of the vendor and registered at the time of settlement.

The vendor contends that the contract for the sale of the property did not contain any agreement to provide vendor finance or alternatively, to provide it on the terms expressed in the order for specific performance. This is the sole question raised by the appeal.

It was found by the learned trial judge that the contract was constituted by an exchange of documents between the solicitors for the parties which took place on 22 February 1996. This finding was not disputed on the appeal.

At the trial, there was a great deal of evidence led concerning the negotiations leading to the making of the contract. Most of this evidence was admitted over the objection of the vendor's counsel, who contended that it was inadmissible under the parol evidence rule.

There were substantial conflicts of evidence, particularly between the evidence of Mr Macmichael and Mr Forster. This conflicting evidence was not the subject of any express findings by the learned trial judge. When His Honour delivered judgment on 29 October 1997 he stated that he intended to give detailed written reasons later but that some time would elapse before that could be done. His Honour obviously recognised that the resolution of the dispute was an urgent matter and obliged the parties by announcing the result and giving abbreviated reasons intended to be amplified later. In the result, a notice of appeal was given and the parties have conducted the appeal upon the basis of His Honour's reasons as given on 29 October 1997.

Leaving aside the question of admissibility, the evidence led concerning the events leading up to the exchange of documents on 22 February 1996 shows the following sequence of events during the earlier part of that month. I should add that during the relevant period Mr Mitaros of Philip & Mitaros acted for the vendor and Mr Parish of Mildrens acted for the purchaser.

On 9 February 1996, Mr Macmichael wrote to Mr Mitaros with instructions to prepare a Contract of Sale of 62 East Point Road. The particulars given provided for vendor finance of $125,000. On 11 February Mr Mitaros faxed a copy of these instructions to Mr Macmichael with a request that Mr Macmichael provide particulars of the limit of the first mortgage to Australian Central Credit Union ("ACCU") "for priority purposes".
Mr Macmichael faxed back the figure of $130,000 as being the limit of the vendor's liability under the proposed first mortgage. In evidence,

Mr Macmichael conceded that he knew that a second mortgagee usually requires a deed limiting the first mortgagee's priority. The odd spectacle of the purchaser's husband giving instructions to the vendor's solicitor for the preparation of the contract is explained by the fact that Mr Macmichael had for a long time been closely connected with the vendor in business activities. The evidence shows that he had been the company secretary of the vendor. In this way Mr Macmichael had presumably had dealings with Mr Mitaros, who acted for the vendors.

On 12 February Mr Macmichael telephoned Mr Parish and asked him to act for Mrs Macmichael in the purchase.

On 13 February Mr Mitaros sent the first draft contract, based on the instructions from Mr Macmichael, to Mr Parish. This contract provided for vendor finance of $125,000 and contained a special condition requiring the purchaser to ensure that the first mortgagee's priority was limited to $130,000. The contract had annexed to it a draft second mortgage and a guarantee in relation to repayments of the second mortgage loan for signature by Mr Macmichael.

On 14 February, Mr Parish discussed the draft contract with the Macmichaels. On the same day Mr Parish wrote to Mr Mitaros to the effect that the purchaser was satisfied with the contract and sought an early exchange of parts.

On 19 February, Mr Macmichael told Mr Mitaros that on the previous day he had agreed with Mr Forster that there should be vendor finance of $125,000 "on same terms as previously discussed".

Also on 19 February, Mr Mitaros telephoned Mr Parish to say that the special conditions in the first draft contract concerning the $90,000 credit and the vendor finance would not appear in the final contract because of "family politics". Mr Mitaros said that there would be trouble if Mrs Forster knew about either of those matters. Mr Parish said that there must be some contemporaneous acknowledgment of those terms. Mr Mitaros had no recollection of the conversation with Mr Parish.

However, later on the 19 February, Mr Mitaros gave a second draft contract, a further draft guarantee and a further draft second mortgage to Mr Macmichael who took them to Mr Parish. This second draft contract omitted all of the special conditions relating to vendor finance which had been in the first draft contract. The further draft second mortgage provided that the only encumbrance having priority to the second mortgage was a first mortgage to ACCU. There were conflicting provisions about the repayment of principal and the payment of interest.

