[2010] UKPC 4
Privy Council Appeal No 0035 of 2009

JUDGMENT

Keith O'Connor (Appellant) *v* (1) Paul Haufman Percival Piccott (2) Eugene Adolphus Piccott (Respondents)

From the Court of Appeal of Jamaica

before

Lord Saville
Lord Clarke
Sir Jonathan Parker

JUDGMENT DELIVERED BY

SIR JONATHAN PARKER

ON

17 February 2010

Heard on 30 November 2009

Appellant	*Respondent*
James Dingemans QC Paul Letman Mrs Pamela Gayle (Jamaican Bar)	Dr Lloyd Barnett (Jamaican Bar)
(Instructed by M A Law LLP)	(Instructed by David Thomas Solicitors)

SIR JONATHAN PARKER:

1. Mr Keith O'Connor, the appellant on this appeal, is the freehold owner of a plot of land comprising four flats and situate at 26 Silverdene Drive, Three Oaks Gardens in the Parish of St Andrew, Jamaica. His title is duly registered in Volume 968 Folio 681 of the Register Book of Titles. Mr Paul Piccott and Mr Eugene Piccott (son and father, respectively), the respondents to this appeal, claim to be contractually entitled to purchase one of those flats, namely Flat 3.

2. In the action (the reference to the record of which is 074/97), which was commenced in the Supreme Court of Judicature of Jamaica as long ago as 2 May 1997, the respondents seek against the appellant specific performance of a written Agreement for the purchase of Flat 3 from the appellant at the price of $96,000. It is alleged in paragraph 2 of the Statement of Claim that the appellant's attorney, Mr Melbourne Silvera, acted in the transaction as the appellant's agent.

3. No Defence having been filed by the appellant, the respondents applied by motion for judgment in default of Defence. The respondents' affidavit in support of the motion identifies the Agreement sued on as being an Agreement made in March or April 1984 between Mr Silvera and a Mr Tomlinson of the one part and the respondents of the other part for the sale of Flat 3 to the respondents at the price of $96,000.

4. The motion was heard by Ellis J on 21 May 1998. By his order of that date, Ellis J ordered specific performance "of the Agreement for Sale made between the parties" and granted consequential relief.

5. On the footing that the order of Ellis J was a judgment in default of Defence, the appellant applied by motion to set the order aside on the ground (among others) that Ellis J had not been made aware of an order dated 22 May 1990 and made by Harrison J in an earlier action brought by the appellant against Mr Silvera (the reference to the record of which was E353/89). In his affidavit in support of the motion the appellant contended that Harrison J's order had rendered any agreement for the sale of Flat 3 by him to Mr Silvera "void".

6. By order dated 22 March 2001 Cooke J dismissed the motion on the ground (as stated in paragraph 2 of the order) that it was "misconceived as a Judge of co-ordinate jurisdiction cannot set aside a judgment on motion decided on the merits" (emphasis supplied). The appellant appealed Cooke J's order to the Court of Appeal of Jamaica

on the ground that the judge had erred in law in holding that he had no jurisdiction to set aside the order of Ellis J, since the matter had not been heard on the merits: i.e. it was a judgment in default of Defence.

7. On 7 April 2006 the Court of Appeal dismissed the appellant's appeal. The Court of Appeal held that the order of Ellis J was indeed a judgment in default of Defence and not (as Cooke J had held) a judgment on the merits. It was satisfied that it had a discretion under the Civil Procedure Rules to set Ellis J's order aside, but it declined to exercise that discretion in the appellant's favour on the ground that he had deliberately ignored the procedural requirements, having taken a decision not to defend the action.

8. The appellant now appeals to the Board.

9. The matter has a long and confusing history, and, without intending any criticism of counsel appearing before the Board, it is a regrettable fact that many of the relevant documents are missing from the Record of Proceedings which has been placed before the Board. In consequence, it is simply not possible for the Board to attempt to set out a complete account of the history of this matter. What follows, therefore, is no more than a summary of the history as it appears from the documents which the Board has seen and from such assistance as counsel have been in a position to give. As will appear from that summary, there has been a plethora of litigation relating to the alleged contractual entitlement of various parties to purchase Flat 3 and/or to charge rent for its occupation. For convenience and clarity, each of the various actions will hereafter be referred to by its reference number.

