GAYMARK INVESTMENTS PTY LTD v TSANGARIS & ORS

Court of Appeal of the Northern Territory of Australia.

O'Leary C.J., Rice and Asche JJ.

8, 9 and 10 December 1986, and 27 March 1987 at Darwin.

Legal Practitioners - Counsel - Authority of counsel ostensible authority - Compromise of action - Whether counsel had ostensible authority - Whether any limitation on authority - Whether risk of grave injustice to appellant if compromise agreement not set aside - Whether compromise involved collateral matter.

Contract - Certainty - Agreement of compromise - Whether terms of contract incomplete - Whether "subject to proper formulation and signature by the respective parties" - Intention of parties.

Contract - Agreement of compromise - Assignment of lease by lessee - Lessor's consent withheld - Proceedings instituted by lessee - Lessor agreed to consent on terms - Compromise of action - Whether proposed assignee of lease was a party to contract - Condition precedent - Whether contract dependent upon assignee's fulfilment of condition precedent - Whether condition precedent was a fact alleged and admitted in pleadings.

Contract - Specific performance - Agreement of compromise - Sale of supermarket business - Lessor's consent for assignment to purchaser withheld - Application by lessee for declaratory relief - Compromise of action - Lessor to give consent - Further refusal - Order for specific performance - whether trial judge erred in exercise of his discretion to grant such relief - Futility of order - Proceedings for possession against lessees - Breaches of lease by lessees - Conduct of lessees and lessor considered - Sale agreement between lessee and purchaser considered.

Injunction - Mandatory - Discretion to grant relief by way of - Whether trial judge erred in exercise of his discretion - Futility of order - Lessor to consent to assignment of lease - Proceedings for possession against lessee - Breaches of lease by lessee - Conduct of lessor and lessee considered.

Landlord and Tennant - Lease - Implied term - Whether implied term of lease to continue trading as a supermarket - Whether failure to do so breach of agreement.

Practice and Procedure - Appeal - New grounds of appeal - Not pleaded in defence - Issue not raised before trial judge - No evidence on issue at trial - Issue not beyond controversy - Possibility of evidence which could have been given at trial - Whether issue should be raised for first time on appeal.

Practice and Procedure - Pleading - Conditions precedent - Specific Performance - Readiness, willingness and ability - necessity to specifically plead in defence - Supreme Court Rules (NT) O.23 R.14, 15.

Cases applied:

Australia Safeway Stores Pty Ltd v Toorak Village Development Pty Ltd (1974) VR 268
Baird v Magripilis (1925) 37 CLR 321
Waugh v H.B. Clifford & Sons Ltd (1982) 2 W.L.R. 679

Cases distinguished:

Bridle Estates v Myer Realty Ltd (1977) 15 A.L.R. 415
Harvey v Phillips (1956) 95 C.L.R. 235
H. Clark (Doncaster) Ltd v Wilkinson (1965) 1 Ch.694
Neale v Gordon Lennox (1902) A.C. 465
Marsden v Marsden (1972) 2 All E.R. 1162

Cases followed:

Connecticut Fire Insurance Co. v Kavanagh (1892) A.C. 473
Coulton v Holcombe (1986) 60 A.L.J.R. 470
Masters v Cameron (1954) 91 C.L.R. 353
Neale v Lady Gordon Lennox (1902) K.B. 838
Strauss v Francis (1866) L.R. 1 Q.B. 379
Suttor v Gundowda Pty Ltd (1950) 81 C.L.R. 418

Cases referred to:

Charlick v Foley Brothers Ltd (1916) 21 C.L.R. 249
Chillingworth v Esche (1924) 1 Ch. 94
Davison v Vickery's Motors Ltd (in liquidation) (1925) 37 C.L.R. 1
Grey v Manitoba & North Western Railway Co. of Canada (1897) A.C. 254
Hampton Court Ltd v Crooks (1957) 97 C.L.R. 367
Hansen v Marco Engineering (Aust.) Pty Ltd [1948] V.L.R. 198
Miller v Miller (1978) 141 C.L.R. 269
Swinfen v Lord Chelmsford (1860) 5 H. & N. 89 Q. 157 E.R. 1436 Halsbury 4th Ed. Vol.3 81 p.649
Von Hatzfeldt-Wildenburg v Alexander (1912) 1 Ch. 284

Counsel for appellant	:	B.K.C. Thomson, Q.C. D. Ross
Solicitors for appellant	:	McCormack & Co.
Counsel for respondents	:	G.E. Hiley
Solicitors for respondents	:	Mildren Silvester & Partners

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

AP.1 of 1986

BETWEEN:

GAYMARK INVESTMENTS PTY. LTD.

Appellant

AND:

NICHOLAS TSANGARIS,
SEVASTI TSANGARIS,
EMMANUEL GERAKIOS
and GARFALIA GERAKIOS

Respondents

CORAM: O'LEARY C.J., RICE and ASCHE JJ.

REASONS FOR JUDGMENT
(delivered 27 March 1987)

O'LEARY C.J.: The appellant, Gaymark Investments Pty. Ltd., is a company incorporated in the Northern Territory, and, at the relevant time, was registered as the proprietor of certain land, namely Lot 5405 Fannie Bay Place, Fannie Bay, Darwin. Erected on that land was a supermarket known as the Fannie Bay Supermarket. By Memorandum of Lease dated 15 February 1985, the appellant leased those premises to the respondents for a term of 5 years at a rental of $3,958.00 per month. By Clause 1(g) of the Lease the respondents covenanted with the appellant as follows:-

"(g) That the lessee will not transfer assign sublet or part with the possession of the demised premises or any part thereof without the consent in writing of the lessor first had and obtained which consent however shall not be capriciously or unreasonably withheld in the case of a proposed transfer assignment or subletting to a respectable and solvent person or persons proof thereof shall rest upon the lessee BUT the lessor may require as a condition of the giving of such consent that the proposed assignee or sub-tenant shall enter into such direct covenants with the lessor as the lessor's solicitors shall reasonably require and as between the lessor and the lessee and the lessor's legal costs of and incidental to such consent and any necessary investigation and the preparation of any such direct covenants shall be borne by the lessee."

On 30 September 1985 the respondents entered into an agreement with a company, Detapan Pty. Ltd., for the sale to it of the supermarket business for the sum of $200,000 plus stock. Clause 10 of the Agreement was in these terms:-

"10. Completion of this agreement is conditional upon and interdependent with transfer or assignment to the purchasers by the vendors of the vendor's right title and interest as lessees of the said premises under and by virtue of Memorandum of Lease dated 21 (sic) February 1985 and made between the vendors and Gaymark Investments Pty. Ltd., such transfer or assignment to be with the consent of the said lessor, Gaymark Investments Pty. Ltd. The purchasers shall submit to the

> vendors as soon as practicable and in any event prior to settlement a Memorandum of Transfer in respect of the transfer of the said lease. The vendors agree to execute the said Memorandum of Transfer and deliver same to the purchasers at completion. The purchasers acknowledge that they have inspected the said lease and that they have satisfied themselves as to the terms and conditions thereof. Should the consent of the said lessor (pursuant to clause 1(g) of the lease) to the transfer or assignment of the lease from the vendors to the purchasers not be available, then this agreement shall be deemed to be null and void from the date on which the vendors or their solicitors shall in writing notify the purchasers or their solicitors that such consent is not available and the deposit and any other monies paid hereunder shall be refunded to the purchasers without deduction and neither of the parties shall be liable to the other for damages costs or expenses."

Negotiations for the sale of the business had begun some weeks before the date of the contract, probably very early in the month of September, 1985. They were conducted between an agent acting on behalf of the Respondents and a Mr. & Mrs. Jongue, the prospective buyers. Initially, it seems, Mr. & Mrs. Jongue proposed buying the business in their own names, but, in the end, the sale was made to a company Detapan Pty. Ltd., of which they were the sole shareholders and directors. At some time during the month the agent had also introduced Mr. & Mrs. Jongue to a director and the secretary of the appellant company, and

some discussions took place then, and subsequently, regarding the appellant's consent to the transfer of the lease. It is not necessary to refer further to those discussions here. It suffices to say that the upshot of them was that the appellant would not consent to the transfer of the lease, except perhaps on terms that the respondents regarded as unreasonable. Meanwhile the respondents' solicitor had also written to the appellant's solicitors formally requesting consent to the transfer of the lease, but he received no reply to those letters. Finally on 1 October 1985, he wrote again to the appellant's solicitors requesting consent to the transfer, and asking for a reply, as a matter of urgency, by 10.00 a.m. on 4 October, 1985. He received no reply to that letter.

On 4 October 1985, then, proceedings by way of Originating Summons were commenced in this court by the respondents against the appellant seeking declarations determining the following questions of construction arising under the Memorandum of Lease:-

> "1. A declaration that on the true construction of the said lease and in the events which have happened the refusal of the defendant to grant consent to assign the said lease to Detapan Pty. Ltd. is unreasonable.

2. A declaration that notwithstanding the said refusal the plaintiffs are entitled to assign the said lease to the said Detapan Pty. Ltd."

The Originating Summons came on for hearing before Nader J. on 24 October 1985. On the following day, 25 October, counsel for the appellant, Mr. Pauling Q.C., announced to his Honour that the parties had resolved their differences, and had reached agreement on a number of matters which were in dispute between them. Mr. Pauling then proceeded to explain to his Honour the background to some of the disputes, and finally read onto the transcript the agreement that had been reached. The agreement, as read by him, was in these terms:-

> "That subject to the proposed assignee Detapan Pty. Ltd., agreeing to pay from the date of its taking possession of the supermarket premises, the sum of $949.92 per month in addition to the rental specified in item F of the lease - this is to cover airconditioning - that is, the sum of $3,958 per month, it is agreed as follows:
>
> Firstly: the defendant shall consent in writing to the assignment by the plaintiffs of the lease to the Fannie Bay Supermarket premises to Detapan Pty. Ltd., and shall endorse the Memorandum of Transfer of Lease with such consent within 24 hours of receipt of such Memorandum of Transfer.
>
> Secondly: that the plaintiffs acknowledge and agree that they are

liable to rectify the premises at Lot 5405 to a condition satisfactory to the various Statutory authorities in order to allow the premises to open for retail trade, and that is without prejudice to the defendants rights inter alia under the lease to require the plaintiffs to make good any structural alterations to the premises at Lot 5404 and Lot 3048 - that's the old supermarket.

Now, for the purposes of the second clause just read, it is agreed that from the consideration receivable by the plaintiffs for the sale of the Fannie Bay Supermarket business, there be paid into the Trust account of Morris, Fletcher & Cross at settlement of the sale of the business the sum of $20,000, such monies to be held by Morris, Fletcher & Cross in an interest bearing deposit as stakeholder for the plaintiffs and the defendant for the purposes specified in paragraph 2, that I read. That is, for the rectification.

Fourthly: the plaintiff shall be entitled to such interest as accrues on the said sum of $20,000 and Morris, Fletcher & Cross shall pay to the plaintiffs such interest at the end of each calendar month.

Fifthly: the said sum of $20,000 or so much thereof as may be required, shall be applied for the purposes of clause 2, and claims for payments may be submitted to the stakeholder, but subject to the arbitration clause no payment shall be made without the approval of both the parties' solicitors.

Sixthly: in the event that the parties remain in dispute as to claims under clause 5, such dispute may be submitted to the arbitration of a consulting engineer nominated by the President of the Northern Territory Chapter of the Institute of Engineers (Australia), whose decision shall be final and whose costs shall be borne by the party against whom the arbitrator finds, or the matter may be referred to the court under the liberty to apply reserved.

> Seventh: when the parties solicitors are agreed that all claims have been satisfied under clause 2 hereof, then the stakeholder shall pay to the plaintiffs the balance, if any, of the said sum of $20,000 and any interest thereon not already paid.
>
> Eighth: liberty is reserved to either party to apply for further relief or orders.
>
> Ninth: there be no order as to costs."

Those terms having been read onto the transcript by Mr. Pauling, Mr. Riley, who appeared for the respondents, informed his Honour that the respondents agreed to them. Thereupon, further hearing of the proceedings was adjourned.