On 20 February, Mr Parish wrote to Mr Mitaros enclosing an unsigned invoice seeking an acknowledgment of the $90,000 deduction from the purchase price and confirming that the vendor was to provide vendor finance.

The invoice did not seek an acknowledgment that vendor finance was to be provided or of any proposed deed or terms.

On 22 February, Mr Mitaros sent Mr Parish a copy of the invoice signed by Mr Mitaros on behalf of the vendor. The vendor instructed Mr Mitaros to exchange contracts and acknowledge the $90,000 entitlement to commissions.

The purchaser did not execute the further draft second mortgage nor otherwise communicate her agreement to that document being part of the contract at any time prior to the exchange. When asked by the learned trial judge whether the draft second mortgage was signed on 22 February, Mr Parish said “Not at that time, Your Honour. There were some drafting errors in the mortgage which made the document nonsensical. And I intended to negotiate or discuss that with Nick Mitaros at a later time. I didn’t see the point of having it signed”. The evidence shows that Mr Parish unilaterally made amendments to the document several months later at the time of the proposed settlement on 1 July.

Finally, on 22 February the formal exchange took place. Only two documents were exchanged, the final contract and the invoice signed by Mr Mitaros.

The contract provided that the date for completion was on or before 30 June. Settlement was attempted on 1 July, but the purchasers would not settle because the vendors refused to provide vendor finance. On or about

1 July, Mr Parish amended the draft second mortgage. The original draft had provided that the $125,000 was to be repaid within four months of the date of the advance. It also provided that the first mortgagee was ACCU. Mr Parish amended the repayment provision by substituting five years for four months. However, he failed to amend the name of the first mortgagee although the ANZ Bank was the proposed first mortgagee at the time of settlement and proposed to advance $200,000 towards the purchase price rather than $130,000 which was referred to in the negotiations to which I have earlier referred. The purchaser signed the second mortgage in its amended form.

When asked to explain these events, Mr Parish said in evidence "In correspondence with De Silva Hebron, I drew their attention to these drafting errors and inconsistencies and asked for fresh documentation that correctly reflected the agreement between the parties. Nothing happened. No proper documents were given to me, so I had no alternative but to make those amendments to the original mortgage to reflect the agreement.".

The settlement having gone off, the present proceedings were initiated a short time later on 16 July 1996.

By their amended Statement of Claim the plaintiffs alleged an oral agreement on 18 February 1995 and various negotiations which took place over the following year, but in paragraph 17 alleged that the contract for the sale of the property was constituted by

(i) the second contract of sale;

(ii) the Memorandum of Second Mortgage which was tendered by the Defendant's solicitor to the Plaintiffs' solicitor on 19 February 1996;

(iii) the Deed of Guarantee which was tendered by the Defendant's solicitors to the Plaintiffs' solicitors on 19 February 1996;

(iv) the plaintiffs' solicitors' letter of 20 February 1996; and

(v) the Second Plaintiff's invoice dated 20 February 1996 acknowledging the terms of variation and signed by the Defendant's solicitor dated 20 February 1996.

The plaintiffs claimed specific performance of the contract as alleged. The second plaintiff further sought a judgment for the commissions which remained unpaid.

In its defence, the vendor relied upon the contract exchanged on 22 February 1996 and denied that there was any agreement for the provision of vendor finance. In the alternative, it alleged that any agreement for vendor finance was conditional upon the purchaser ensuring that the first mortgagee's priority was limited to $130,000.

I have referred to para 17 of the Statement of Claim which alleges that the relevant contract was constituted by five identified documents. However, it would appear from the learned trial judge's reasons for judgment that the

plaintiffs' counsel also relied upon various oral agreements as constituting part of the contract sued upon.

The learned trial judge delivered reasons for judgment on 29 October 1997. His Honour stated that counsel for the plaintiffs had submitted that the contract sued upon was a composite contract constituted by, among other things, a series of oral agreements between Mr Macmichael and Mr Forster between 1993 and 1996.

His Honour rejected this argument because he found that the intention of the parties was that the contract was to be constituted by an exchange of documents. That finding was accepted as correct by each party to the appeal.