10. The story begins, at least so far as the Record of Proceedings goes, with the Agreement dated 27 June 1984 and made between Mr Tomlinson and Mr Silvera of the one part and the respondents of the other part ("the 1984 Agreement"). By the 1984 Agreement Mr Tomlinson and Mr Silvera agreed to sell Flat 3 to the respondents for $95,000 (not $96,000 as alleged in the Statement of Claim in 074/97). A deposit of $9,500 was expressed to be payable on the signing of the agreement, and vacant possession was to be given on completion. Completion was to take place on or before 30 September 1984, but in the event the sale was never completed.

11. By an Agreement made in about April 1988 between the respondents of the one part and Ms Maisie Hines of the other part ("the 1988 Agreement") the respondents agreed to sell Flat 3 to Ms Hines for $240,000. A deposit of $10,000 was payable on the signing of the 1988 agreement, and vacant possession was to be given on completion. Completion was to take place within 60 days from the date on which a registrable Instrument of Transfer together with a Certificate of Title was tendered by the Respondents to Ms Hines. According to the Statement of Claim filed by Ms Hines

in a later action (E135/91) commenced by her against the respondents, she paid the respondents $20,000 towards the purchase price and, by agreement with the respondents, entered into occupation of Flat 3 paying a monthly rental.

12. On 27 September 1989 the appellant commenced an action (E353/89) against Mr Silvera. The originating summons in E353/89 sought the determination of the question whether Silvera (sc. acting as the appellant's agent) could "validly" sell Flat 3 on the appellant's behalf to third parties without the appellant being advised to seek independent advice, and sought declaratory relief to the effect that a purported purchase of Flat 3 by Silvera from the appellant was "void".

13. In his supporting affidavit, the appellant deposed that in 1983, at Mr Silvera's office, he had signed a form of agreement for the sale of Flat 3 in which the names of the purchasers was left blank, and that he later learned that the purchasers were Mr Tomlinson and Mr Silvera. The appellant went on to state that during the discussion leading to "the purported sale in 1983" Mr Silvera failed to advise him to seek independent advice, or to advise him of the sale price or any of the other terms and conditions of "the intended sale".

14. In his affidavit in opposition, Mr Silvera deposed that in 1983 he had discussed the sale of Flat 3 with an estate agent, Mr Charles Hylton, and that he had informed Mr Hylton that he would try to find someone who would join with him in purchasing Flat 3 for $225,000 as he was unable to proceed with the purchase on his own. In the event, according to his evidence, he arranged with Mr Tomlinson (via Mr Tomlinson's mother) that he and Mr Tomlinson would together purchase Flat 3. He denied that there were any blanks in the form of Agreement signed by the appellant. He went on to refer to a sale of Flat 3 to the first respondent (notwithstanding that, as stated above, both respondents were named as purchasers in the 1984 Agreement) at the price of $95,000, stating that $80,500 of that sum remained unpaid.

15. On 22 May 1990 Mr Justice Harrison made an order in Chambers granting certain of the declaratory relief sought by the appellant, including a declaration that "the purported sale was void". It appears to the Board that the reference to "the purported sale" can only be a reference to a sale by the appellant to Mr Silvera, or possibly to Mr Silvera and Mr Tomlinson (i.e. a reference to the 1984 Agreement).

16. On 4 September 1990 the appellant's then attorney, Mr Garth Lyttle, wrote to the first respondent in the following terms:

> "Re proposed sale of Flat 3 …

> You will recall that at our meeting at my office, I pointed out that there was a serious problem with the title to the above premises as these lands belonging [sic] to Kingston and St Andrew.
>
> As a result of this encroachment, the Sub-division Plan has not been approved and consequently our client is not in a position to pass the title to you and is [therefore] inviting you to come in to discuss the matter with us, with a view of returning to you your deposit.
>
> You will also recall that by our letter dated 21st June, 1990 we advised you that the sum of $18,850.33 was owing to our client by way of arrears.
>
> We now make a formal demand that within ten (10) days from the receipt of this letter you pay to our client, through us, the said sum of $18,850.00 representing arrears of rent, failing which our instructions are to commence litigation against you without further notice."