Thereafter, on 28 October 1985, the solicitor for the respondents wrote to the solicitors for the appellant enclosing the Memorandum of Transfer of the Lease, and asking them to arrange for the formal consent of the appellant to be endorsed on it. Having received no reply to that letter, the solicitor for the respondents again wrote to the solicitors for the appellant on 12 November and, (there being still no reply) again on 20 November 1985, asking that the appellant endorse its consent on the Memorandum of Transfer, and that it be returned for stamping to enable settlement of the sale to take place. Once more there was no reply, and, eventually, on 2 December 1985 the solicitor for the respondents wrote to the solicitors for

the appellant informing them that their client was in breach of the settlement agreement reached between them, and that unless the appellant gave its consent to the transfer of lease by the following day proceedings would be commenced to enforce the agreement.

In the end, the appellant did not give its consent, and accordingly on 6 December 1985 the respondents commenced proceedings in the court by way of Writ of Summons claiming an injunction to compel the appellant to carry out its part of the agreement of compromise entered into between the parties on 25 October, 1985. The specific relief sought was an injunction -

> "(i) that the defendant give written consent to the assignment of the said lease by the plaintiffs to Detapan Pty. Ltd.;
>
> (ii) that the defendant forthwith endorse such consent on the Memorandum of Transfer of lease submitted to it by the plaintiffs' solicitors;
>
> (iii) that subsequent to endorsements of consent the defendant forthwith return the said Memorandum of Transfer to the plaintiffs' solicitors."

The respondents also claimed damages for the appellant's breach of contract, the costs of the proceedings, and, subsequently, certain other relief, but none of these is relevant for present purposes.

In their statement of claim, the respondents pleaded the agreement of compromise of the proceedings before Nader J. entered into on 25 October 1985 by Mr. T.I. Pauling Q.C. and Mr. T.F. Coulehan of counsel on behalf of the appellant, and Mr. T.J. Riley on behalf of the respondents. They also pleaded that it was a term of the agreement that the appellant would consent in writing to the assignment by the respondents of the lease to Detapan Pty. Ltd., and would endorse the Memorandum of Transfer of Lease with its consent within 24 hours of receipt of the transfer. They further pleaded (in paragraph 8) that the agreement was at all times subject to Detapan Pty. Ltd. agreeing to pay from the date of its taking possession of the premises the sum of $949.92 per calendar month in addition to the monthly rental specified in the lease. There then followed two paragraphs (to which I shall return later) in these terms:

> "9. By letter dated 4 November 1985, the said Detapan Pty. Ltd. by its solicitors Messrs. Waters, James & O'Neill advised the defendant by its solicitors Morris Fletcher & Cross that Detapan Pty. Ltd. agreed to pay the said additional sum of $949.92 per calendar month.
>
> 10. The said condition referred to in paragraph 8 hereof was satisfied by the sending and delivery of the letter referred to in paragraph 9 hereof."

Finally the statement of claim alleged a breach by the appellant of the term of the agreement pleaded, and therefore claimed to be entitled to the relief sought.

In its Defence, the appellant first of all admitted certain facts alleged in the statement of claim, the only relevant one for present purposes being the "facts" alleged in paragraph 9 (see p. above). The defence then raised a number of defences, the principal one being a denial that "any agreement was formed, whether in the terms alleged or at all in that the persons T.F. Coulehan and T.I. Pauling Q.C. who purported to make that agreement on the defendant's behalf had no authority to do so". And then, a defence was raised, in the alternative, that if any agreement was lawfully entered into between the plaintiffs and the defendant, it was an implied term of that agreement that the obligation of the defendant to consent to the assignment of the lease was conditional upon the plaintiffs' continuing to observe the terms of the lease until the assignment was effected. But, it was alleged, the plaintiffs failed to observe certain terms of the lease, whereupon, so it was claimed, the liability of the appellant to consent to the assignment of the lease was wholly discharged and of no further force or affect, or, alternatively, was postponed until such time as the respondents have remedied the breaches. The Defence also raised defences of mistake and

fraudulent misrepresentation in the making of the agreement, but these defences were not pursued at the hearing. Finally, the appellant claimed that, if an agreement was lawfully made between the parties as alleged, the court should not in the exercise of its discretion grant the injunctive relief sought for the reason that the agreement was then impossible of performance, and therefore the relief was illusory and of no practical benefit to the respondents. I should add here that, during the course of the trial, the respondents sought, and were granted leave, to amend the statement of claim further by adding a paragraph alleging that they were and always had been ready, willing and able to complete their obligations under the agreement. The appellant did not seek leave to amend its defence, but were content to rely, as an answer to that allegation, on a paragraph in the defence: "Save as aforesaid, the Defendant does not admit and puts in issue generally all facts alleged, whether expressly or by implication, in the Statement of Claim".

The action came on for hearing before Maurice J. on 17 February 1986. The hearing was confined to the determination, as a matter of urgency, of the questions whether a binding agreement of compromise had been entered into between the parties, and, if so, whether the plaintiffs should have an order for the performance in specie by the

defendant of its obligation under the agreement, namely, to consent to the transfer of the lease to Detapan Pty. Ltd. The hearing of a claim for damages by the plaintiff, and of a counterclaim for damages by the defendant were left to be determined in the ordinary list of cases awaiting trial.

On 7 March 1986 his Honour delivered his judgment in which he made orders (inter alia) as follows:-

> "1. That the defendant forthwith endorse its consent on the Memorandum of Transfer of Lease forwarded to the defendant's solicitors under cover of the plaintiff's solicitors letter dated 28 October 1985 and return such Memorandum of Transfer of Lease to the plaintiff's solicitors.
>
> 2. That the plaintiffs have liberty to apply on 24 hours notice for any further orders that may be required to give effect to this judgment."
>
> 3. That the plaintiff have liberty to apply on 24 hours notice for declaratory relief with respect to the construction of the compromise entered into between themselves and the defendant on 25 October 1985 so far as that agreement concerns any obligation on the part of the defendant to provide airconditioning.

4. That the defendant pay the plaintiff's costs of and incidental to the issues in this action tried so far."

The appellant now appeals against that decision and those orders. There are seventeen grounds of appeal in all. Some of them were added by way of amendment to the original Notice of Appeal, and a number of them raise matters that were not in issue or argued before the trial judge, but which the appellant now seeks leave to raise on appeal. It will be convenient to deal with these as they arise in these reasons. The most significant of the new matters sought to be raised as a ground of appeal is expressed in these terms:

"3. The learned trial judge erred in law in failing to find that any compromise agreement as may have existed was unenforceable in that it was not in writing and signed by the person to be changed as required by the Statute of Frauds."

That is a matter that was not raised by way of defence in the pleadings, nor was it in any way canvassed on the hearing of the action. I will consider it as a separate matter later in these reasons.

The substantial matter argued in the court below, and now on appeal, is whether, on the evidence, a binding agreement of compromise was entered into between the parties in the proceedings before Nader J., and, in particular, whether counsel for the appellant had authority to bind his client by such an agreement. I will consider that question first.

What I think is in question in this case is counsel's ostensible authority, as between himself and his opponent, to bind his client to an agreement of compromise, as distinct from his actual or implied authority, as between himself and his client, to do so. In that case, I think it is clear law that a solicitor or counsel retained by a client to represent him in proceedings in the court has, as between himself and his opponent, ostensible authority to compromise the proceedings on behalf of his client, provided that the compromise does not involve matter collateral to the proceedings, and is not contrary to, or in excess of, some express limitation imposed on his authority by his client, and communicated to his opponent: Hansen v Marco Engineering (Aust.) Pty. Ltd. [1948] V.L.R. 198, at 201, 202; Harvey v Phillips (1956) S.R. (N.S.W.) 161.

In the present case, the evidence is clear that Messrs. Morris, Fletcher & Cross, solicitors, were

instructed and authorised by the appellant to conduct the defence of the proceedings on its behalf, and that, through a solicitor employed by them, Mr. Wyvill, they duly briefed Mr. T.I. Pauling Q.C. and Mr. T.F. Coulehan to appear for the appellant in the proceedings. Furthermore, I think it is also clear on the evidence, and the trial judge so found, that the appellant did not in fact impose any limitation on their authority to compromise the proceedings, and, of course, no such limitation was communicated to counsel for the respondents. On the contrary, far from having any notice of any such limitation of their authority, the fact that two directors and the secretary of the appellant company were present in court during the proceedings, and when the terms of settlement were announced, could only have conveyed to them positively that there was in fact no limitation on their authority.

That being the case, the only question that really calls for consideration on this point is whether the compromise involved extraneous matter. In determining this question, the trial judge applied what was said in Waugh v H.B. Clifford & Sons Ltd. (1982) 2 W.L.R. 679, at 690, 691, namely "that a compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action", and that matter is not "collateral" to the action "unless it

really involves extraneous subject matter, as in Aspin v Wilkinson (1879) 23 S.J. 388, and In Re a Debtor [1914] 2 K.B. 758". Applying that test (with which I respectfully agree), his Honour found that the compromise in the present case did not involve extraneous subject matter, and, in my opinion, he did not err in doing so. The proceedings before Nader J. were commenced by Originating Summons. There were, therefore, no pleadings. However, it is clear from the relief sought in the proceedings, and in the affidavits filed in support of the Originating Summons, that the central issues to be raised were whether, in the terms of the lease, the proposed transferee was "a respectable and solvent person", and, if so, whether the appellant had unreasonably withheld its consent to the transfer. Material to that question was also a consideration of the terms on which the appellant might reasonably insist as conditions for giving its consent, such as, for example, the payment of arrears of rent, the payment of additional rent by the proposed lessee to cover the cost of airconditioning installed since the date of the original lease, and the payment of the cost of restoring the adjoining premises on which the supermarket had previously been conducted for which the respondents were liable. The terms of the compromise itself make it obvious that terms such as these were the subject of the negotiations between the parties which ultimately led to agreement being reached. They were

promises extracted from the respondents as the price for the appellant's consent to transfer the lease. In my opinion, they are not matters collateral to the proceedings, but are matters essentially involved in the resolution of the issues between the parties.

It was further argued by the appellant, on this aspect of the case, that the agreement of compromise involved collateral matter in that it involved the consent of a third party, Detapan Pty. Ltd., which was not a party to the proceedings. The fact is, however, that the agreement between the parties to the proceedings was simply made subject to Detapan Pty. Ltd. agreeing to pay an increased rent for the premises, and that did not, in my opinion, involve that company in the compromise itself so as to introduce collateral matter into it. It merely made the agreement of that company to pay the increased rent a condition precedent to the coming into operation of the agreement. I therefore think there is no substance in this point.

The next ground of appeal that the appellant sought to argue was that, if an agreement of compromise was reached between the parties, it was "subject to proper formulation and signature by the respective parties", that is, it was incomplete in its terms, and it was not to bind the parties

until it was completely formulated and signed by them. This point was not raised or argued in the court below, and, in my opinion, the appellant ought not to have leave to argue it here. But, in any event, I do not think the argument can be supported by the evidence. Certainly there is nothing in the agreement itself, as read onto the transcript by Mr. Pauling, which would support such a construction of the agreement, and the only support that counsel could find for his submission was in Mr. Pauling's opening words to Nader J. after informing him that the parties had compromised their difference. He went on to say: "I would propose to read onto the transcript some terms of settlement and later have them properly engrossed and signed and lodged in the court." It was argued, in the first place, that the use by Mr. Pauling of the word "some" indicated that the terms of settlement read onto the transcript were not all the terms of the settlement, but some still remained to be agreed upon. I do not think there is any warrant for giving that meaning to the word "some", nor do I think Mr. Pauling can be taken to have used the word in that sense in the context in which he said it. Besides, the terms of settlement themselves do not indicate that they were in any way incomplete, or that further terms remained to be agreed upon.

And then it was argued that Mr. Pauling's words that he "would propose ... and later have them properly engrossed and signed and lodged in the court" pointed to an intention by the parties that they were not to be bound until that had been done. I do not think that one can construe those words as indicating any such intention. I think the case is quite otherise. As Mr. Pauling said, the parties had resolved their differences, and the terms on which they had resolved them were as read by him onto the transcript. As I have said, those terms themselves do not indicate that they are incomplete in any way, or that they are not to bind the parties until they were embodied in a formal signed agreement. It seems clear to me that the intention of the parties was that they should be bound immediately to the performance of those terms, and all that was proposed by Mr. Pauling was that the terms, as read by him, be "properly engrossed and signed and lodged in the court", and no more: see Masters v Cameron (1954) 91 C.L.R. 353, at 360ff; Bridle Estates Pty. Ltd. v Myer Realty Ltd. 15 ALR 415, at 422.

