"SUBJECT TO CONTRACT"—A DIFFERENT RING

The phrase "subject to contract" is generally understood in the context of the sale of land to mean that the parties are not bound until a formal contract is signed. The use of this expression can affect the formation of contract and/or its enforceability, which are or should be two separate issues. This article attempts to show the confusion of these two issues by the Courts in the understanding, interpretation and use of cases which have dealt with one or both of these issues and some consequences, actual or possible, of such confusion.

I. INTRODUCTION

WHEN parties negotiate for the sale and purchase of land on the basis that the sale is "subject to contract" they mean that until they sign a written contract they will not be legally committed. The expression "subject to contract" has been said to be "so well known and has acquired so definite a meaning in relation to the sale of land that unless the facts and circumstances are so very strong and exceptional its effect in law is that there is no binding contract of sale...."[1] Used in this context, the expression affects, in that it prevents, the *formation* of a contract.

There is another context in which the expression is employed. In cases where the parties do reach agreement and a valid, albeit, oral contract is made, such a contract is not enforceable by action against any party thereto unless[2] there is a memorandum or note of the contract signed by that party. Section 4 of the Statute of Frauds (a statute applicable in Singapore) and section 40 of the Law of Property Act 1925 (the English re-enactment of section 4) so provide.[3] It is common practice to insert in correspondence proceeding from an oral contract for the sale of land, the expression "subject to contract" even though in the negotiations culminating in the oral contract no such qualification was introduced to prevent the contract from being concluded. This practice is based on the assumption that such correspondence cannot constitute a sufficient note or memorandum of the oral contract for the purpose of the said Statutes. Employed in this context, the "subject to contract" qualification affects the *enforceability* of contract.

When a Court grants specific performance of a contract in a case where the contract document contains the words "subject to contract", one should ask if the Court has ruled on one or both of the two distinct issues that may arise out of the use of the said expression. The first issue is whether a contract has arisen despite the expression "subject to contract" being introduced into the communication between

1 Tai Tong *Realty Co.(Pte)Ltd.* v. *Galstaun & Anor.* [1973] 2 M.L.J. 7, at p. 8

2 Except where the doctrine of part performance is successfully invoked.

3 29 Car. 2, c. 3; 15 & 16 Geo. 5, c. 20. Singapore received in 1826 *via* the Second Charter of Justice the real property law of England including the Statute of Frauds 1677.

the parties (the formation issue) and the second is whether the documentation which bears the words "subject to contract" can constitute a sufficient memorandum to satisfy the Statute of Frauds (the enforceability issue).

It is intended to show that there has been confusion of the two issues by the Courts in the understanding, interpretation and use of subject to contract cases. Some possible consequences of this confusion will be suggested.

II. THE FORMATION ISSUE

The formation issue is concerned with whether it was the intention of the parties to contract for the sale and purchase of land. This intention has to be objectively determined. When the qualification "subject to contract" has in some way been introduced into the negotiations, whether verbally or in writing, it would be very difficult to persuade the Court that a valid contract has been concluded without a subsequent formal agreement. It should be noted that to come to a conclusion, the Courts are not confined to the instrument evidencing the contract, but may draw their conclusion from all the relevant facts of the case.

In *Cohen* v. *Nessdale*[4] the defendant owners of a flat initiated negotiations with the plaintiff by a letter of offer to sell the lease of their flat subject to contract. Negotiations came to a halt with no agreement reached. Six months later the defendants wrote again to the plaintiff and a meeting was held whereat the parties orally agreed to the sale of the lease. No reference was made by either party to the terms agreed as being subject to contract but in a letter from the defendants subsequent to the meeting the agreement was stated to be so qualified. Upon the defendants' failure to proceed with the sale the plaintiff sued for specific performance. The Court held that no binding contract had been made. One of the issues that the Court had to deal with was whether the effect of the qualification "subject to contract" which was introduced earlier could be and had been waived or expunged by the parties when they met and orally agreed to the sale of the lease. Kilner Brown J. recognised that in principle parties could so expunge but "the oral agreement must take place in circumstances where the 'umbrella' [*i.e.* the effect of the qualification] has by express or implied agreement obviously been pulled down. It is not merely the fact of oral agreement to which one must have regard. One must equally have regard to the circumstances leading up to the oral agreement".[5]