17. In October 1990 the respondents attempted to cancel the 1988 Agreement on the ground that they were unable to make title to Flat 3.

18. On 5 April 1991 Hines & Co., Ms Hines' attorneys, wrote to Keith Brooks, the respondents' then attorney, giving the respondents notice to complete the 1988 Agreement.

19. On 26 April 1991 Ms Hines commenced action E135/91 against the respondents, claiming specific performance of the 1988 Agreement.

20. In 1992 the first respondent commenced an action in the Half Way Tree Resident Magistrates Court (2887/92) against Ms Hines claiming arrears of rent in respect of her occupation of Flat 3. This was the first of a number of actions (possibly as many as seven) commenced by the first respondent against Ms Hines for alleged arrears of rent, alternatively for possession of Flat 3, none of which actions has as yet succeeded. The claim in action 2887/92 was dismissed by order of Her Honour Ms Elise Francis on 2 March 1995.

21. In the meantime, on 4 May 1993 the appellant entered into an Agreement with Ms Hines ("the 1993 Agreement") for the sale of Flat 3 to her at the price of $240,000, with vacant possession on completion (in fact, as already stated, Ms Hines

was already in occupation). It is not in dispute that Ms Hines has paid the purchase price of $240,000 in full; indeed, a receipt for the full purchase price is included in the Record of Proceedings.

22. As from the signing of the 1993 Agreement Ms Hines has paid rent for her occupation of Flat 3 to the appellant, rather than to the respondents. Ms Hines also asserts that since 1993 she has expended a substantial sum on improving Flat 3.

23. On 2 May 1997 the respondents commenced the present action (074/97), claiming against the appellant specific performance of "an Agreement" whereby the appellant agreed to sell Flat 3 to them at the price of $96,000. Reference has already been made to their Statement of Claim, which is dated 18 October 1997. However it is not clear to the Board whether the single page Statement of Claim which has been included in the Record of Proceedings represents the whole of the document. The fact that it does not include any prayer for relief, and that the text finishes at the foot of the single page, suggest that a further page or pages may be missing. Through no fault of theirs, counsel were unable to assist the Board on this point.

24. As stated earlier, no Defence was filed in 074/97 by the appellant, and on 22 January 1998 the respondents issued a notice of motion seeking judgment for specific performance in default of Defence.

25. In paragraph 9 of their affidavit in support of the notice of motion the respondents stated that as a result of the order of Harrison J in E353/89 the ownership of Flat 3 "reverted" to the appellant, but that "a part of the Judgment recommended that the status quo in respect of the sale of the properties for which an Agreement for Sale was entered should remain and enure to the benefit of the Purchasers". The Board has not seen any judgment of Harrison J leading to his order, and is accordingly not in a position to comment on that statement.

26. Paragraph 10 of the respondents' affidavit reads as follows:

> "10. That this position has been recognized and adopted by the Attorney-at-Law for [the appellant] as shown in his letter dated September 4, 1990 …"

27. In paragraph 11 of their affidavit the respondents asserted that to date they had paid $42,543.00 on account of the purchase price (be that price $95,000 or $96,000) and as a result were given possession of Flat 3. In paragraph 12 they stated that they had requested the appellant to complete "the agreement", but that "there seems to be a plan to sell to another purchaser". The Board finds the respondent's reference to a

plan to sell to another purchaser is somewhat strange, given that the respondents were by that time well aware of the interest of Ms Hines as purchaser under the 1993 Agreement.