The next matter discussed by His Honour was the effect of Clause 13 of the written contract and the parol evidence rule. Clause 13 of the contract provided, inter alia, "the terms herein constitute the entire and only contract between the parties in relation to the property". His Honour said that the problem with the vendor's arguments was that this was not a case of a contract in writing but was a contract by exchange. Accordingly, neither the parol evidence rule nor the rule in *Hoyts v Spencer* 27 CLR 133 had any application. I interpolate to say that the rule in *Hoyts v Spencer* had been relied upon by counsel for the defendant who contended that the invoice, if it evidenced a contract, evidenced a collateral contract inconsistent with the contract to which it was collateral.

His Honour said that the exchange constituted one transaction. It included the invoice which itself referred to “the proposed mortgage transaction”. This meant that Clause 13 of the contract was “simply untrue” and could be ignored because it was inconsistent with the intention of the parties.

The core of His Honour’s reasons for judgment are expressed in the following passage:

> “The invoice document specifically refers to a second mortgage for $125,000. That document formed part of the exchange. The exchange has to be seen, against the background that a mortgage in the sum of $125,000 for signature by the first plaintiff was prepared by the defendant’s solicitors and forwarded together with the vendor purchase contract to Mr Parish.
>
> I think it is quite clear on the evidence before me that I find acceptable that there was an agreement for vendor finance in the sum of $125,000 over 10 years at the rate of interest referred to by Mr Parish. That was an integral part of the one transaction.”

Upon the appeal Mr Fraser QC, with Mr Hebron, appeared for the appellant. Mr Southwood of Counsel, appeared for the respondents. Mr Fraser identified a number of areas in which he submitted that the learned trial judge had erred. In particular, Mr Fraser contended that His Honour was in error in finding a concluded agreement for vendor finance or alternatively, in finding an agreement for vendor finance with no priority term. He further submitted that His Honour erred in admitting evidence of the terms of a vendor finance agreement which were not contained in the exchanged documents.

Mr Southwood contended that the reasoning of His Honour was correct and that the inferences to be drawn from the conduct of the parties provide sufficient evidence of the existence of a vendor finance agreement without a priority clause.

The first point which requires consideration is the application of the parol evidence rule and the entire contract provision contained in Clause 13.

The learned trial judge expressed the view that the parol evidence rule did not apply to a contract by exchange. This proposition, which is unsupported by any authority to which we were referred, is one that I am unable to accept. In *Eccles v Bryant* [1948] 1 Ch 93 Lord Greene MR said, at p99,

> "When you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. This particular procedure of exchange ensures that none of these difficulties will arise".

In my view, it is implicit in that passage that written contracts which are exchanged are subject to the legal rules relating to written contracts in general.

In *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1981] 149 CLR 337, Mason J, at p347, stated the rule in the following terms:

> "The broad purpose of the parol evidence rule is to exclude extrinsic evidence (except as to surrounding circumstances), including direct statements of intention (except in cases of latent ambiguity) and antecedent negotiations, to subtract from, add to, vary or contradict the language of a written instrument."

His Honour goes on to discuss the question of admitting evidence of the surrounding circumstances if such evidence throws light on ambiguity which arises from the plain meaning of words used in a written contract. But His Honour points out, at p347, that where the language gives rise to no such problem recourse to extrinsic evidence is superfluous.

To my mind, the parol evidence rule applies to the present contract quite apart from the presence of Clause 13. The effect of such a clause will depend upon its precise wording but, in principle, such a clause "will render inadmissible extrinsic evidence to prove terms other than those in the written contract, since the parties have by the clause expressed their intention that the document is to contain all the terms of the agreement" *Chitty on Contracts,* General Principles, 26th Edition, para 854.

In the present case, it has not been suggested that the language of the contract of sale or the invoice has any latent ambiguity which requires

evidence of surrounding circumstances as an aid to interpretation. I am satisfied that the parol evidence rule operates, in this case, to exclude any evidence as to the terms of the contract other than that contained in the documents themselves.

As to Clause 13, it is well established that such a term should be accorded its ordinary meaning *Hope v RCA Photophone of Australia Pty Ltd* [1937] 59 CLR 348. The learned trial judge stated that Clause 13 was "untrue" because it did not express the parties' intention. But, as Mr Fraser pointed out, the untruthfulness of a contractual provision does not affect its binding quality if it is agreed upon as a contractual provision. Mr Fraser also put it that the learned trial judge's reliance upon extrinsic evidence was appropriate to a suit for rectification but not to a claim based upon contract.