In very exceptional cases the Courts may hold that a contract has been made despite the phrase "subject to contract" being introduced into the communication between the parties. The Courts have stated that although the words "subject to contract" indicate in themselves that there is no binding bargain, there might be other circumstances which would induce the court not to give the phrase that meaning in a particular case[6] or to find that the effect of the phrase has been expunged.[7]

4 [1981] 3 All E.R. 118.
5 *Ibid*. at p. 128.
6 *Chillingworth* v. *Esche* [1924] 1 Ch. 97, (C.A.).
7 *Cohen* v. *Nessdale* [1981] 3 All E.R. 118.

Such a case was *Michael Richards Properties Ltd.* v. *Corporation of Wardens of St. Saviour's Parish, Southwark*[8] Here, the defendants advertised property for sale by tender. The tender documents contained full particulars and special conditions of sale. By the terms of the documents a prospective purchaser was to send, *inter alia,* the completed form of tender to the defendants and the party whose tender was accepted should be the purchaser, subject to a condition which is not relevant to the immediate issue. The plaintiff submitted all the necessary documents to the defendants and the defendants sent an acceptance to the plaintiff. By a clerical error the words "subject to contract" were typed at the end of the letter of acceptance. It was contended by the plaintiff that no contract had come into existence since the letter of acceptance was expressed to be subject to contract and it was not an acceptance at all but left the matter in negotiation from which it never emerged. Goff J. in summary of the facts said,[9] "[t]his was a sale by tender. Nothing remained to be negotiated, there was no need or scope for any further formal contract, and it is difficult to see how it would be drawn. Nobody ever thought there was. The [defendants] did not submit a draft contract, nor were they asked to do so, and the matter proceeded with the steps necessary not to negotiate or finalise a contract, or even put it into further form or shape, but with the steps required for completion. In the context of a tender document which sets out all the terms of the contract, and which is required to be annexed to the tender form, it seems to me that the words "subject to contract" in the acceptance are meaningless ..." Accordingly, the Court held that a valid contract had been made.

III. THE ENFORCEABILITY ISSUE

The enforceability issue is or should be confined to the construction of written evidence of a contract. It is said that the object of the Statute of Frauds is to prevent fraud and perjury by taking away the right to sue on certain agreements if they are established only by verbal evidence; therefore, in determining whether a document is a sufficient memorandum to satisfy the requirements of the Statute, the Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it.[10] In deciding that a document or series of documents tendered as proof of a contract satisfies the requirements of the Statute, the Court should be satisfied that such documentation can stand on its own strength. No oral evidence should be allowed to supplement an insufficient document for otherwise the very purpose of the Statute would be defeated.[11]

This explains why conveyancers have for so long acted on the view that a written confirmation of the terms of the sale which states that the sale is subject to contract will not suffice to satisfy the Statute of Frauds notwithstanding that the oral contract for sale can be proved by oral evidence. It also explains why the 1973 decision in *Law* v.

8 [1975] 3 All E.R. 416.
9 *Ibid*. at p. 424.
10 *In re Hoyle* [1893] 1 Ch. 84, at p. 99, (C.A.), *per* Bowen L.J.
11 *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146, at p. 165, (C.A.), *per* Stamp L.J.

Jones[12] has been said to have sounded an alarm bell in the office of every solicitor in the land.[13]

In that case, which clearly dealt with the enforceability[14] and not the formation issue, an oral contract for the sale of a house was followed by a letter from the seller's solicitors stating that the sale was subject to contract. This letter dated 18 February 1972 was the first in an exchange of correspondence which included the seller's draft contract. On March 13 an oral agreement was made for a higher price and the seller's solicitors by their letter of 17 March 1972 requested an amendment to the price stated in the draft contract. The buyer sued for specific performance. The Court of Appeal (Buckley and Orr L.JJ.; Russell L.J. dissenting) upheld the buyer's claim.