28. Mr Lyttle appeared before Ellis J at the hearing of the motion for judgment on 21 May 1998, but it appears that no affidavit had been filed in opposition to the motion. In the result, as stated above, Ellis J made the order which has given rise to the present appeal. It reads as follows (so far as material):

> "UPON this action coming on for hearing this day and after hearing Dr Lloyd Barnett Attorney-at-Law instructed by Miss Leila Parker, Attorney-at-Law for the [respondents] and Mr Garth Lyttle, Attorney-at-Law for [the appellant] IT IS HEREBY ADJUDGED:
>
> 1. that the [respondents] be granted Specific Performance of the Agreement for Sale made between the parties that [Flat 3] be transferred to the [respondents].
>
> 2. that the [appellant] deliver up to the [respondents] … the relevant unencumbered duplicate Certificate of Title along with an Instrument of Transfer within thirty (30) days of this order being made.
>
> 3. that if the [appellant] fail to abide by the terms [hereof]:
>
>   a. the Registrar of the Supreme Court be empowered to execute a valid Transfer to the [respondents]
>
>   b. …..
>
> 4. that the costs of this action be agreed or Taxed and paid by the [appellant]…."

29. On 12 July 1999 Ms Hines applied to be joined as a defendant in action 074/97 and to set aside the judgment of Ellis J, but that application was in due course refused. Whatever may have been the reasons for that refusal (and the Record of Proceedings contains no record of the refusal, nor were counsel able to assist in this respect), on the information before it the Board cannot conceive of any good reason why, given Ms Hines' interest as a contracting purchaser under both the 1988 Agreement and the 1993 Agreement, and given the fact that (according to her evidence) she had paid

$20,000 to the respondents on account of the purchase price of $240,000 under the 1988 Agreement and that she had indisputably paid to the appellant the full purchase price of $240,000 under the 1993 Agreement, she should not have been joined as a defendant in action 074/97 in order to assert her own claims in relation to Flat 3 as against the respondents and the appellant. This is an aspect of the matter to which the Board will return later in this judgment.

30. Also in 1999 the first respondent commenced another action against Ms Hines claiming arrears of rent and possession of Flat 3. This action was commenced in the Sutton Street Resident Magistrates Court and was numbered 4003/99. Judgment in action 4003/99 was delivered by Her Honour Ms Mangatal in about August 2001 following a 10-day trial. In the course of the trial oral evidence was given by the first respondent, by Ms Hines, by the appellant and by his attorney Mr Lyttle.

31. In a full and reasoned judgment, HH Ms Mangatal referred to Mr Lyttle's evidence that the appellant did not attend to give evidence at the hearing of before Mr Justice Ellis on 21 May 1998, and that "therefore judgment was entered in favour of the [first respondent]". She goes on to record Mr Lyttle as stating that at that hearing "[t]he matter was not actually tried, and no evidence was heard".

32. In the result, HH Ms Mangatal expressed herself not to be satisfied on the balance of probabilities that the respondents were entitled to possession of Flat 3 or to claim compensation from Ms Hines whether as rent or as any other form of payment during the relevant period. She went on to say that this was so because (among other things) the Agreement referred to in the order of Ellis J had not been put in evidence; Ms Hines was not a party to the action 074/97; and in any event the order of Ellis J was not a judgment in default but a judgment by consent (albeit Ms Hines could not have consented to it as she was not a party to the action). HH Ms Mangatal accordingly dismissed the action.

33. With respect to HH Ms Mangatal, the Board finds it hard to see how the order of Ellis J could be described as, in any sense, a judgment by consent.

34. In the meantime, having failed in her attempt to be added as a defendant in action 074/97, on 20 January 2000 Ms Hines commenced action H005/00 against the appellant, claiming specific performance of the 1993 Agreement. The Record of Proceedings does not reveal how far (if at all) that action has progressed.

35. On 7 March 2000 the appellant applied to set aside the order of Ellis J in the present action (074/97). In his affidavit in support of that application the appellant stated that during the trial of action 2887/92 the first respondent had approached him and offered to purchase Flat 3, but that he (the appellant) had told the first respondent

that he had already sold Flat 3 to Ms Hines. The affidavit went on to refer to the 1993 Agreement, exhibiting a receipt for the full purchase price paid by Ms Hines.