The next ground of appeal relied upon was that the trial judge "erred in law in finding that the respondents did not have to show that all parties to the alleged compromise were ready, willing and able to complete their several obligations under the agreement". In fact, the

trial judge made no such finding. Notwithstanding that, however, what the appellant mainly sought to argue under this ground was that his Honour should not have granted the relief sought by the respondents unless he was satisfied that Detapan Pty. ltd. (as well as the respondents) was ready, willing and able to comply with its obligation under the agreement, and that, on the evidence, he could not be so satisfied. This argument, however, proceeds on the basis that Detapan was a party to the compromise agreement, and that what had to be shown was that it was ready willing and able to complete the contract for the purchase of the business from the respondents. As I have already indicated, in my opinion, it was not a party to the agreement, nor was it treated as a party to it in the proceedings in the court below. There could, therefore, be no issues in those proceedings as to its readiness, willingness and ability to do anything. Its agreement to pay the additional rent for the premises demanded by the landlord was treated, and pleaded, in those proceedings as a condition precedent to the liability of the appellant to give its consent to the transfer of the lease. There was argument before his Honour, though, as to whether fulfillment of that condition precedent had been shown. In the result, his Honour held that it had been admitted on the pleadings, and there has been no appeal as such against that decision. Nevertheless, under this present ground of appeal, counsel for the

appellant also sought to canvas that ruling again. Whether or not he should be allowed to do so, I think I can say that, having read the pleadings (or, rather, what were submitted to the court as pleadings) and his Honour's short ruling on them, I could not say he fell into error. The real difficulty with the pleadings arose from the fact that instead of pleading in their statement of claim (as they should have) the material fact that Detapan had agreed to pay from the date of its taking possession of the premises the sum of $949.92 per calendar month in addition to the monthly rental specified in the lease, the respondents pleaded two paragraphs in these terms:

> "9. By letter dated 4 November 1985, the said Detapan Pty. Ltd. by its solicitors Messrs. Waters, James & O'Neill advised the defendant by its solicitors Morris Fletcher & Cross that Detapan Pty. Ltd. agreed to pay the said additional sum of $949.92 per calendar month.
>
> 10. The said condition (precedent) referred to in paragraph 8 hereof was satisfied by the sending and delivery of the letter referred to in paragraph 9 hereof."

Both paragraphs are obviously objectionable as pleadings, and were liable to be struck out for failure to comply with O.23 r.4 of the Rules of Court. The appellant, however, took no objection to them, but, in its defence, admitted the "facts alleged in ... paragraph 9", and did

"not admit the facts alleged in ... paragraph 10", though no facts were alleged in paragraph 10: see paragraphs 1 and 2 of amended defence. What was argued on behalf of the appellant was that by admitting "the facts alleged in paragraph 9" the appellant was admitting no more than that a letter in those terms was sent by Detapan's solicitors; it was not admitting that Detapan had in fact agreed to pay the additional rent. His Honour did not accept that submission, and regarded the defence as having admitted that Detapan had in fact agreed to pay the additional rent. In doing so, I think his Honour may well have had in mind certain other evidence that would confirm that as being the fact, as well as the absence of any real dispute that it was in truth the fact. In those circumstances I would not be prepared to disagree with his Honour's ruling on the point.

The appellant also seemed to rely on this ground of appeal to make an oblique attack on his Honour's ruling in relation to the respondents' readiness, willingness and ability to complete their obligations under the agreement. His Honour's ruling on that point was that no issue as to that had been raised on the pleadings, the appellant not having specifically pleaded to it in its defence, as required by O.23 rr.14 and 15. That ruling by his Honour has not been challenged on appeal, nor do I think it could be challenged.

The appellant then submitted that the trial judge erred in fact and in law in the exercise of his discretion in ordering the performance in specie by the appellant of its promise to consent to the transfer of the lease, such order, so it was argued, being futile. The basis for that submission was that, since the making of the agreement for compromise, the respondents had committed breaches of the lease for which the appellant intended to forfeit the lease and re-enter into possession of the premises. The breaches relied on by the appellant were failure to pay rent, and failure to comply with a covenant in the lease which, so it was argued, required the respondents to carry on the business of a supermarket on the premises. In fact, evidence was put before his Honour that proceedings in the court had already been commenced by the appellant claiming possession of the premises for those breaches, though in those proceedings the respondents were seeking relief against forfeiture. It was not disputed that the respondents were in default in paying rent, and it was admitted that they had long since ceased trading on the premises. It was disputed, however, that there was any clause in the lease, properly construed, that positively required to carry on the business of supermarket on the premises.

What the outcome of the proceedings by the appellant to recover possession of the premises was, I do not know. The relevance to the present proceedings of any breaches of the lease committed by the responednets, and of the proceedings brought by the appellant to recover possession, was that, in those events, it would be futile to grant the relief sought by the respondents in the present proceedings.

In the course of considering that submission, the trial judge dealt with the question whether there was any clause in the lease that required the respondents to carry on the business of supermarket, and concluded in these words: "In the result, but not without hesitation, I tend to the view that the lease contains no covenant to carry on the supermarket business. If I had known more about the surrounding circumstances, particularly the condition of the premises when the lessees took possession, I might have been assisted by that knowledge in construing these covenants."

The appellant now seeks to challenge that conclusion, and also the ultimate conclusion to which his Honour came that specific performance should not be refused on the ground of futility. The basis of his Honour's decision on the first matter, as I understand it, was that he was not in a position to say that the appellant must

succeed in its ejectment proceedings, and he was not prepared to make any assumptions as to its prospects of success in those proceedings; more importantly, he was not prepared to forecast the outcome of the respondents application for relief against forfeiture. He therefore concluded that there was sufficient doubt as to the outcome of those proceedings that the respondents should not be deprived of their right to performance in specie of the agreement to which they were otherwise entitled. In my opinion, he cannot be said to have erred in exercising his discretion in that way.

Another ground of appeal is that the learned trial judge erred in failing to award any costs in favour of the appellant on its counterclaim. However, I do not understand this ground to have been pressed, nor do I think it is a ground that could have any hope of success.

The final matter to be considered is the appellant's application for leave to rely on a ground of appeal that "any compromise agreement as may have existed between the parties was unenforceable in that it was not in writing and signed by the person to be charged as required by the Statute of Frauds". No such defence was pleaded in the proceedings below, nor was any evidence called directed to such an issue. The question, therefore, is whether the

appellant should be allowed to raise such an issue here for the first time.

The defence is that provided by s.4 of the Statute of Frauds (1677,29 Car. 2 c.3) in its application to the Northern Territory. That section so far as relevant, provides that:

> "No action shall be brought ... upon any contract of sale of lands, tenaments or hereditaments, or any interest in and concerning them ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

It is clear that if such a defence had been raised in the court below the two issues that would fall for determination were whether an agreement by a lessor to consent to the transfer of a lease was a "contract of sale of lands, tenaments or hereditaments, or any interest in and concerning them", and, if so, whether, in the instant case, there was an agreement in writing, or some memorandum or note of it, signed by the party to be charged or some other person lawfully authorised by him. Furthermore, it is also clear that the second of these issues can only be resolved in the light of such evidence as might be called in relation to it. Certainly, no facts have been admitted in relation

to that issue; they are by no means beyond controversy. Besides, no reason was advanced why the defence was not pleaded in the trial, though it appears that every other conceivable defence was raised, a fact that lead the trial judge to refer to them as a "farrago of defences". In my opinion, therefore, the defence not having been pleaded, and not having been made an issue at the trial, the appellant, cannot now argue the point on appeal: see Coulton v Holcombe 65 ALR 656 at 659ff.

For these reasons, I would dismiss the appeal.

RICE J: I have had the advantage of reading the reasons for judgment of the Chief Justice who has set out the facts giving rise to this appeal and I shall not repeat them.

Whatever the past history is of the events preceding 25 February, 1985, it is clear that on that date the parties, through their respective counsel, negotiated a settlement of their differences, not only relating to the giving of the lessor's consent to the proposed transfer of the lease to Detapan Pty.Ltd.,but also relating to all other matters on which the giving of consent by the lessor had

previously been withheld. For the appellant to say that these other matters were collateral, in the sense that they were extraneous to the subject matter of the proceedings before Nader J., is, in my opinion, without foundation, since the appellant had obviously withheld its consent unless and until all the so-called collateral matters had been resolved. In other words, the question of the lessor's consent was the dominant fundamental issue between the parties; and the resolution of this issue was dependent upon the resolution of all these other matters, which were inextricably bound up in the question of consent.

Thus, when the terms of settlement were announced by senior counsel for the appellant, they were all connected with, and were interdependent upon, the resolution of the fundamental issue of consent. In my opinion, therefore, none of the terms related to any extraneous issue which was not so interdependent.

The originating summons issued by the plaintiffs against the lessor referred to the plaintiffs as " persons interested under a Memorandum of Lease dated the 15th day of February 1985" and sought declarations determining the following questions of construction arising under the said Memorandum of Lease:

"1. A declaration that on the true construction of the said Lease and in the events which have happened the refusal of the Defendant to grant consent to assign the said lease to Detapan Pty. Ltd. is unreasonable.

2. A declaration that notwithstanding the said refusal the plaintiffs are entitled to assign the said lease to the said Detapan Pty. Ltd."

Now it was said on behalf of the appellant that this process was a mere "construction summons" and was thereby limited to matters of interpretation. In my opinion, however, the application went further and involved a consideration of the history of events surrounding the whole question of whether or not the defendant was justified in refusing its consent to assign the lease; and the making of a declaration in terms of the application in paragraph 1 above was, by itself, sufficient to require the lessor to grant its consent to assigning the lease. Accordingly, once the parties agreed upon a basis for the giving of consent which included the resolution of all matters in dispute between them which had previously provided the impediment to the giving of consent, I am of the opinion that a compromise of all these matters was properly the subject matter of the application in the originating summons. This view is fortified by the expression "in the events which have happened" which were all relevant to a determination of whether "on the true construction of the said Lease" the refusal of the Defendant to grant consent to assign the said lease to Detapan Pty. Ltd. was unreasonable.

It is necessary to set out verbatim exactly what Mr. Pauling QC said in announcing the compromise to His Honour in order to appreciate that the settlement was all-embracing and related to a variety of matters which had been in contention between the parties at the time that the lessees had sought the consent of the lessor. In my opinion, all these matters were relevant to the subject matter of the originating summons (No. 568 of 1985) which came before Nader J. on 24 October, 1985 and which was the subject of the compromise on the following day.

I accordingly, set forth everything which was said by Mr. Pauling on the particular occasion:-

> "MR PAULING: Your Honour, I'm pleased to announce that the parties have resolved their differences and I would propose to read onto the transcript some terms of settlement and later have them properly engrossed and signed and lodged in the court.
>
> Before I do so, though, Your Honour, there are - because Your Honour's only heard one witness and one side of the matter - some unanswered matters that, if left up in the air, would cause my client some considerable disquiet. I'm asked, therefore, to put some matters to Your Honour, to put it into perspective.
>
> Your Honour, the $50,000 that was referred to has this as its background. The supermarket business, Your Honour, and, indeed, in a letter that Mr. Barr wrote to my instructing solicitors on one occasion, he drew attention to the fact that even brief closure of the supermarket business would have an adverse effect on the whole shopping centre. The long period that this supermarket's been closed has had a very marked influence, so I'm instructed, such that the tenants - because my clients own the whole of the shopping centre - have

been making many complaints as to what's going on and what's going to be done, and stirring these people into action and wanting to know what was going to be done to redress the damage that had already occurred in their businesses.

The $50,000, Your Honour, was, when the supermarket was up and running again, to be used to promote very heavily the shopping centre and to expend money on the beautification of the facade and so on along the shopping centre for the purposes of trying to overcome the negative effect of having the business closed altogether; and it certainly was never suggested that this money might somehow simply be going into the pockets of the Finocchiaros with no return to the shopkeepers; that was never intended at all.