The majority judgments held that to satisfy section 40 of the Law of Property Act 1925 it is not necessary that the memorandum should acknowledge the existence of a contract. It is not the fact of agreement but the terms agreed upon that must be found recorded in writing.[15] Further, it was held that the series of correspondence from the seller's solicitors, which included the letter of 18th February bearing the words "subject to contract", constituted a sufficient memorandum to satisfy the Act.

In his judgment Buckley L.J. said[16] that if the words "subject to contract" in the letter of 18 February "should be regarded as in some way affecting the quality of the correspondence down to March 13, then... the firm agreement entered into between the plaintiff and the defendant on that date must have had the effect of eliminating any qualifying effect which the presence of the words may have had in the previous correspondence, so that that previous correspondence as imported into the memorandum of the agreement of March 13 constituted by the letter of March 17 should be read without any such qualifying effect." More explicitly, Orr L.J. in his judgment said,[17] "[it] would, I accept, be a possible view of the words "subject to contract"... that they should be treated as a denial of any then existing contract. But in *Griffiths* v. *Young* [1970] Ch. 675 it was held by this court that the same words were not to be treated as a denial of a contract but only as imposing a suspensive condition, the subsequent waiver of which could be established by oral evidence, with the result that the letter there in question was held to constitute, in conjunction with another document, a sufficient memorandum of a proved oral contract subsequent in date...".

12 [1974] Ch. 112.

13 *Tiverton Estates Ltd.* v. *Wearwell Ltd. [1975] Ch. 146, at p. 159, (C.A.), per* Lord Denning M.R.

14 There was clearly no question that a valid contract had been made. The defendant's problem was that of written evidence. See Buckley L.J. [1974] Ch. 112 at p. 121.

15 *Ibid.* at p. 124.

16 *Ibid.* at p. 126. This was an alternative ground for Buckley L.J.'s finding in favour of the the plaintiff. Principally, he held that the letter of March 17 constituted a sufficient memorandum and that this letter was not in any way qualified by the words "subject to contract" in the letter of February 18.

17 *Ibid.* at p. 128.

The decision in *Law* v. *Jones* was regarded as wrong by the Court of Appeal in *Tiverton Estates Ltd.* v. *Wearwell.*[18] In *Tiverton's* case the plaintiffs entered into an oral contract to sell land to the defendants. The defendants' solicitors wrote to the plaintiffs' solicitors stating, *inter alia,* that the sale was subject to contract. The plaintiffs' solicitors wrote back enclosing a draft contract. When the plaintiffs refused to go ahead with the sale, the defendants registered a caution at the Land Registry. The plaintiffs issued a writ against the defendants claiming a declaration that there was no valid and enforceable contract and by a notice of motion they applied for an order that the registration of the caution be vacated. In their defence based on *Law* v. *Jones,* the defendants alleged that an oral contract had been made and that the plaintiffs' solicitors' letter together with the draft contract constituted a memorandum of the oral contract for the purpose of section 40 of the 1925 Act. The defendants failed both at first instance and on appeal.

The Court of Appeal opposed the majority judgments in *Law* v. *Jones* on two main issues. Firstly, it unanimously held that to satisfy section 40 of the Law of Property Act 1925, there must be in the memorandum of the contract something to indicate that the party signing it thereby acknowledges or recognises the existence of a contract. Stamp L.J. said [19] that in the absence of something in the memorandum at least pointing to the existence of a contract made on the stated terms "[it] would not be a note or memorandum of the contract sued on but merely of the terms which the party charged is alleged to have agreed. It would leave the contract 'to be established by verbal evidence'. It would constitute no shield to the party charged against the perjured evidence of a plaintiff charging that the defendant had entered into a contract the terms of which were to be found in a memorandum signed by the defendant which contained no indication whatsoever that the party charged had ever agreed to those terms".

The Court held that the plaintiffs' solicitors' letter tendered before the Court as evidence of the contract whether read in isolation or together with the defendants' solicitors' letter (which stated that the sale was subject to contract) to which it was a reply, did not recognise the existence of the alleged oral contract and did not therefore constitute a sufficient memorandum to satisfy the Act.