36. The appellant also relied in support of his application on affidavits by Mr Lyttle and Ms. Hines.

37. Mr Lyttle's evidence was that at the time of "the hearing of the said suit" – a reference to the hearing before Ellis J – he was not aware of some of the issues which should have been brought to the judge's attention; in particular, he was unaware of action 2887/92 and of the order made in that action by HH Ms Elise Francis. He went on to say that had he been aware of that order he would have brought it to the attention of the judge. He stated that he was aware of action E353/89, and hence (presumably) of the order of Harrison J in that action, but he made no express reference to that order in his affidavit.

38. Ms Hines' evidence was that following Harrison J's order in action E353/89 she had received a letter from Mr Lyttle, on behalf of the appellant, informing her of the order and instructing her to pay no further rent to the first respondent. Thereafter, according to her affidavit, she paid rent to the appellant. Her affidavit went on to confirm that she paid the purchase price under the 1993 Agreement in full to the appellant. She stated that she had been living in Flat 3 since the 1993 Agreement, although she had not as yet been registered as proprietor of Flat 3 due to delays at the Registry in approving the subdivision of the registered title (which, as noted earlier, included all four flats). In paragraph 16 of her affidavit Ms Hines said this:

> "16. That the [respondents] knew and have known from as far back as 1993 that [Flat 3] did not belong to [the appellant] as during the trial of [action] 2887/92 some time in 1993 it was revealed to the … court and the [first respondent] that I had purchased the property from [the appellant] as the relevant Agreement for Sale [i.e. the 1993 Agreement] and receipt were exhibited in the Trial."

39. In paragraph 19 of her affidavit Ms Hines contended that the order of Ellis J had been obtained "without full disclosure and by misrepresentations to the Court".

40. On 22 March 2001 Cooke J dismissed the appellant's application to set aside the order of Ellis J, on the ground that (as had been submitted on behalf of the first respondent) the order was not a default judgment but a judgment on the merits (see paragraph 6 above).

41. The appellant then applied for a stay of execution of the order of Ellis J and an extension of time for appealing. In his affidavit in support of that application he stated that his reasons for not attending the hearing before Ellis J were that he had previously informed the first respondent that he had sold Flat 3 to Ms Hines, and that the effect of the order of Harrison J in action E353/89 was that Flat 3 had "reverted" to him as the true owner.

42. An affidavit in support of the application was also sworn by Mrs Pamela Gayle, who had represented the appellant before HH Ms Mangatal at the trial of action 4003/99 and before Cooke J. In her affidavit, Mrs Gayle confirmed that at the hearing before Cooke J the respondents' attorney Dr Lloyd Barnett (who also appears for them on this appeal) submitted that Ellis J had made his order "after the matter had been heard on the merits". In paragraphs 7 and 8 of her affidavit Mrs Gayle said this:

> "7. That I indicated to the court that this was inaccurate as the matter had not been heard on the merits.
>
> 8. That further attempts to elaborate were cut short and met with the response that the Motion was misconceived as a Judge of coordinate jurisdiction could not set aside a Judgment on Motion decided on the merits."

43. The hearing of the appellant's appeal took place in December 2005. Mrs Gayle, for the appellant, submitted that Cooke J had erred in law in holding that he had no jurisdiction to set aside the order of Ellis J, repeating the submission she had made to Cooke J that the matter had never been heard on the merits and that under the Civil Procedure Code there was clear jurisdiction to set aside that order. She submitted that there had been a failure to disclose to Ellis J the order made by Harrison J in action E353/89, and that Ellis J did not have before him all the material necessary to enable him to reach a decision on the matter. Dr Lloyd Barnett, for the respondents, submitted that there was no inconsistency between the order of Harrison J in E353/89 and the order of Ellis J in the present action (074/97).

44. On 7 April 2006 the Court of Appeal dismissed the appeal. The leading judgment was delivered by McCalla JA (Ag.), with which Panton JA and Smith JA agreed.