Your Honour, the second matter to be raised is, it's been said in evidence that Mr Benito Finocchiaro gave some sort of carte blanche to Mr Tsangaris to go about the work in the shop without needing any further approval or consent or anything. I put to him a letter which he said that he couldn't remember getting. I'd seek to hand it up to Your Honour, because it's dated 7 August and, inter alia, it points out that there had been an inspection the day before and these things had been discovered; 12 metres of floor penetration, excavation, the number of wall and ceiling penetrations, and so on. It sets out, Your Honour, that the owners were alarmed that NTEC, health and fire services approval hadn't been sought or may not have been sought, and it points out that there were strict instructions given by Mr Benito Finocchiaro that any floor or wall penetration or changes of any nature had to be first approved with the submission of a plan detailing extent of the layout in accordance with the original shop design. This letter made it plain as could be, Your Honour, that unless these things were approved in writing and approved by the appropriate authorities, they weren't to be done. And I seek to hand that up to Your Honour.

So that on the question of the issue as to consent or not consent, Your Honour, - - -

HIS HONOUR Very well, Mr Pauling, I'll have that letter placed with the papers, and I note that it is MFI 2.

MR PAULING Yes, that's what I wish, Your Honour.

Thank you, Your Honour.

MFI MFI 2 ....Letter

MR PAULING: I've already mentioned that a precipitating factor for us being here when prudence might've dictated that consent to transfer or assignment might've occurred some time ago and something else has happened, is largely or much to do, Your Honour, with the concern of other lessees; and as far as the lessor is concerned, he's been paid his rent which is all he'd be getting in any event. So that there's no direct loss there, but the pressure's been on that the steps to have these people evicted ought to be pressed on, and this led to an impasse where one side's saying, 'consent to the assignment' and the other side's saying, 'no, we're going to kick you out'; happily we've compromised that.

Another matter that was raised was the question of delay in the construction of the premises. There were two causes of that, neither of which were the fault at all of the defendant, Your Honour. The first was that the properties had to be consolidated before the construction should go ahead. That is, the number of blocks had to be legally consolidated. And the plaintiffs had put a caveat on the properties and a lot of time was wasted dealing with ways to get the caveat removed or agreements to have it removed. This was the first cause.

The second cause was that the Darwin City Council then went cold on the idea of whether they wanted a supermarket there at all, and none of the delays on my instructions were directly due to any neglect or default, or mucking around on the part of the defendant. Indeed, commercial reality tells that that can't be right, because their interest was best served by getting the business up and running as soon as possible, so that, Your Honour, it was necessary that Your Honour hear both sides of the story so that no false or lingering impression adverse to my clients might have been entertained by Your Honour as to their business acumen, their probity, or their fair dealing.

Now, the agreement we've reached, if I may read this on to the transcript and Your Honour would direct that it be typed, because often when documents read all you get is the first few words and last few words?

HIS HONOUR: Yes, very well, I so direct.

MR PAULING: That subject to the proposed assignee, Detapan Pty.Ltd, agreeing to pay from the date of its taking possession of the supermarket premises, the sum of $949.92 per month in addition to the rental specified in item F of the lease - this is to cover air conditioning - that is, the sum of $3958 per month, it is agreed as follows:

Firstly: the defendant shall consent in writing to the assignment by the plaintiffs of the lease to the Fannie Bay Supermarket premises to Detapan Pty Ltd, and shall endorse the memorandum of transfer of lease with such consent within 24 hours of receipt of such memorandum of transfer.

Secondly: that the plaintiffs acknowledge and agree that they are liable to rectify the premises at Lot 5405 to a condition satisfactory to the various statutory authorities in order to allow the premises to open for retail trade, and that is without prejudice to the defendant's rights inter alia under the lease to require the plaintiffs to make good any structural alterations to the premises at Lot 5404 and Lot 3048 - that's the old supermarket.

Now, for the purposes of the second clause just read, it is agreed that from the consideration receivable by the plaintiffs for the sale of the Fannie Bay Supermarket business, there be paid into the trust account of Morris, Fletcher and Cross at settlement of the sale of the business the sum of $20,000, such moneys to be held by Morris, Fletcher & Cross in an interest bearing deposit as stakeholder for the plaintiffs and the defendant for the purposes specified in paragraph 2, that I read. That is, for the rectification.

Fourthly: the plaintiff shall be entitled to such interest as accrues on the said sum of $20,000 and Morris, Fletcher and Cross shall pay to the plaintiffs such interest at the end of each calendar month.

Fifthly: the said sum of $20,000 or so much thereof as may be required, shall be applied for the purposes of clause 2, and claims for payment may be submitted to the stakeholder, but subject to the arbitration clause no payment shall be made without the approval of both the parties' solicitors.

Sixthly: in the event that the parties remain in dispute as to claims under clause 5, such dispute may be submitted to the arbitration of a consulting engineer nominated by the President of the Northern Territory Chapter of the Institute of Engineers (Australia), whose decision shall be final and whose costs shall be borne by the party against whom the arbitrator finds, or the matter may be referred to the court under liberty to apply reserved.

Seventh: when the parties' solicitors are agreed that all claims have been satisfied under clause 2 hereof, then the stakeholder shall pay to the plaintiffs the balance, if any, of the said sum of $20,000 and any interest thereon not already paid.

Eighth: liberty is reserved to either party to apply for further relief or orders.

Ninth: there be no order as to costs.

That in detail, is the basis of the settlement, Your Honour.

HIS HONOUR: Thank you, Mr Pauling.

MR PAULING: Might I just mention something about the air conditioning, because I'm sure I don't want to leave it up in the air. There was mention about air conditioning and so on. There's an $80,000 plant in there, and in order for that to run, that's what the extra money is about, and Health won't let the premises open unless it's air conditioned, and there's an informal agreement been reached with the ingoing assignee that he's prepared to pay that.

HIS HONOUR: Yes, thank you, Mr Pauling. Mr Riley, your client agrees to those terms?

MR RILEY: Yes, the plaintiffs do agree, Your Honour

HIS HONOUR: Yes, very well. Well, thank you, I congratulate the parties on having reached agreement, and their counsel for such assistance as they gave them."

As to the point that Mr. Pauling states that the terms would be "properly engrossed and signed and lodged in the Court," I am of the opinion that this intimation in the context of the whole of his remarks and in the circumstances surrounding the matter then before the Court, amounted to no more than something in the nature of a formal ratification of the compromise. The words were not used in any sense to indicate that an agreement executed by the parties themselves was to be a condition of precedent to the compromise, or that the compromise was to be subject to such formalities. Accordingly, in my opinion Bridle Estates v. Myer Realty Ltd. (High Court) 15 ALR 415 is clearly distinguishable on the facts.

It was further urged upon us that the compromise was rendered unenforceable by the Statute of Frauds. The point was not taken in the Court below and we are asked to give leave to the appellant to amend its grounds of appeal by including it here. For my part, I would not be prepared to give leave since a defence of this sort must be specifically pleaded and the time for doing so, even after the close of pleadings, was before the trial judge who would then have been bound to have allowed the plaintiffs not only to have amended their reply by pleading part performance (if so advised) but also to have allowed them discovery of any memoranda containing the agreed terms of the compromise and

to have interrogated, if need be. In any event, I am of the opinion that the mere consent to the assignment does fall within the purview of the Act since it is not a disposition of an interest in land, which in the circumstances of this case is essentially between the lessor and lessee. To hold otherwise would mean that where a lessor's refusal to consent to an assignment was subsequently declared by a Court to be unreasonable, the absence of the lessor's consent in writing would forever remain a bar to the implementation of the Court's declaration.

In Coulton v. Holcombe (1986) 60 A.L.J.R. 470 in the joint judgment of Gibbs, C.J., Wilson, Brennan and Dawson JJ., their Honours said at p. 473 :-

> "To say that an appeal is by way of rehearing does not mean that the issues and the evidence to be considered are at large. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issues been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see Suttor v. Gundowda Pty Ltd (1950) 81 C.L.R. 418 at 438; Bloemen v. The Commonwealth (1975) 49 A.L.J.R. 219. In O'Brien v. Komesaroff (1982) 150 C.L.R. 310, Mason J., in a judgment in which the other members of the Court concurred, said at 319:

> 'In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (Connecticut Fire Insurance Co. v. Kavanagh [1892] A.C. 473 at 480: Suttor v. Gundowda Pty Ltd (1950) 81 C.L.R. 418 at 438; Green v. Sommerville (1979) 141 C.L.R. 594 at 607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy.
>
> The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial.'

In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six Justices of this Court - University of Wollongong v. Metwally [No.2] (1985) 59 A.L.J.R. 481 at 483; 60 A.L.R. 68, at 71 - the Court said:

> 'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.'

The Court of Appeal recognised the great importance, in the public interest, of these principles. Their Honours summarised them in the following terms:

> 'the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court.'"

The Statute of Frauds was neither pleaded in the action before the learned trial judge, nor was it made an issue by the conduct of the parties at the trial. If it had been pleaded it would have, almost certainly, opened up new vistas including further discovery and interrogatories and possibly evidence of part-performance. Moreover, since the professional reputation of Counsel was at stake, they too may well have been called upon to testify about the existence or otherwise of any writings on which the announcement of the terms of settlement were based. In the absence of such a plea the respondents were alerted to none of these matters. Far from supporting the appellant on this point, I am of the opinion that the words of Mason J., in the passage cited, provide an answer in themselves for declining leave to amend the grounds of appeal to plead the Statute.

Before parting with this issue it may not be inappropriate to recall what Isaacs J. said about the Statute in Charlick v.Foley Brothers Ltd. (1916) 21 C.L.R. 249 at p.251:-

> "The Statute of Frauds or its local equivalent is frequently the means of protecting a person from fraud or from the consequences of a transaction into which he has been hastily drawn. It is couched in general terms, and applies no doubt, so far as legal effect is concerned, to such a bargain as the present. But in practice a great mass of business rests upon the word of the parties, or upon quite informal memoranda,

sufficiently understood by the parties, but not sufficient to satisfy the Statute of Frauds. And in practice these understandings are faithfully recognized. Where a great mercantile firm in substance invites its customers to dispense with the formalities of written contracts, and to rely upon the business honesty and fidelity of the firm to the pledged word of its responsible agents, it is distinctly dishonourable to repudiate a transaction so entered into upon the ground that the customer was simple enough to place reliance on anything short of a written undertaking duly signed. And in my opinion it is not the duty of any legal adviser to compromise the honour and reputation of such a client, contracting in those circumstances, by placing on the record a defence of that nature without fully explaining it, and pointing out its full meaning and effect, and the probable consequences of the defence in case the event turns on a question of credibility. If the law is explained and the true position indicated, then, if the client instructs his adviser to set up the strict legal defence, let it be done; but then the client runs the risk of being regarded as personally untrustworthy should the circumstances assume the appearance that they do in this case."

Lord Alverstone C.J. expressed the basic principle of Counsel's authority to bind his client in Neale v. Lady Gordon Lennox (1902) 1 K.B. 838 at p.843 as follows :-

"I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement, and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side. These propositions are, I think, established by the cases of Wright v. Soresby 2 C. & M. 671; 39 R.R. 876; Prestwich v. Poley 18 C. B. (N.S.) 806; Strauss v. Francis L.R. 1 Q.B. 379; Mathews v. Munster 20 Q.B.D. 141; and stated to be clear law by Lord Coleridge C.J. in Harvey v. Croydon Union Rural Sanitary Authority (1884) 26 Ch.D. 249, at p.256. It is equally well established that the authority of counsel does not

extend to matters collateral to the action: See Furnival v. Bogle (1827) 4 Russ. 142; 28 R.R. 34, the various reports in Swinfen v. Swinfen 1 C.B.(N.S.)364; Kempshall v. Holland 14 R.336; Matthews v. Munster 20 Q.B.D. 141. "

Lord Denning M.R. in H. Clark (Doncaster) Ltd. v. Wilkinson (1965) 1 Ch. 694, in distinguishing that case from circumstances such as the present, said at p.703:-

"We were referred to cases where a compromise or settlement has been made by counsel acting within his ostensible authority. That of course is binding, as in Strauss v. Francis (1866) L.R. 1 Q.B. 379. But those are very different, and they rest on the simple principle that a principal is bound by a contract made by his agent within his ostensible authority."