Lord Denning M.R. understood [20] the Court in *Law* v. *Jones* to have held that the words "subject to contract" were not to be treated as a denial of the contract, but only as imposing a suspensive condition, the subsequent waiver of which could be established by oral evidence. In his view, the sum effect of this ruling together with the principle that it is not necessary that the memorandum should acknowledge the existence of a contract would expose a party against which a contract is sought to be enforced to the full blast of fraud and perjury attendant on oral testimony. As to the meaning of the phrase "subject to contract" Lord Denning M.R. could see no difference between a

[18] [1975] Ch. 146. See J.T. Farrand. *Contract & Conveyance* (4th ed., 1983), pp. 22-23.

[19] *Ibid,* at p. 165.

[20] *Tiverton Estate Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146, at p. 159 *(per* Lord Denning M.R.). See also Buckley L.J.'s explanation of *Law* v. *Jones* in *Daulia Ltd.* v. *Four Millbank Nominees Ltd.* [1978] 2 W.L.R. 621, at pp. 634-635, C.A.

writing that denies that there was any contract and one that says that there was an agreement "subject to contract".[21]

IV. KEEPING THE ISSUES APART

Although both the formation and enforceability issues arise from the use of the same expression, the two issues involve different considerations. As mentioned above, the formation issue is concerned with the intention of the parties and the Court bases its conclusion on all the relevant facts, oral or written. In deciding on the enforceability issue however, i.e. whether there is sufficient memorandum to satisfy the Statute of Frauds, the Court has to restrict itself to considering the written evidence of the contract. The Court of Appeal in *Tiverton's* case has decided that the memorandum must contain something to indicate that the party signing it thereby acknowledges or recognises the existence of a contract. In effect, it has also held that the contents of a memorandum cannot be overruled or supplemented by oral evidence.

It is expedient to be mindful of which issue decided cases actually considered. Failure to do so may lead to misapplication of principles. Applying the constraints required for the enforceability issue in trying the formation issue may unnecessarily stunt the development of this aspect of the law. Conversely, the grounds for deciding that there is a valid contract may not be appropriate for deciding that there is sufficient memorandum. Indeed, as will be shown, applying principles promulgated for the formation issue to the enforceability issue can undermine the objectives of the Statute of Frauds.

V. CONFUSION OF THE TWO ISSUES

The confusion of the two issues and some of its consequences can be seen in decided cases.

In *Michael Richards'* case,[22] it was the buyer's contention that there was no contract because the letter of acceptance from the sellers contained the words "subject to contract". The sellers tried to argue, *inter alia,* that the effect of those words had been waived. There was nothing wrong with the sellers' contention. It is suggested that Goff J. was misguided in saying that *Tiverton's* case established beyond doubt that the sellers' proposition was wrong.[23] *Tiverton's* case, it will be recalled, dealt only with the question whether a letter with the words "subject to contract" can constitute a sufficient memorandum. It did not apply itself to the question whether parties who have negotiated on a subject to contract basis can by agreement expunge the effect of the said words so that a valid contract arises without formal contract. It is one thing to say that a letter with the qualifying words cannot constitute a sufficient memorandum and quite another to say that parties cannot by clear agreement remove the effect of the qualification from their negotiations so that a contract is concluded. Surely there is no policy or principle of law against giving effect to the deliberate

[21] [1975] Ch. 146, at p. 160. Note also Stamp L.J.'s remark at p. 169 that he thought that an agreement "subject to contract" represents no more than an agreement not intended to create a legal relationship, and so not a contract.
[22] See note 8.
[23] [1975] 3 All E.R. 416, at p. 421.

agreement of parties to do away with their initial reservation that the negotiations were subject to contract and to commit themselves firmly to a contract. That the effect of the qualification can be waived was considered in *Cohen* v. *Nessdale.*[24]

The Court of Appeal in *Cohen* v. *Nessdale* had to deal with. *inter alia,* the question whether a letter written by the vendors which stated the sale to be subject to contract could be a sufficient memorandum of the alleged oral agreement (the enforceability issue) and the question whether the effect of an oral agreement made by the vendors and the purchaser for the sale of land was to expunge the qualification introduced several months earlier that the negotiations were subject to contract (the formation issue). With regard to the first issue, it was said to be "clear beyond argument"[25] that the use of the qualification in the vendors' letter meant that it indicated that there was no acknowledgement of a binding contract and therefore it could not be a sufficient memorandum. On the question of formation however, it will be recalled that it was recognised that in principle, parties who negotiate on the subject to contract basis can get rid of the qualification if they both expressly agree that it should be expunged or if such agreement was to be necessarily implied.