45. After summarising the history of the matter, which she rightly described as unusual and complicated, McCalla JA held that the order of Ellis J was a default judgment and not a judgment on the merits. In the paragraph of her judgment numbered 33 (which in fact follows immediately after paragraph 30) she said this:

> "There is no doubt that Ellis J was seized with jurisdiction to hear the matter. I am of the view that having regard to the circumstances outlined above, the matter was not decided on the merits. Although counsel [Mr Lyttle] appeared for the appellant at the hearing of the Motion, the matter could not have been decided on its merits as no defence had been filed. However, in my opinion, Cooke J was correct in exercising his discretion to refuse to set aside the judgment and extend the time to file a defence. The appellant had deliberately ignored the procedural requirements, having taken a decision not to defend the matter. He could not have been ignorant of the Order made by Ellis J as Counsel had represented him at the hearing of the Motion …. Thereafter he took no steps, in a timely manner, to seek to set aside the Order."

46. McCalla JA then turned to rule 13.3 of the Civil Procedure Rules ("CPR"), which provides as follows (so far as material):

> "13.3
>
> (1) …., the court may set aside a judgment entered under Part 12 only if the defendant –
>
> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) gives a good explanation for the failure to file … a defence …; and
>
> (c) has a real prospect of successfully defending the claim.
>
> (2) …."

47. Having held (in paragraph 31 of her judgment) that the requirements of rule 13.3 had not been satisfied in this case, McCalla JA then referred to rule 1.2 of the CPR, which provides that in exercising any discretion given to it by the CPR the court must give effect to the overriding objective of dealing with cases justly (see ibid. rule 1.1). She continued (in paragraph 32 of her judgment):

> "Having considered all the circumstances, I see no basis on which this Court should exercise its discretion to assist the appellant to avoid the consequences of his deliberate inaction. It would not be in accordance with the overriding objective of the CPR which enables the court to deal with cases justly."

48. The appeal was accordingly dismissed.

49. Before the Board, Mr James Dingemans QC (leading Mr Paul Letman and Mrs Gayle, for the appellant) points out that the CPR came into force, subject to transitional provisions, on 1 January 2003 (that is to say, after the hearing before Cooke J on 22 March 2001); and that the rules in force at the date of the hearing before Cooke J were those contained in the Civil Procedure Code ("the Code").

50. Mr Dingemans referred the Board to section 258 of the Code, which provided as follows (so far as material):

> "Any judgment by default … may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

51. Mr Dingemans also referred the Board to the transitional provisions in Part 73 of the CPR, pointing out that these provisions (like the corresponding provisions of the English Civil Procedure Rules) do not expressly deal with the application of the new rules to appeals. He invites the Board to adopt the general approach of the English courts when confronted with the same issue arising out of the introduction of the English Civil Procedure Rules (on 26 April 1999). That general approach is described by Lord Woolf MR in *McPhilemy v. Times Newspapers Ltd* [1999] 3 All ER 775 as follows (at 792f-g):

> "The transitional provisions … do not expressly deal with appeals. However, the general approach should be obvious. In reviewing a decision made prior to 26 April 1999, this court will not interfere after that date if it would not have done so if the appeal had been heard prior to that date. This court only interferes with a decision of a court below if that decision was wrong. If the decision was not wrong prior to 26 April 1999, it does not become wrong, for the purposes of an appeal, as a result of the subsequent coming into force of the rules. However, if the decision is one with which this court would have interfered prior to 26 April 1999, in deciding what order should be made for the future, this court will take into account,

> in particular, Pt 1 of the rules [in which the overriding objective is set out]."

52. Mr Dingemans points out that the procedural rules which were in force in England prior to 26 April 1999 (the Rules of the Supreme Court) contained a rule in substantially the same form as rule 258 of the Code. He referred us in this context to the decision of the Privy Council in *Strachan v. The Gleaner Co Ltd* [2005] 1 WLR 3204 on an appeal from the Court of Appeal of Jamaica. The judgment of the Board was delivered by Lord Millett. At paragraph 21 of his judgment Lord Millett said this:

> "A default judgment is one which has not been decided on the merits. The courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion: see *Evans v. Bartlam* [1937] AC 473, 480 where Lord Atkin (*discussing the provisions of English rules in substantially the same terms as section 258*) said:
>
> > 'The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.'" (Emphasis supplied)

53. Accordingly, submits Mr Dingemans, notwithstanding the introduction of the CPR prior to the hearing in the Court of Appeal, section 258 remains of central importance in this case.