In Strauss v. Francis (1866) L.R. 1 Q.B. 379 Blackburn J. had this to say at p.381:-

"Mr Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause: and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding."

I, therefore, agree with the learned trial judge that the compromise entered into between counsel for the respective parties was both efficatious and binding between them.

As to the remaining grounds of appeal, I respectfully agree with the reasoning and conclusions of the Chief Justice and accordingly I would dismiss the appeal.

ASCHE J.: The respondents conducted a supermarket upon a block of land at Fannie Bay as lessees of the appellant. In 1984/85 the appellant lessor conducted some replanning of the property owned by it which included neighbouring properties to the supermarket, and part of that replanning was to build a new supermarket on the next door block to that on which the supermarket was being carried on. It was agreed between the lessor (the present appellant) and the lessees of the old supermarket (the present respondents) that the respondents would move into the new supermarket and enter into a new lease with the appellant.

The agreement for lease was duly executed by the parties in February 1985 and the lease itself appears at pages 68 to 83 of the Appeal Book.

In an affidavit sworn on 4th October 1985 by the respondents' solicitor reference was made to the "constant and bitter" disputes between the parties. Those disputes were obviously still continuing in September 1985 and on 16 and 24 September 1985 the appellant's solicitor wrote letters to the respondents complaining about various alleged breaches of the covenants in the lease including the covenant to pay rent. At the same time the respondents were negotiating to sell the business and first made this known to the appellants by a letter from the respondents' solicitor to the appellant's solicitors dated 5 September 1985. On 13 September the respondents' solicitor wrote to the appellant's solicitors requesting consent in writing by the appellant to the assignment of the lease to a Mr and Mrs Jongue.

On 25 September the respondents' solicitor again wrote to the appellant's solicitor referring to certain demands that had been made by the appellant as a condition of granting consent. The demands were said to have no proper basis and the letter then stated that unless the lessor consented to the assignment by 30 September proceedings would be instituted in the Supreme Court.

Consent was not forthcoming by that date and on 1 October the respondents' solicitor wrote to the appellant's

solicitors stating that the proposed lessee was now a company known as "Detapan Pty Ltd" of which Mr and Mrs Jongue were the directors. The letter further stated that Mr and Mrs Jongue were prepared to give personal guarantees to the appellant if required. The letter stated that the matter was now one of "commercial urgency" and that unless consent were given by 10am on 4 October Supreme Court proceedings would be instituted.

When consent was not given by that date and time the respondents' solicitor did in fact issue an originating summons on 4 October seeking declarations that the appellant's refusal to consent to the assignment was unreasonable and that notwithstanding such refusal the respondents were entitled to assign the lease to Detapan. Before the matter came on for hearing certain other correspondence took place.

(a) By letter of 4 October the appellant's solicitors formally refused consent to the assignment, alleging breaches of covenant still unremedied.

(b) On 7 October the respondents' solicitor replied to the two letters of the appellant's solicitors of 16 and 24 September alleging breaches of covenant. This letter stated that the respondents had not been conducting business on the premises since 16 September pending negotiations for the sale; admitted that rent had been in arrears but said it had now been made up; and either denying or confessing and avoiding the allegations of other breaches of covenants.

(c) On 14 October the appellant's solicitors repeated their allegations of breaches of covenant and

purported to treat such breaches as grounds forfeiture and re-entry, and foreshadowed a Writ of Ejectment.

(d) On 21 October solicitors for Detapan wrote to the appellant's solicitors asking whether the appellants had consented to the assignment. That letter stated that Mr & Mrs Jongue were the proprietors of Detapan Pty Ltd and that company had entered into the purchase of the Fannie Bay Supermarket business from the respondents subject to the obtaining of consent from the appellant.

The proceedings originated by the respondents came before Nader J. on 24 October 1985. There is no transcript of what occurred on that day but there is a transcript of what took place in Court on 25 October 1985. On that day Counsel for the Appellant told His Honour that the matter had been settled. The transcript of what occurred is at pages 63 to 67 of the Appeal Book. It is of some importance to refer to certain things there said. Senior Counsel for the appellants told His Honour:-

> "I am pleased to announce that the parties have resolved their differences and I would propose to read on to the transcript some terms of settlement and later have them engrossed and signed and lodged in Court."

Senior Counsel for the appellant then dealt with certain matters which had been raised during the trial and he then said this:-

> "Now, the agreement we have reached, if I may read this on to the transcript and have Your Honour direct that it be typed because often when documents are read, all you get is the first few words and the last few words."

His Honour made the necessary direction.

Senior Counsel for the appellant then read various heads of agreement which, in summary were; that the appellant would consent in writing to the assignment of the lease from the respondents to Detapan; that the rent to be paid by Detapan was $3,958-00 per month plus $949-92 per month (which obviously represented installation and running expenses of an airconditioning plant which the authorities had required the appellants to install in the new building); and that it was acknowledged that the respondents were liable to "rectify" the premises. (The expression "rectify" related to getting the new premises into a state fit for opening). There was then an arrangement whereby the respondents paid $20,000-00 into an account which was to act as some form of security for recovery of monies by the appellant if the respondents did not satisfactorily rectify the premises and there was provision for arbitration of claims for payment against the $20,000-00.

The respondents included Detapan in the announced terms although that company was not formally represented at

the hearing. There seems little doubt however that Detapan knew of and agreed with the arrangements proposed. See letter of 21 October 1985 previously referred to. After the proceedings of 24 October 1985 the solicitors for Detapan again wrote to the solicitors for the appellant on 4 November 1985 in terms indicating knowledge of and agreement with the settlement announced to the court.

On 28th October 1985 the respondents' solicitor wrote to the appellant's solicitor referring to the terms of settlement and enclosing a Memorandum of Transfer of Lease which had been submitted to him by the solicitors for Detapan. The respondents' solicitor asked that the formal consent of the appellant be endorsed.

On 4th November 1985 the solicitors for Detapan wrote to the solicitors for the appellant advising that they had instructions from their client (there referred to as "Jongue") to pay an additional sum of $949-92 per month for the provision of airconditioning for the supermarket, as from the date of their client taking possession. The letter asked the appellant's solicitors to confirm the terms of the settlement which it was understood had been reached by the appellant and the respondent. Reference was then made to the "rectification" to be done by the respondents. The terms of the letter make it clear that at least at that

stage "Jongue" was prepared to follow through the terms of settlement announced to the court so far as their participation as purchasers of the business was concerned.

On 12 November the respondents' solicitor again wrote to the appellant's solicitors referring to his previous letter of 28 October. He said that he understood

> "that your client has now given its formal consent to the transfer and that the document has been executed."

One must comment that, while that may have been the solicitor's understanding, there is no evidence that this had occurred and it was soon made clear that the appellant had decided not to consent to the transfer.

The letter of 12 November to the respondents' solicitor continued

> "If the document has now been completed would you please return same to me just as soon as possible so that I may prepare for the settlement of the supermarket business.
>
> I assume that you have now received the letter to your firm from Waters James & O'Neil dated 4 November 1985 in which those solicitors confirm that the transferee agrees to pay an additional sum of $949-92 per month in respect of airconditioning for the supermarket premises."

On 20 November the respondents' solicitor again wrote to the appellant's solicitors referring to his letter of 12 November 1985 and to a subsequent telephone discussion with a member of the firm of solicitors acting for the appellants and asking that the Memorandum of Transfer be returned immediately.

Up to this point there seems to have been no suggestion by the appellant that it was not going to honour the terms of the agreement reached before His Honour Nader J.

On 2 December the respondent's solicitor again wrote to the appellant's solicitor referring to his earlier letters of 28 October, 12 and 20 November 1985. He referred to the letter by solicitors for Detapan (or Jongue) of 4 November 1985 and to the terms of settlement of the earlier proceedings and commented,

> "It seems that your client has chosen to breach the terms of settlement in the above Supreme Court action."

The letter then threatened Supreme Court proceedings seeking orders to endorse the terms of settlement and for damages and costs unless the consent to transfer was delivered by 9am on 3 December.

No reply to that letter was forthcoming and on 6 December 1985 the respondents issued a Writ with Statement of Claim seeking orders that the defendant (i.e. the appellant) give written consent to the assignment of the lease by the respondents to Detapan, endorse such consent on the memorandum of transfer and return the memorandum to the respondents' solicitor. Damages for breach of contract were also claimed an an order for costs.

The learned trial judge commented that "In effect, the plaintiffs seek specific performance." At times thereafter His Honour used the expression "specific performance". Although he was no doubt using it as a compendious phrase for the relief sought in the sense of "enforcement in specie of any contractual obligation to perform an act" (See Spry - "Equitable Remedies" 2nd Ed. p. 51.) it must nevertheless be emphasised that the actual relief sought was by way of mandatory injunction and indeed it was in that form in which orders were finally made.

The pleadings between the parties were characterised by an amplitude of amendments. Both the Statement of Claim and the Defence were amended on three occasions. Furthermore on the defence (i.e appellant's) side the learned trial judge commented that

> "A farrago of defences have been raised, some only to be abandoned when the action came on for hearing."

In summary, the Statement of Claim relied upon the compromise reached on 25 October 1985 and announced to the court on that day. It alleged breach of that compromise by the appellant, in particular by the failure of the appellant to consent to the assignment of the lease from the respondents to Detapan and sought a mandatory injunction for damages and costs.

The Defence denied any obligation under the agreement. It alleged that counsel had no authority to make it. It then pleaded that if an agreement was entered into between the respondents and the appellant such agreement was conditional upon the respondents continuing to comply with the terms of the lease until the assignment to Detapan had been effected, and it alleged that the respondents had not done so. In particular it relied upon non-payment of rent, interference with structural alterations made by the appellant, and failure by the respondents to carry on the business as a supermarket. It alleged impossibility of performance on the basis that Detapan did not intend to continue with the transfer and it pleaded that in the circumstances the court should not exercise the discretion to grant injunctive relief. Certain other defences based on

mistake and misrepresentation were not proceeded with at the trial. In addition the appellant counterclaimed for arrears of rent, damages for breaches of the lease and for interest thereon and for delivery of possession, the last plea being abandoned at trial. Arrears of rent were admitted by the respondents.

On 24 December 1985 the learned trial judge made an order that certain matters be heard separately. Those matters came before him in February 1986 and judgment was delivered on 7 March 1986. The orders resulting from such judgment appear at pp. 267-268 of the Appeal Book. Orders were made that the appellant forthwith endorse its consent to the transfer of lease from the respondents to Detapan, that the appellant have judgment on its counterclaim for $15,832 (being the arrears of rent) that the hearing of claims for damages (both claim and counterclaim) be adjourned to the ordinary list, that the appellant pay the respondents' costs and general liberty to apply. In addition His Honour granted special liberty to apply on 24 hours notice with respect to the construction of the compromise insofar as that concerned any obligation to provide airconditioning.

In one respect the hearing before His Honour took a somewhat unusual course. No doubt in an endeavour to save

time, counsel on both sides had prepared a document (which appears at pp. 257-58 of the Appeal Book) which was headed "Agreed Facts" and was received by His Honour as an exhibit. That document spoke for itself and allayed the necessity of calling evidence to prove what was there admitted. However, again in an endeavour to shorten the proceedings, counsel on both sides had also agreed to hand up to His Honour a large number of documents in one book entitled "Agreed Documents". These documents, 22 in all, together took up some 114 pages, and apart from their general connection with the case cannot otherwise be said to have any internal consistency. They comprise documents as diverse as letters between solicitors, the summons and affidavits in the earlier proceedings, the transcript of counsel's remarks before Nader J. on 25 October 1985, various company documents, and the lease between the appellant and the respondents for 5 years commencing 26 May 1983. In addition some documents had annexures which also became part of these "Agreed Documents". For instance, the affidavit of the respondents' solicitor sworn 4 October 1985 contained, inter alia, an annexure which was in fact the purchasers' copy of the agreement for sale between the respondents and Detapan.

To receive a multifarious conglomeration of diverse documents as one exhibit obviously had its difficulties and His Honour was careful to warn counsel of the problems which

would necessarily arise of admissibility and weight of evidence. In the end His Honour was prevailed upon to accept these documents only on the basis of their existence and not as to the truth of any assertions in them made by or on behalf of either party. Although (if I may say so with respect) His Honour seems to have circumvented the difficulties thus posed it was not a satisfactory way of presenting the case, as His Honour rightly observed.