But even in *Cohen* v. *Nessdale* where the two issues were dealt with separately, there was some blurring of lines in the use of precedent. When contending that a firm contract had been made, counsel used dicta from the judgment of Buckley L.J. in *Daulia Ltd.* v. *Four Millbank Nominees Ltd.*[26] to argue that the entry into a new and distinct oral agreement could remove the effect of the qualification "subject to contract" introduced in earlier negotiations. Buckley L.J. was attempting to clarify his judgment in *Law* v. *Jones* which clearly only dealt with the enforceability issue. Yet the Court in *Cohen* v. *Nessdale* did not find counsel's use of the dicta in the *Daulia* case inappropriate and proceeded to reconcile that dicta with the case of *Sherbrooke* v. *Dipple*[27] which dealt only with the formation issue. Even if such a mix of cases in this instance did not lead to injustice, it nevertheless adds to the general confusion which could cause *Cohen* v. *Nessdale* to be in turn viewed as authority for the proposition that the phrase "subject to contract" can be expunged from a document by oral agreement so that that document could constitute a sufficient memorandum.

VI. Is the Distinction Illusory or Real?

It is obvious that since both issues deal with the effect of the words "subject to contract" the Court must be mindful of how a decision on one issue may affect the law with regard to the other. Because the phrase is widely accepted to mean that the parties are not legally committed until a formal contract is signed, the effect of the phrase in the case of the formation issue generally is that the parties have not made a valid contract and the effect in the case of the enforceability issue is that the qualifying words amount to a denial of contract and therefore the document with those words cannot be regarded as a

[24] See note 4. Decision of Kilner Brown J. was affirmed by the Court of Appeal [1982] 2 All E.R. 97.
[25] *Ibid*, at p. 126.
[26] [1978] 2 W.L.R. 621.
[27] (1980) 255 Est. Gaz. 1203, (C.A.).

memorandum at all. So it would seem that a case which places an interpretation on the meaning of the phrase "subject to contract" is relevant to both the formation and enforceability issues.

It can easily be discerned how the decision in *Michael Richards'* case can be thought to be authority for the enforceability issue. First, it may be argued that if the Court can find a valid contract from documents which contain the phrase "subject to contract" because the qualifying words are meaningless in the context of those documents, then it is implicit at least that those documents could be considered a sufficient memorandum for the purpose of the Statute. Secondly, the Court can be said in a sense to have taken a wider interpretation of the phrase "subject to contract". By recognising that the phrase "subject to contract" can be interpreted to be meaningless, *Michael Richards'* case has opened the way for the Courts to accept a document with the words "subject to contract" as a sufficient memorandum.[28] To this extent *Michael Richards'* case can be viewed as a development of the law with regard to the enforceability issue. That may be so but two things must be borne in mind.

Firstly, it should be ascertained if the issue of enforceability was actually dealt with by the Court in any particular case. In accordance with the rules of civil procedure in Singapore and England the allegation that section 4 of the Statute of Frauds or section 40 of the 1925 Act has not been satisfied has to be specifically pleaded.[29] If not, the Court shall not taken cognisance of it at the trial.[30]

In *Michael Richards'* case where the issue was whether a valid contract had arisen out of the communication between the parties the ruling that there was a valid contract in no way means that the Court made a finding that the 1925 Act was satisfied. The enforceability issue never came up for consideration. No principles were laid down for the proposition that if the words "subject to contract" were found

[28] This may explain why in *Michael Richards* case Goff J., having held that the phrase "subject to contract" in a letter of acceptance was meaningless and therefore could give rise to a valid contract, felt it necessary to say, lest he trip another alarm bell, that his decision was on the facts of the particular case. But if the distinction between the two issues is kept clearly in mind it may be that Goff J.'s fears of offending the principles defended in *Tiverton's* case were unfounded. *Michael Richards* case dealt solely with the formation issue. By finding that the phrase "subject to contract" had no meaning in the context of the facts of that case the Court was doing nothing exceptional. The Court was not giving a new interpretation to the phrase *per se*. It merely came to a conclusion about the intention of the parties by finding that the phrase was meaningless in the context in which it was used, having regard to all the relevant facts of the case.