54. Turning to the merits of the appeal, Mr Dingemans submits that the Court of Appeal failed to take into account the rights of Ms Hines as contracting purchaser of Flat 3; and that in the light of the history of this matter, and in particular the order of Harrison J on E353/89, an order for specific performance in favour of the respondents would be unworkable. He submits that the Court of Appeal gave excessive weight to the appellant's admitted failures to meet procedural requirements; alternatively that in dismissing the appeal it failed to achieve the overriding objective of dealing with cases justly.

55. For the respondents, Dr Lloyd Barnett accepts that the overriding objective applied to the hearing in the Court of Appeal, pointing out that in dismissing the appeal the Court of Appeal expressed itself as exercising a general discretion (see paragraph 32 of the judgment of McCalla JA quoted in paragraph 47 above).

However, he submits that the appellant provided no valid basis on which the Court of Appeal could properly have exercised its discretion in his favour.

56. As to any suggested inconsistency between the order of Ellis J and the order of Harrison J in action E353/89, Dr Lloyd Barnett seeks to rely on Mr Lyttle's letter dated 4 September 1990 (quoted in paragraph 16 above) as a ratification or adoption by the appellant of his contract with Mr Silvera (or, as the case may be) with Mr Silvera and Mr Tomlinson.

57. Both Mr Dingemans and Dr Lloyd Barnett have made their submissions to the Board on the basis that the order of Ellis J was a default judgment, and the Board is content to proceed on that basis.

58. The Board accepts the submission of Mr Dingemans as to the general approach to be adopted by the Court of Appeal in this case, as set out by Lord Woolf MR in *McPhilemy* (see the extract from his judgment quoted in paragraph 51 above). It follows that, whether one applies section 258 of the Code or rule 1.2 of the CPR, the result is the same: viz. that in deciding what order to make for the future the Court of Appeal was required to have regard to the overriding objective of dealing with cases justly.

59. In the judgment of the Board, in deciding in effect to confirm Ellis J's order for specific performance the Court of Appeal failed to have sufficient regard to the overriding objective. The Board reaches this conclusion for essentially two reasons.

60. In the first place, the Court of Appeal appears to have focussed exclusively on the procedural failures of the appellant, without having paid any regard to the rights of Ms Hines as a third party who has entered into contracts for the purchase of Flat 3 from the respondents and from the appellant, and who is substantially out of pocket having paid the full price of $240,000 to the appellant pursuant to the 1993 Agreement and $20,000 to the respondents on account of the purchase price under the 1988 Agreement.

61. Secondly, given the history of the matter, and in particular the terms of Harrison J's order in E353/89, an order for specific performance in favour of the respondents appears to the Board to be wholly unworkable in practice and a recipe for yet further litigation. The Board notes that Dr Lloyd Barnett seeks to rely on Mr Lyttle's letter dated 4 September 1990 as a ratification or adoption of a sale of Flat 3 by the appellant to Mr Silvera (or, as the case may be, to Mr Silvera and Mr Tomlinson). However, that is not an issue which has as yet been litigated and the Board cannot comment further on it beyond saying that on the face of it the respondents will face considerable difficulties in pursuing it.

62. The Board considers that the only practicable way in which this matter can be progressed to a conclusion is by the three contesting parties (that is to say the appellant, the respondents and Ms Hines) being joined in a single action in which all the issues between them can be litigated to judgment. Since Ms Hines is not a party to the action and does not appear on this appeal, the Board is not in a position to give any procedural directions affecting her. However, the Board expresses the hope that the three parties will lose no time in taking the necessary procedural steps to achieve that end.

63. For the above reasons, the Board will humbly advise Her Majesty that the appeal should be allowed, and the order of Ellis J dated 21 May 1998 set aside. The parties should make any submissions on costs in writing within 14 days.