Apart from some formal oral evidence and the tendering of certain answers to interrogatories there was no other evidence before the learned trial judge.

After having established the facts surrounding the making of the compromise the learned trial judge summarised the position in this way (at p. 237 of the Appeal Book):-

> "Now there are only three defences still strongly persisted with: want of authority; non-fulfilment of an implied condition precedent to the defendant's obligation under the compromise agreement; and discretionary considerations peculiar to specific performance."

His Honour concluded:-

(a) That the compromise was valid and enforceable since counsel for the appellant had ostensible authority to make the same and the terms were within the bounds of that authority.

(b) Insofar as there had been a breach of the condition of payment of rent (which

non-payment was admitted) the appellant was sufficiently protected by the order which His Honour made in the proceedings that the respondents pay the arrears of rent. Such an order was not opposed by the respondents. Insofar as other breaches were alleged His Honour found that it was not a condition of the lease that the respondents continue to carry on the business as a supermarket and insofar as it was a condition of the compromise that Detapan would pay the extra rent attributable to the instalment of airconditioning the evidence was that Detapan had agreed to pay it.

(c) That in all the circumstances this was not a case where the exercise of the court's discretion to grant the respondents the relief sought should be refused.

The appellant filed a Notice of Appeal from the judgment and orders of the learned trial judge. In view of what might be called the tacking duel already manifested in the pleadings it is perhaps not surprising that the appellant then sought to go about on several new courses. It sought leave to amend the Notice of Appeal by adducing certain new grounds and amending certain of the original grounds. It was at this late stage, and for the first time, that three substantial issues were raised which had clearly not been raised or argued before the learned trial judge. These were that the compromise was subject to proper formulation and signature of the parties (Ground 2 of the Amended Notice of Appeal); that the compromise was unenforceable by reason of the operation of the Statute of Frauds (Ground 3); and that the appellant could not be bound

by the compromise unless its seal was appropriately fixed to any agreement (Ground 4).

Leave to amend the Notice of Appeal was given by Kearney J. on 23 September 1986. However His Honour, in granting leave, made these observations:-

> "I consider that there is a likelihood of the appeal succeeding on the new grounds, if the Court of Appeal is prepared to entertain them. The fact that the Notice of Appeal is amended so as to include the grounds in question does not mean that the Court of Appeal hearing the appeal will necessarily entertain those grounds."

It is convenient to deal first with those grounds of appeal which clearly arise out of issues which were raised and argued before the learned trial judge.

THE AUTHORITY OF THE APPELLANT'S LEGAL ADVISERS

(Grounds 1, 5, 6 and 7 of the Amended Notice of Appeal)

At the hearing before the learned trial judge a document headed "Agreed Facts" was by consent of counsel tendered and indeed marked as an exhibit. The document sets out, inter alia, that Mr Pauling Q.C. and Mr Coulehan

appeared in the original proceedings (i.e. proceedings 568 of 1985 wherein the compromise was announced to Nader J.) as senior and junior counsel respectively for the appellant: that they were instructed by Mr Wyvill solicitor, an employee of the firm Morris Fletcher & Cross; that the appellant gave instructions to Mr Wyvill in relation to the proceedings "on practically every working day from and including 14 October 1985 to and including 25 October 1985."

It is to be remembered that the compromise was announced to Nader J. on 25 October.

Apart from those agreed facts it is common ground and appears in the transcript of the proceedings of 25 October 1985 that Mr Riley of counsel appeared for the respondents and announced the agreement of his clients to the terms announced by Mr Pauling. No doubt his instructing solicitor was also present.

I omit from the picture so far painted the presence in court on 25 October of 2 directors and the company secretary of the appellant since the learned trial judge said (at p. 248 of the Appeal Book) that he had not sought to make anything of what he commented might be treated as the "nodding assent" of those persons; (although he does seem to make some point of it at p. 263).

There was also before the learned trial judge, as part of the evidence, certain interrogatories asked by the respondents to which one Marco Aurelia Finocchiaro replied as managing director of the appellant company and in his affidavit stating that he was duly authorised to swear the interrogatories on the company's behalf. Here is his answer to one of those interrogatories:-

> "In answer to interrogatory 5 I say that on the 25th day of October 1985, the firm of Morris Fletcher & Cross was instructed to represent the defendant in the proceedings issued out of the Supreme Court of the Northern Territory of Australia and numbered S.C. 568 of 1985, and no other firm of solicitors was so instructed."

Here is another:-

> "In answer to Interrogatory No. 8(g) I say that Messrs Morris Fletcher & Cross had authority to conduct the defence of action No. 568 of 1985. No express authority was given to the said firm by the defendant to settle the action. There was no specific limitation placed upon the said firm's authority to conduct the defence of the said action. I am unable to further answer this question."

And finally:-

> "In answer to Interrogatory No. 22 I say that Messrs Pauling Q.C. and Coulehan had the authority of the defendant to appear in court on its behalf in the said action. There were no express limitations on that authority. I am unable to further answer this interrogatory."

In view of the agreed facts and the answers I have just set out and with all respect to the skill and ability with which Mr Thomson presented his arguments on this head I must confess to a considerable feeling of mystification as to how it could be argued (as it was) that the compromise announced before Nader J. did not come within the ostensible authority of counsel to make. The situation seems in no wise different from the usual run of settlements of legal actions. A defendant is sued. It engages a firm of solicitors to represent it in the proceedings. (Answer to Interrogatory 5). Those solicitors have authority to conduct the defence. (Answer to Interrogatory 8(g)). Those solicitors brief counsel to appear. No express limitation is placed on the solicitors' authority to conduct the action (Answer to Interrogatory 8(g)), or upon counsel's authority to do so (Answer to Interrogatory 22). Counsel appears and ultimately settles the case with opposing counsel. (Agreed facts). That settlement is announced in open court with the legal representatives of both sides being present. (Transcript of proceedings before Nader J.).

On the face of it a clear case of ostensible authority. Indeed, although the learned trial judge also discussed whether the compromise was within the express or implied authority of counsel it does not seem to me, with respect, that in this case it was necessary to do so. The

question of express or implied authority is a question between the legal practitioner and his client. The practitioner may be given express authority to conduct or compromise an action; or he is given implied authority to do so by his retainer. If he exceeds the express or implied terms under which he is retained he may become liable or answerable to his client. (One need not here discuss the distinction between counsel's and solicitor's liability.) The point is that express or implied limitations on authority vis a vis the client and its legal representatives do not (save in exceptional cases discussed hereafter) affect the other side in the action unless those limitations are made known to it; for it is entitled to assume that what counsel or solicitor says or does on behalf of the client is done with the authority of the client. This is ostensible authority. All this is clearly set out in the judgment of Brightman L.J. in Waugh v H.B. Clifford & Sons (1982) 1 All E.R. 1095. With that judgment the other members of the Court of Appeal concurred. The learned trial judge (if I may say so with respect) properly relied upon that judgment and quoted the relevant passages. It is not necessary to repeat them here save to point to the distinction clearly drawn by Brightman L.J. in Waugh's case at p. 1105:-

> "It follows in my view that a solicitor (or counsel) may in a particular case have ostensible authority vis a vis the opposing litigant where he has no implied authority vis a vis his client. I see no objection to that."

These comments dispose of the point raised by Mr Thomson in the case before us that it was not ever demonstrated that the directors of the appellant company had authority to compromise the action. Mr Thomson submits that counsel's authority could not be greater than that of the directors.

If one is talking about ostensible authority the simple answer is that it could be.

I am, with respect, unable to see what assistance Mr Thomson gets from his citation of Harvey v Phillips (1956) 95 C.L.R. 235. That was a case of express authority where the High Court held that, although that authority was only given under great pressure and against the real desires of the plaintiff and was subsequently withdrawn, nevertheless it was given and until it was withdrawn counsel had express authority to settle the matter for a particular sum, and the resultant compromise should not be disturbed.

Mr Thomson however relies on the remarks made by their Honours at p. 243 of the judgment in Harvey v Phillips which speak of the court's discretion to set aside a compromise made by counsel contrary to his authority when in the circumstances of the case it would involve injustice to allow the compromise to stand, even though the opposing side

did not know of the restrictions placed on counsel's authority. The clearest statement of this view appears in the decision of the House of Lords in Neale v Gordon Lennox (1902) A.C. 465.

In that case an agreement had been made between counsel as to the subsequent course of action of a case for defamation. The plaintiff however had said plainly that she would not agree to that course without the imputations on her character being publicly withdrawn. Yet her counsel had not made that a condition of the agreement. The trial judge (Lord Alverstone C.J.) considered it a case of ostensible authority (he uses the term "apparent" authority) and his view was that if the arrangement had been a final settlement of the action it would be binding on the plaintiff even assuming she had limited her counsel's authority. (See the report of the case at (1902) 1 K.B. 838 at 843-4). He was able to set aside the agreement on the basis of a distinction which he drew between interlocutory and final orders. That distinction was not adopted in the Court of Appeal or the House of Lords. The House of Lords took a very strong view that it would not allow an obvious injustice to be perpetrated. Lord Halsbury was particularly robust:-

> "to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over

> justice between the parties is, to my mind, the most extraordinary proposition that I have ever heard." (p. 470)

But surely the whole basis of that decision is that there was a direct and proved limitation on counsel's authority. Only if that is established might a court proceed to determine whether in all the circumstances the compromise should be set aside because of resultant injustice. How can such a case avail the appellant here where no evidence at all is produced that counsel's authority was in any way limited?

The mere denial which appears in paragraph 3 of the Amended Defence that counsel for the appellant had "no lawful authority" to enter into the agreement on the appellant's behalf seems in the circumstances to do no more than any other bare denial or non-admission does in a pleading, namely put the opposing side to proof; and if that then required proof of ostensible authority, that was amply supplied by the Statement of Agreed Facts and the Answers to Interrogatories to which I have already referred.

Furthermore nothing appears in the material to suggest any injustice to the appellant such as would justify a court setting aside the compromise. The case of

Neale v Gordon Lennox was one where a clear case of injustice to one party had been made out. Their Honours of the High Court in Harvey v Phillips appear to have been a little circumspect in their adoption of that principle. At p. 243 they observe:-

> "It is said that this power of the courts is to be exercised as a matter of discretion when in the circumstances of the case to allow the compromise to stand would involve injustice in view of the restriction on counsel's authority. See Halsbury's Laws of England Vol. 3, 3rd Ed. p. 51; 2nd Ed. Vol. 2 pp. 526-527."

The passage in those 2 editions of Halsbury to which their Honours refer is the same in each edition, namely,

> " ... when in the particular circumstances of the case grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side." (Underlining mine).

The only case given as authority for this statement is Neale v Gordon Lennox. The same passage appears in Halsbury's 4th Edition at Vol. 3 p. 650-651 and to the authority Neale v Gordon Lennox is added that of Marsden v Marsden (1972) 2 All E.R. 1162 at 1167. That was a case where counsel for the wife, contrary to express

instructions, compromised a suit on terms which inter alia released her charge on the matrimonial home. The limitation on counsel's authority was unknown to counsel for the husband. Watkins J., applying Neale v Gordon Lennox and the passage in Halsbury 3rd Edition p. 51, considered "there may be grave injustice visited on her if the orders stand. On balance therefore I think the injustice is on her side." (1972) 2 All E.R. at pp. 1167-8. He set aside the order made by consent on this issue although such order had been perfected.

It is to be noted that Watkins J. considered the question of injustice as a matter to be examined from both sides: and in that respect his views were similar to those of their Honours of the High Court in Harvey v Phillips at p. 244.

> "The issue is one which must be considered from the defendant's point of view as well as from (the plaintiff's)."

In the present case, nothing is shown to limit counsel's authority; and nothing is shown to suggest that on balance as between the appellant and the respondents grave injustice might occur to the appellant if the compromise were allowed to stand.