[29] Singapore Rules of the Supreme Court, Order 18, Rule 8. English Rules of the Supreme Court, Order 18, Rule 8. See also *Clarke* v. *Callow* [1877] 46 L.J. Q.B. (N.S.) 53, C.A.

[30] In *Tiverton's* case [1975] Ch. 146, the Court dealt with the section 40 issue on an interlocutory motion in an action instituted by a writ even though the pleadings which had been thus far filed did not raise the issue. Lord Denning M.R. said at p. 156, "[t]here is no point in going formally to trial when the discussion at the trial would be merely a repetition of the discussion on the summary procedure." Stamp L.J. said at pp. 171-172, "[a]nd I suppose, it is theoretically possible that the vendors will not plead the statute. But the court has to deal with the matter on the evidence before it. In doing so it is no doubt right to take probabilities into account, but it seems to me rather improbable that a memorandum will come to light on discovery and almost inconceivable that the statute will not be pleaded."

to be meaningless they may be disregarded for the purpose of the 1925 Act.[31] No safeguards against undermining the Act were considered. If the Court had had to decide on the said proposition it is suggested that it would have had to confine itself to the construction of the documents. It is not altogether clear that the Court drew its conclusion solely from the documents.[32]

Secondly, whilst there does not appear to be anything objectionable about accepting a document with the phrase "subject to contract" as a memorandum for the purpose of the Statute of Frauds where the phrase is found to be meaningless, the real concern is how the phrase is to be found meaningless. Should the phrase be interpreted on the construction of the document only or in the wider context of all relevant facts? The following situation may arise for decision. A contract is alleged to have arisen out of a document with the qualifying words. The said words can be proved to be meaningless or at least that they are not to be given their conventional meaning only if read in the wider context of the circumstances of the case. The document is however the only written evidence. To rule that the words are meaningless or not to be given their conventional meaning for the purpose of the Statute because of facts extraneous to the document would mean the circumvention of the Statute. This could happen if cases like *Alpenstow Ltd.* v. *Regalian Properties* PLC[33] are misunderstood.

VII. THE *ALPENSTOW* CASE

The facts of that latest case on the subject are as follows. By an exchange of letters the plaintiffs undertook that if they wished to dispose of any interest in certain land they owned, they would serve on the defendants a notice of their willingness to sell a 51 per cent interest in the property or pay the defendants £500,000 and the defendants agreed to accept the notice within 28 days after its service "subject to contract". By these said letters the parties cancelled an earlier and admittedly binding agreement giving the defendants a right to purchase an interest in the land should the plaintiffs wish to dispose of their interest in the land. In accordance with the said letters the plaintiffs served on the defendants a notice of their willingness to sell a 51 per cent interest in the land and the defendants accepted the plaintiffs' notice subject to contract. The defendants lodged cautions at the Land Registry against the plaintiffs' land and the plaintiffs issued an originating summons and notice of motion for an order to vacate the cautions on the ground that the letters could not constitute a binding agreement. The defendants then issued a writ seeking, *inter alia,* specific performance of the alleged contract. Nourse J. dealt with the motion upon a consolidation of the two proceedings and dismissed it.

31 Contrast C.T. Emery's view in his article "The Alarm Bells Ring Again — Where 'Subject to Contract' is Meaningless" (1976) 35 C.L.J. 28; where it is stated that "*Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146 may be taken to have settled that writing expressed to be "subject to contract" cannot satisfy the requirements of section 40(1) of the Law of Property Act (but c.f. [1974] C.L.J. 42). However, in *Michael Richards Properties Ltd.* v. *Corporation of Wardens of St. Saviour's Parish, Southwark* [1975] 3 All E.R. 416, Goff J. has held that if, in a particular context, the words "subject to contract" are meaningless, they may be ignored and the writing may satisfy the statute" (emphasis supplied). See also Brian W. Harvey and Franklin Meisel, *Auctions Law and Practice* (1st ed. 1985), p. 183.