Having come to the foregoing conclusion that extrinsic evidence led was inadmissible, the question is whether the material in the written contract is enough to support the purchaser's claim to an order for specific performance. The first aspect of this question is whether each document exchanged must be looked at in isolation. The presence of Clause 13 makes out a strong case for saying that the contract for the sale of the property is to be found within its pages and within its pages alone. For the reasons I have discussed earlier, I consider that this is the correct view. That means that the only contract which the purchaser can seek to have specifically performed is the contract expressed

in that document. All the terms essential to such an agreement are to be found within its pages. It is a complete contract for the sale of land and the parties have agreed that it constitutes the only contract in relation to the property. Clearly upon that view, the appeal must be allowed.

However, I feel it is desirable to consider the case upon the basis that the two exchanged documents form a composite agreement and that the terms of the invoice are part of the "terms herein" referred to in Clause 13.

The invoice, which appears at p625 of the appeal book, quite clearly limits the acknowledgment of Mr Mitaros to the deduction of $90,000 from the purchase price at the time of the settlement. This is the only part of the document that is expressed in contractual terms. It is not able, in my view, to be read as an agreement by the vendor's solicitor to provide vendor finance. It was not pleaded as such by the purchaser – see paragraphs 14 and 15 of the amended Statement of Claim.

If it had been pleaded as an acknowledgment that vendor finance would be provided, a real question would have arisen as to the authority of Mr Mitaros to make such an acknowledgment. Mr Forster swore that he did not agree to vendor finance. Furthermore, it is an inescapable inference from Mr Mitaros' statements to Mr Parish on 19 February 1996 that Mrs Forster did not agree to vendor finance. She was a co-director and shareholder of the vendor.

As I say, it was not the purchaser's case at the trial that the invoice was anything other than an acknowledgment of the amount of commission owing and the vendor's willingness to have it credited at the time of settlement. Limited in that way, the invoice was a contractual document which was harmonious with the principal contract.

But it is to my mind impossible to say that the invoice provides evidence of an agreement by the vendor to provide vendor finance. Apart from anything else, the invoice says nothing about vendor finance. It refers to a "second mortgage of $125,000 from 28.6.96". The reference is part of a calculation concerning rent to which the second mortgage sum is to be added.

The learned trial judge recognised that the invoice did not sufficiently express an agreement to provide vendor finance. His Honour stated that the invoice "refers to a second mortgage for $125,000" and that the exchange of documents had to be seen against the background that the draft second mortgage had been forwarded with the second draft contract to Mr Parish. This enabled His Honour to find that "there was an agreement for vendor finance in the sum of $125,000 over 10 years at the rate of interest referred to by Mr Parish".

The reference to "10 years" seems to be a slip and the reference to "the rate of interest referred to by Mr Parish" is obscure. The period of the loan in the draft second mortgage, after it had later been amended by Mr Parish, was five years. The rate of interest is provided for in the draft second mortgage prepared by Mr Mitaros. It is a variable rate and was not amended by Mr Parish.

Even if it be accepted (which I do not) that the reference to a second mortgage in the invoice incorporates the draft second mortgage into the agreement constituted by the exchange, it does not provide evidence of a concluded agreement for vendor finance. The draft second mortgage was indeed, a draft. The drafting, according to Mr Parish, made the document nonsensical. An examination of the document compels agreement with Mr Parish's characterisation. It was not signed by the proposed mortgagee at the time of the contract because it clearly required further negotiation and amendment. Nor was there any other form of acquiescence in its terms communicated to the vendor by the purchaser. It is, to my mind, impossible to find that any concluded agreement for vendor finance arose from the exchange of documents.

The correctness of this conclusion is demonstrated by the necessity to make amendments to the draft mortgage before it was executed by the purchaser at the time of settlement. Even after amendment, the mortgage

recited that the only encumbrance was a first mortgage to ACCU, whereas the purchaser proposed to finance the purchase by a first mortgage loan from ANZ Bank of $200,000 (see para 15.2 of the Reply).