But, it is said that authority of counsel is limited to the issues in the action and the compromise involved collateral matters outside that authority and which do not bind the client unless the client expressly consents. Swinfen v Lord Chelmsford (1860) 5 H. & N. 890 at 922: 157 E.R. 1436 at 1449. Hals (4th Ed.) Vol. 3 81 p. 649. Accepting this, I am unable to see how any of the matters involved in the compromise were collateral to the issues between the parties. In Waugh v Clifford (supra) at p. 1106 Brightman J. says:-

> "I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors and counsel to bind their clients to a compromise. I do not think we should decide that matter is 'collateral' to the action unless it really involves extraneous matter as in Aspin v Wilkinson (1879) 23 S.J. 388 and Re a debtor (No. 1 of 1914) (1914) 2 K.B. 758."

With respect I agree with the analysis of the learned trial judge at pp. 244-245 of the appeal book:-

> "So it seems to come to this: the grounds upon which the defendant was withholding its consent were potentially many and various; it lay within counsel's apparent authority to identify and delimit those grounds if in the exercise of his skill and judgment he thought it appropriate to do so and when he did, his client was bound by it so far as the Court and the other side were concerned. It seems to me to make no difference that the identification and delimitation in this case may only have come as late as when the settlement was announced. The significant thing is that what was

> announced came within the range of issues to which the relief sought in the originating summons had the potential to give rise. Taking a common sense approach, the real question must have appeared to all to have been: What price the lessor's consent? Provided the answer put forward by its counsel was, as here, connected with the premises themselves, it is difficult to see how it can be said to have involved extraneous matter."

Mr Thomson does raise another point. He invites us, if we find the English authorities to be adverse to his argument on this matter of counsel's authority, to disregard them or at least be circumspect in adopting them. He reminds us of the substantial difference in practice between the English Bar and the Australian Bar as to seeing clients. The English barrister used rarely to confer with the client. I suspect this is not the case today, but it was certainly the case in the 19th century when the principles we are now discussing were being formulated. One has only to read in the Pickwick Papers of the consternation created when Mr Pickwick had the temerity to ask to see counsel retained for him in the celebrated case of Bardel v Pickwick. Mr Pickwick persisted and insisted. So "in violation of all established rules and customs" he was ushered into the chambers of Serjeant Snubbin. Serjeant Snubbin obviously did not desire the intrusion; and displaying that sagacity always so manifest in senior counsel, sent for his junior and left Mr Pickwick with him.

Mr Thomson submits that where you have this Olympian detachment from the client it is understandable that the same detachment flows into the conduct of the case and counsel may with perfect propriety decide what is best for the client without consulting him. Such a situation, he submits, does not prevail in Australia, where it would be almost unheard of for counsel to go into court without at least one conference with the client and certainly many more in an important case. And since the communication between counsel and client is so much more direct so also must be the line of authority and counsel is bound in these circumstances to act with much greater consultation.

There may be something in this if the investigation is to the express or implied authority of counsel. But it does not seem to me to affect the question of ostensible authority, that is the persona which counsel presents to the court and to his opponent. He remains clothed in apparent authority and, if anything, that appearance of authority is strengthened by the known and accepted fact that he has been in direct contact with the client.

READINESS WILLINGNESS AND ABILITY

(Grounds 8 and 9)

Ground 8 of the Amended Notice of Appeal states:-

> "The learned trial Judge was wrong in law in finding that the Respondents did not have to show that all parties to the alleged compromise agreement were ready, willing and able to complete their several obligations under the said agreement."

Ground 9 states:-

> "There was no evidence upon which the learned trial Judge could find that all parties to the alleged compromise agreement were ready, willing and able to complete their several obligations under the said agreement."

Ground 8 is in my view inaccurately stated. His Honour did not rule that the Respondents did not have to show that all parties were ready etc to complete their obligations under the agreement. In fact His Honour accepted that -

> "It is well established that to obtain specific performance in the orthodox sense a plaintiff must be ready willing and able to perform his part of the bargain."

And His Honour gave leave to the Respondents to plead that specifically (p. 255 of the Appeal Book). What His Honour did was to apply the Northern Territory Supreme Court Rules Order 23, rules 14, 15 and 17 and observe that the defence had not joined issue, as in his opinion it was bound to do, in something more specific than the mere traverse of all issues generally.

His Honour noted that rules similar to the Northern Territory rules applied in Queensland and referred to the remarks of Higgins J. in Baird v Magripilis (1925) 37 C.L.R. 321 at 330-1:-

> "Under the Queensland Rules and these pleadings, there was no issue joined on the subject of readiness and willingness. Under Order XXII., r. 12, an averment of the performance or occurrence of all conditions precedent necessary is implied (not expressed) in the statement of claim (see Form XII., "statement of claim"; Wilson & Graham's Supreme Court Practice, p. 498); and when the performance or occurrence is denied, the condition precedent must be distinctly specified in the defence. The defendants must (under r. 14) raise by the defence all matters of fact which show that the claim of the plaintiff's is not maintainable; and all grounds of defence must be pleaded which, if not raised, would be likely to take the plaintiffs by surprise. The defence here merely denied all the allegations of the statement of claim (not the implications); there was no issue, and, therefore, no need of a finding, as to readiness and willingness; and, in my opinion, no evidence was even admissible, on that mere subject, at the trial."

I note that Higgins J. was the dissenting judge in that case but the other 2 judges Rich and Starke JJ. did not address this issue. (See p. 331 - Rich J. and p. 335 - Starke J.).

In my view these grounds cannot succeed.

FAILURE TO CARRY ON THE SUPERMARKET BUSINESS

(Ground 10)

It was common ground and accepted by the learned trial Judge that the Respondents had ceased to carry on the business as a supermarket from 24 September 1985. (P. 259 of the Appeal Book). The Appellant argues, as it did below, that there was an implied term that the Respondents had an obligation under the lease to continue trading as a supermarket and that their failure to do so was a breach of the agreement, and a breach of so substantial a nature that the respondents cannot be entitled to the relief sought.

Mr Thomson refers us the first schedule to the lease (p. 82 of the Appeal Book) where these words appear:-

"Item H - Purposes of Lease - Supermarket and Storage"

Mr Thomson also submits that it must have been known from the circumstances that there were surrounding shops dependent on the presence of the supermarket and the trade generated by it.

This may be so but one might ask rhetorically why, if continuance in trading as a supermarket was considered

vital, was it not included as a specific term in the lease? The only clauses which approach this question are 1(b), which provides that the lessee will not use the premises for any purpose other than those set out in Item H of the Schedule, and 1(c) which provides that the lessee will conduct its business in an orderly and respectable manner.

In my view this matter is, apart from the other texts and authorities relied on by the learned trial Judge, amply covered by the decision of Gowans J. in Australia Safeway Stores Pty Ltd v Toorak Village Development Pty Ltd (1974) V.R. 268. This was a case on all fours with the present. A lease contained a Schedule (the first schedule) that the purpose for which the premises were to be used was for a supermarket business. A clause in the lease (Covenant 7 - Second Schedule) prohibited the lessee without the lessor's consent from using the demised premises for any other purpose. The lessee opened up a supermarket business a short distance away and ceased actively to carry on the supermarket business at the demised premises but carried on no other business there. Gowans J. held that the lessee's conduct did not constitute a breach of the Covenant nor a repudiation abandonment or disclaimer of the lease nor a repudiation of any basic condition thereof.

Gowans J. said at pp. 272-3:-

"In the face of the fact that there are set out in the lease express words of covenant dealing with the exception from the right of use and occupation, and there are no such words in the First Schedule, and that the natural reading is to treat the passage in the Schedule as merely designating a stated purpose of use to provide for the exception, and not indicating an addition such as is intended to be set out in the Second Schedule, the words in the paragraph of the First Schedule should not, in my opinion, be regarded as importing an obligation.

The words in the body of covenant 7 ' ... the use to which the same are to be put as aforesaid ...' then naturally adapt themselves to refer to the general use to which the premises are to be put after allowing for the exclusion of any purpose other than that stated. The other expressions 'use pursuant to this lease' and ' deprived of the use' adapt themselves accordingly to a similar meaning. In my opinion, then, the provisions of the lease do not impose on the lessee any obligation to continue to use the premises for the supermarket business."

DISCRETION TO GRANT RELIEF BY WAY OF MANDATORY INJUNCTION
(Grounds 11, 12, 13, 14, 15 and 16)

The grounds covered here relate to the complaint that the learned trial judge should not have exercised his discretion to order a mandatory injunction because the facts failed to establish a proper basis for it.

Firstly it is submitted that His Honour was wrong in attributing blame to the appellant, and since that was a matter which influenced the exercise of his discretion the order was made on a wrong basis. What His Honour said as to the appellant's conduct appears at p. 263 of the Appeal Book:-

> "The defendant has refused to honour a compromise entered into by senior and junior counsel on its behalf the terms of which were solemnly announced before this Court in the presence of the company's solicitor, its secretary and two of its directors, both members of Mr Marco A. Finocchiaro's family. At the time the supermarket was temporarily closed. It was not proposed to reopen it until the sale had been completed. It could not reopen without airconditioning. There could be no airconditioning without the lessor's agreement. The sale could not be completed without the lessor's consent. These things were all known to the lessor at the time. If its management had acted honourably, there is no reason to suppose that any of the breaches of which it now complains would have occurred. In the peculiar circumstances of this case they should be regarded as largely if not exclusively its own making.

In my view it was clearly open to His Honour to make the findings above on the evidence tendered to him particularly from the large bundle of agreed documents received as exhibit "P2". Even on the limited basis that His Honour accepted these documents only as some sort of historical narrative without exploring the truth or otherwise of the various allegations and counter-allegations put forth, His Honour does no more than recite the facts and draw a conclusion from them adverse to the appellant. It was open to both parties during the proceedings to adduce evidence to explain and justify their conduct. Save for tendering certain answers to interrogatories neither party took this course. His Honour had specifically drawn attention to the problems involved in the presentation of Exhibit P2 in globo. In those circumstances it is not open

now to the appellant to complain about the criticism His Honour makes. The argument before us really amounts to no more than that on the same material as was before His Honour we should draw different inferences. There is no reason why we should do so.

Then it is said that because of the respondents' breaches of the lease His Honour should not have exercised his discretion in their favour. Mr Thomson lays stress on the fact that the breaches alleged (and he relies on, failure to pay rent; damage to the premises; and the closing of the supermarket) had occurred before the compromise. As I follow him he submits that this is conduct of the respondents which should debar them from relief and which His Honour has wrongfully failed to take into account. But the compromise was entered into by the respondents with the full knowledge of those matters. (See letter of 16 September 1985 - appellant's solicitors to respondents - pp. 119-124 of Appeal Book : letter of 7 October 1985 - respondents' solicitor to appellant's solicitors - pp. 125-127 of Appeal Book). Once he was satisfied that the compromise was enforceable it was hardly appropriate for His Honour to look back to a time when the respondents rightly or wrongly had been complaining of certain breaches which had by then been subsumed into the compromise, or, in the case of failure to pay rent, could be dealt with by the order which His Honour made on the counterclaim.

Then it is said that His Honour took into account as an irrelevant consideration that the court could give relief against forfeiture for failure to carry on the business of a supermarket when there was no evidence of any application for relief against forfeiture on that ground.

His Honour referred at p. 258 of the Appeal Book to the respondents' application for relief against forfeiture for non-payment of rent. At p. 262 His Honour says:-

> "But even if I am wrong in this conclusion, then for reasons I have stated I do not think specific performance should be refused because of the plaintiffs' failure to carry on business. In its action for possession the defendant has got to overcome any question of waiver or estoppel that its past conduct may have given rise to. More important is the question of how this Court will react to the plaintiffs' application for relief against forfeiture in the light of the defendant's conduct: see Fry on Specific Performance 6 ed. pars. 961 to 968."

Later His Honour says (p. 263),

> "I am not in a position to say that the defendant must succeed in its latest round of ejectment proceedings."

I do not understand His Honour to be saying any more than that.

Then it is put that His Honour erred in law and in fact in failing to find that the granting of the relief sought by the respondents was futile.