32 See note 9.

33 [1985] 1 W.L.R. 721.

The question before the Court was whether the effect of the qualifying words in the said letters was that the defendants acquired no interest in the land merely by accepting the plaintiffs' notice and until contracts were exchanged in accordance with ordinary conveyancing practice no contract for the sale of land could come into existence. The Court held on a construction of the letters that this was the case where there was a very strong and exceptional context which must induce the Court not to give the qualifying words their clear *prima facie* meaning. Consequently, the defendants took an equitable interest when they accepted the plaintiff's notice to sell.

It is not clear from the report whether the issue of enforceability was pleaded but although the word "enforceability" was used in the judgment[34] the Court's ruling appears to be, from the general tenor of the judgment, on the question whether a valid contract had come into existence and not directly at least on a question of sufficient memorandum. The cases cited in the judgment relevant to the issue were cases on formation of contract.[35]

Even if one views this case as concerning the enforceability issue also, the facts of the case are such that the Act arguably was satisfied. Solely on the construction of the letters it might be argued that the qualifying words in the context were meaningless or not to be given their conventional meaning. Further, like the *Michael Richards'* case, the *Alpenstow* case (whether viewed as a formation or enforceability case) in ruling that the phrase "subject to contract" may be meaningless or not to be given its conventional meaning,[36] given the context in which it is used, has opened the way to a wider view of the meaning of the phrase. There should be nothing wrong with that conclusion if it is based solely on the construction of the documents.

The main concern is whether this case and others like it will or should be taken as authority to argue that circumstances extraneous to a document containing the qualifying words can affect the construction of that document so that the words are not given their usual meaning for the purpose of the Statute. In the *Alpenstow* case, apart from the construction of the letters, regard was given to the fact that the qualifying words were not used at the primary stage of negotiation but four or five months on. Nourse J. also said,[37] "You would not expect to find them [the qualifying words], as you do here, in a detailed and conscientiously drawn document which admittedly cancelled and replaced a previous binding agreement [insertion mine]". It is not clear therefore whether the Court confined itself to the construction of the documents. Further, Nourse J. said[38] when deciding on the effect of the phrase "subject to contract", that he had to determine "the true construction of the letters of 12 July and 21 December 1983 against the factual background known to the parties at or before these dates... [emphasis supplied]". This statement if understood as pertaining to the enforceability issue will permit the use of oral evidence

34 *Ibid,* at p. 729.

35 *Chillingworth* v. *Esche* [1924] 1 Ch. 97, C.A. *Eccles* v. *Bryant and Pollock* [1948] Ch. 93, C.A.

36 No special meaning appears to have been assigned to the phrase "subject to contract" in the *Alpenstow* case.

37 [1985] 1 W.L.R. 721, at p. 730.

38 *Ibid*. at p. 728.

to supplement an otherwise insufficient memorandum for the purpose of section 40. As long as the principles laid down by the Court in *Tiverton's* case have not been overruled, one should be wary of such an interpretation and use of Nourse J.'s remarks. Otherwise the somewhat muffled *Law* v. *Jones'* bell may be heard again albeit with a slightly different ring.

VIII. CONCLUSION

The real issue could well be whether the case law on section 4 of the Statute of Frauds or section 40 of the Law of Property Act should be re-examined to determine what is or should be required of a memorandum. Indeed the insistence by the Court in *Tiverton's* case that the memorandum must contain an acknowledgement of the existence of the contract has been questioned.[39] So it may be that a memorandum need not stand on its own strength and may be supplemented by oral evidence. One may even suggest that section 4 of the Statute of Frauds should be repealed for why should proof of a contract of land warrant special protection as opposed to a contract for shares? But these are issues that will not be taken up here.

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[39] See C.T. Emery's view in his article "The Alarm Bell Continues to Ring" (1974) 33 C.L.J. 42.

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