Mr Southwood submitted that in his letter of 20 February 1996, Mr Parish accepted the terms of the draft second mortgage which had been delivered on 19 February. This cannot be so in view of the "nonsensical" state of the document at that stage which was recognised by Mr Parish. At the highest, all that can be said of Mr Parish's letter of 19 February is that it confirmed that the vendor would provide vendor finance at settlement secured by a second mortgage in terms to be later agreed upon.

Mr Fraser's alternative case was that even if an agreement to provide vendor finance can be extracted from the exchange of documents, it must necessarily be subject to the purchaser limiting the first mortgagee's priority to $130,000 in accordance with the agreement between Mr Mitaros and Mr Macmichael to which I have earlier referred. I consider that this alternative case is well founded. There was no suggestion in the negotiations that this reasonable requirement of the vendor had been abandoned. As a consequence of the order finally made, the vendor was obliged to advance $125,000 on second mortgage subject to a priority security of $200,000 which may be increased, thus leaving the vendor in a very vulnerable position.

To enable the vendor to raise the alternative argument, Mr Fraser made application to amend the Notice of Appeal. This application was made at the outset of the appeal and was opposed by Mr Southwood, who contended that the point had not been raised at the primary hearing. The Court deferred ruling upon the application until the appeal was argued.

Mr Fraser has persuaded me that the amendments should be allowed. The alternative case was pleaded in para 3(e) of the Defence and was denied in para 3 of the Reply. During the hearing, Mr Reeves (who then appeared for the vendor) made it clear that he was relying on the alternative case. In the course of his final address (transcript p 586–7) Mr Reeves submitted that any order for specific performance should include a term that the purchaser ensure that the first mortgagee's priority be limited to $130,000.

The vendor's alternative argument was not mentioned by the learned trial judge in his reasons for judgment but I am satisfied that the point was squarely raised at the trial. Accordingly I would give the Appellant leave to amend its Notice of Appeal in the terms of the draft amendments provided to the Court.

Before the learned trial judge framed the final order for specific performance, there was a lengthy discussion with counsel in which the difficulties of expressing the order were discussed.

When the order was expressed in final form, the contract to be performed was said to be constituted by the contract of sale and "an oral agreement evidenced in part" by the invoice which was exchanged. The order recites that the contract contained a number of terms. These included a term that the vendor would advance $125,000 to be secured by a second mortgage in the terms of the mortgage amended by Mr Parish months after the contract was said to have been made. Another term required the signing of a guarantee by Mr Macmichael although no guarantee had been exchanged. The order made no provision for the limitation of the first mortgagee's priority.

For the reasons I have endeavoured to express, I am satisfied the order for specific performance of a contract containing the stated terms should not have been made.

Mr Southwood, in an able address, sought to defend the reasoning of the learned trial judge. Mr Southwood's central theme was that His Honour was entitled to look at and consider the surrounding circumstances in order to determine what was the real intention of the parties and that, upon this basis, he was justified in making the findings that he did. I have already expressed my view that recourse to the surrounding circumstances was not warranted in this case. This was not a case such as *Sindel v Georgiou* [1984] 154 CLR 661 where the High Court held that the contract could be rectified to make it express the undisputed agreement between the parties. In such a case an

examination of the negotiations is allowable to determine what was the agreement.

Mr Southwood also placed reliance upon *Allen v Carbone* [1975] 132 CLR 528 as authority in support of the learned trial judge's approach to the present case. But in *Allen v Carbone* the Court was concerned, not with the construction of a written contract, but with an informal, partly oral arrangement. The question was to determine what the parties relevantly intended. The High Court (Stephen, Mason and Murphy JJ) held that in such a case it was open to the trial judge to draw inferences from the words and conduct of the parties. At p 532 the Court said

> "To ascertain their relevant intention it is often necessary to resort to inference, a process for which there is little or no scope when the parties have taken care to comprehensively record the terms of their agreement in written form".

At p 531, the Court said

> "No doubt it is right to say that the intention of the parties to a contract wholly in writing is to be gathered from the four corners of the instrument."

I have already expressed my opinion that the present case falls within the category referred to in the last quoted passage, there being no ambiguity such as would warrant resort to surrounding circumstances.

For the foregoing reasons, I would allow the appeal with costs, including the costs of the proceedings below. I would set aside the orders made below and substitute a judgment for the defendant.