Mr Thomson relies upon the fact that the respondents had ceased to trade as a supermarket as one aspect of the futility of granting the injunction; but he adds to that the submission that there was no evidence on which His Honour could find that Detapan would carry out its earlier agreement to purchase the supermarket business from the respondents subject to the consent of the appellant being obtained. Now it may well be that one of the results of the action, and no doubt also a result of this appeal, may be that Detapan is no longer interested in the original agreement. But that is speculation and was not the position before the learned trial judge. He came to the following conclusions (pp. 231-2):-

> "One of the issues raised in this action is whether this agreement is still on foot. The plaintiffs were interrogated on the point by the defendant, their answers being tendered as part of the latter's case. They disclose that on two occasions in 1986 Detapan's solicitor has said over the telephone that his client 'did not wish to proceed with the purchase'. Of course, taken by themselves and with no knowledge of the context in which these words were spoken it is not possible to say that they reveal an intention to repudiate the agreement. However, the plaintiffs' answers also disclose that they do not regard Detapan as having communicated to them any intention to rescind or terminate the agreement or not be bound by it. More importantly, perhaps, there is nothing in the evidence before me to suggest that Detapan has any grounds for repudiation or that the plaintiffs have elected to treat Detapan's solicitors's words as bringing the agreement to an end. In the circumstances, on the evidence before me, I must find that the agreement is still on foot. Furthermore, although I have had no direct evidence from the plaintiffs to this effect, I have no hesitation in inferring from their conduct of this

> action that they intend to enforce their agreement with Detapan insofar as it lies within their power to do so."

In my view His Honour's findings were consistent with the evidence before him and I see no reason to differ from them.

FAILURE TO AWARD COSTS ON COUNTERCLAIM

(Ground 17)

I do not understand this ground to have been pressed; but if I am wrong in that, it would seem that His Honour's approach was fully justified. The counterclaim was for arrears of rent. That was admitted. It must have taken a miniscule time to determine compared with the other issues.

NEW ISSUES RAISED BY THE NOTICE OF APPEAL

(Grounds 2, 3 and 4)

Much of the argument before us concerned certain issues which Mr Thomson concedes were not raised in the pleadings or before the learned trial judge. As previously mentioned, leave to amend the Notice of Appeal to include these grounds was granted by Kearney J. on 23 September 1986. His Honour, (if I may say so) correctly observed that

the granting of leave did not mean that this court would necessarily entertain those grounds.

The argument of the appellant is that the new grounds are raised from undisputed facts discoverable without further evidence; facts which, it is submitted, go so directly to the resolution of those issues in favour of the appellant that it cannot as a matter of justice be shut out from relief. It concedes that the price of that relief must be that the appellant necessarily pays the respondents' costs both here and below.

For the respondents it is put that, had the case been conducted below on those issues it must necessarily have taken a very different course; for the respondents may well have had answers to the allegations. It is not, therefore in the interests of justice to force both parties back to what would be a virtually new and different trial. Interest reipublicae ut sit finis litium.

The new matters are contained in grounds 2, 3 and 4 of the Notice of Appeal. There were amendments to other grounds but not such as to raise new issues. Grounds 2, 3 and 4 in summary, are:-

Ground 2: that the compromise was subject to proper formulation and acceptance which was never done.

Ground 3: that the compromise was unenforceable under the provisions of the Statute of Frauds.

Ground 4: that the appellant company could not be bound by any agreement without its seal being appropriately fixed to that agreement and this was never done.

It is necessary to add that the respondents have never consented to the raising of these new grounds of appeal.

I propose to deal with Grounds 2 and 4 together since they are interconnected, in the sense that what the appellant is relying on is that something further had to be done before a concluded contract could be found; that something further being both a formal contract (before any contract at all came into existence) and any such contract being signed by the parties and, in the case of the appellant, with the seal of the appellant company affixed.

Mr Thomson argues that all that occurred before Nader J. comes within the well-known principle stated by Parker J. in Von Hatzfeldt-Wildenburg v Alexander (1912) 1 Ch. 284 at 289 that

> "the law does not recognise a contract to enter into a contract."

Mr Thomson submits that when on 25 October 1985 Mr Pauling announced in open court and in the presence of the legal advisers of the appellant that

> "the parties have resolved their differences and I would propose to read onto the transcript some terms of settlement and later have them properly engrossed and signed and lodged in the court",

he was doing no more than announcing a contract to enter into a contract.

One would think that the very expression "resolved their differences" speaks for itself. I see no substance in the suggestion that the use of the expression "some terms of settlement" implies in the context anything to the contrary. Later Mr Pauling speaks of "the agreement we've reached" and later still he says, "that, in detail, is the basis of the settlement, your Honour".

In my view the whole of the remarks of Mr Pauling which appear at pp. 63-66 of the Appeal Book can permit of no other construction than that the parties had reached an agreement on that date and it was intended merely that a more formal document would be drawn up embodying the agreement already reached. It was clearly intended that such a document would be duly and properly executed by the parties.

The cases have long pointed to this distinction between a contract already arrived at one still not complete. In Von Hatzfeldt-Wildenberg v Alexander (supra), Parker J., immediately before the passage already quoted, said:

> "... it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract ...".

See also: Chillingworth v Esche (1924) 1 Ch. 97.

The distinction is very clearly set out in Masters v Cameron (1954) 91 C.L.R. 353. In that case Cameron agreed in writing to sell a farming property to Masters "subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions". Masters in the same document agreed to purchase the property on the above terms and conditions. It was held that the document did not constitute a binding document. Mr Thomson relies on this case to support his argument but a reading of what their Honours in the High Court said seems really to give support to a contrary position so far as the facts in the present case are concerned. For what their Honours Dixon C.J., McTiernan and Kitto JJ. said at pp. 360-1 was this:-

"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditicnal upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. Throughout the decisions on this branch of the law the proposition is insisted upon which Lord Blackburn expressed in Rossiter v Miller (1878) 3 App. Cas. 1124, when he said that the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. His Lordship proceeded: '... as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.'"

Later their Honours said at p. 361:

> "Cases of the third class are fundamentally different. They are cases in which the terms of the agreement are not intended to have, and therefore do not have any binding effect of their own."

Now it seems to me that any reading of Mr Pauling's remarks before Nader J. clearly puts this case within the first of the categories enunciated by the High Court.

The case of Bridle Estates Pty Ltd v Myer Realty Ltd (1977) 15 A.L.R. 415 was also relied on by Mr Thomson, but in my view, is clearly distinguishable since the expression there under consideration was, "subject always to preparation and execution of a formal contract of sale" and that clearly brought it within the third category mentioned by the High Court in Masters v Cameron.

Quite apart therefore from any question as to whether the court should allow these grounds, which clearly were not taken in the court below, to be now raised, it seems plain that they would fail on the principles set out above.

THE STATUTE OF FRAUDS

Much argument was addressed to the Court on whether or not the compromise complied with the provisions of the State of Frauds. In the view I take it is not necessary to examine this no doubt very interesting argument because, in the circumstances of this case and having regard to the nature of the defence now sought to be taken, the Appellant should not be permitted to rely upon a defence of this nature not taken below. That a Court of Appeal has the power to entertain a ground of appeal based on a point not taken below cannot be doubted. Davison v Vickery's Motors Ltd (In Liquidation) (1925) 37 C.L.R. 1 and see Starke J. at p. 35: Hampton Court Limited v Crooks (1957) 97 C.L.R. 367 : Miller v Miller (1978) 141 C.L.R. 269 : Connecticut Fire Insurance Co. v Kavanagh (1892) A.C. 473. In the last-mentioned case Lord Watson, delivering the judgment of the Privy Council considered that,

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea." (at p.480).

(In Coulton v Holcombe (1986) 60 A.L.J.R. 470 their Honours Gibbs C.J., Wilson, Brennan and Dawson JJ. were of the opinion that no distinction was to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. See p. 473.)

However, having stated the general test, Lord Watson in the Connecticut Fire Insurance case went on to say:-

> "The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea." (at p.480).

In Suttor v Gundowda Pty Ltd (1950) 81 C.L.R. 418 the appellant sought to raise a defence of sharp practices on the part of the respondent's agent such as would make it inappropriate to grant the discretionary equitable remedy of specific performance that had been granted at first instance. Such a defence had not been taken on the pleadings and was raised for the first time in the High Court as a ground of appeal. Their Honours Latham C.J., Williams and Fullagar JJ., after citing the remarks of Lord Watson set out above concluded at p. 438 that,

> "The present is not a case in which we are able to say that we have before us all the facts bearing on this belated defence as completely as would have been the case had it been raised in the court below."

Their Honours concluded that it was too late to raise the defence. See, also, Grey v Manitoba & North Western Railway Co. of Canada (1897) A.C. 254 at 267: O'Brien v Komesaroff (1982) 150 C.L.R. 310.

In the latter case Mason J. (as he then was) said, at p. 319:

> "In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interest of justice that the question should be argued and decided (Connecticut Fire Insurance Co. v Kavanagh [1892] A.C. 473 at p.480; Suttor v Gundowda Pty Ltd (1950) 81 C.L.R. 418 at p.438; Green v Sommerville (1979) 141 C.L.R. 594 at pp.607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy. The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial."

In Coulton v Holcombe (1986) 60 A.L.J.R. 470 the High Court allowed an appeal from the N.S.W. Court of Appeal which had given leave to rely upon a ground of appeal on a point not taken at first instance. Their Honours Gibbs C.J., Wilson, Brennan and Dawson JJ.; Deane J. dissenting, took the view that the original plaintiff's were bound by the conduct of their case at the trial such that it would be unfair to subject the present appellants to virtually a new trial on an issue different from that litigated. Their

Honours of the majority were of the view that such a course would deny the interests of expedition, finality and justice. (Page 474).

In my view the present case is par excellence an instance where the Appellant should not be permitted to rely upon this ground. There are a number of reasons why it should not.

1. It creates in the words of their Honours of the High Court in Coulton v Holcombe "virtually a new trial on an entirely different issue to that which has been litigated". Mr Thomson says this is not so because all the facts are before this Court and can lead to only one conclusion. Mr Hiley for the Respondents disputes this. He says matters must be investigated which are not yet resolved. A written note or memorandum might be found upon discovery and inspection; for one example, counsel's brief notes if in existence might become discoverable. The extent to which acts of part performance had taken place would need to be explored. There is certainly some material in Exhibit P2 which might repay investigation in this area. There might now be some defence available on estoppel. (See the article "Riches v Hogben : Part Performance & the Doctrines of Equitable & Proprietary Estoppel" by K.G. Nicholson and

appearing in 60 A.L.J. 345.) There is a sufficient basis on the matters raised by Mr Hiley to create a new round of pleadings, evidence and trial. This is not conducive to the certainty and determination required of the resolution of legal disputes. This case in my view comes within the expression already quoted of Mason J. that "the facts are not admitted nor are they beyond controversy".

2. Order 23 rule 15 is unambiguous.

> "15. When there are pleadings, the defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply (as the case may be) as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statue of Limitations, Statute of Frauds, release, payment, performance, facts showing illegality, any statutory provision requiring contracts to be in, or to be evidenced by, writing, either by any law or at common law."

When there is a special requirement of this nature it must make it so much more difficult for an appellant to persuade an appeal court that an omission to comply with the rules should be disregarded on appeal.

3. It is notorious that with some rare exceptions the Statute of Frauds never found favour with judges. (See Cheshire & Fifoot - Law of Contract - 1981 Ed. - pp. 174 - 178). There was a tendency to cut down its effect e.g. by the doctrine of part performance. Holdsworth, History of English Law Vol. VI at pp. 379-397 puts the Statute into its historical context and allows it some justification for its time, while conceding that it has long outlived its usefulness. Sometimes it was not even considered a very meritorious defence. See Charlick v Foley Bros Ltd (1916) 21 C.L.R. 249. Obviously this would not always be so, but perhaps one could summarise that there is a general approach (embodied for instance in Order 23 rule 15) that if the Statute is to be relied on it must be pleaded specifically clearly and expeditiously. Such an approach would then lean strongly against a situation here where the Statute was not pleaded below and now is sought to be relied on to set at naught a bargain not oppressive or unreasonable on the face of it and announced in open court.

4. In the court of first instance there had already been placed before the learned trial judge and after various amendments to the Defence, what His Honour referred to as a "farrago of defences". The appellant had therefore

had ample opportunity to take this defence and had not done so. It would not be proper to allow it to mend its hand once again at this late stage.

For these reasons I consider that the appellant should not be permitted to rely upon Ground 2 of the Notice of Appeal.

For all the above reasons I would dismiss the appeal.

O'LEARY C.J.

The order of the court is that the appeal be dismissed. The orders made by the trial judge are affirmed, and the appellant must pay the respondents cost of the appeal.
