understood that the Lots numbered 1 and 2 to be retained by us were the Lots numbered 1 and 2 described on the said proposed subdivision plan.

8. When the Plaintiff and I met at my property at Hopewell, Christ Church to discuss the proposed sale some time in July 1997 we did so against the background of the said plan. We agreed that the lots numbered 1 and 2 on the said plan would be retained by my wife and I and that the remaining portion of land would be sold to the Plaintiff at $2.00 per square foot."

[39] It is conceded by System Sales in the affidavit sworn on its behalf by Mr. Gittens that it was a fundamental term of the agreement that the Suttles would retain lots 1 and 2 and grant to System Sales a right of way over those lots.

[40] Having regard to that concession the real dispute between the parties relates to whether it was a fundamental term of the agreement that lots 1 and 2 must have the same orientation as shown on the Suttle Plan that is that the lots must both face South on the public road. This is the allegation of the Suttles. The onus rests on them to establish that allegation on a balance of probability.

[41] According to *Chitty on Contracts* 29th Edition Vol. I at p. 716 "the fundamental term has been described as part of the "core" of the contract, the non-performance of which destroys the very substance of the agreement." Accordingly, one would expect to find such a term