IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007HCV05110

BETWEEN	**J.T.M. CONSTRUCTION & EQUIPMENT LTD**	**CLAIMANT**
AND	**CIRCLE B. FARMS LTD**	**DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the claimant

Ms. Tara Reid instructed by Vaccianna & Whittingham for the defendant

Heard: January 19, June 17 & 29, 2009

Contract for sale of land -- delay by purchaser -- vendor serving notice to complete -- notice making time of the essence -- validity of notice to complete -- whether service of notice to complete on purchaser's attorney-at-law valid--effect of notice -- purchaser failing to complete within time -- Rescission by vendor -- whether rescission valid -- whether purchaser entitled to specific performance -- whether vendor entitled to damages and recovery of possession – forfeiture of deposit

McDONALD-BISHOP, J

THE PARTIES

1. J.T.M. Construction and Equipment Ltd, the claimant, is a limited liability company incorporated under the laws of Jamaica and carrying on business at Pollyground, Ewarton, St. Catherine. Mr. Ronald Prendergast is its CEO and its representative and sole witness for the purposes of these proceedings.

2. Circle B. Farms Ltd, the defendant, is also a limited liability company incorporated under the laws of Jamaica with registered offices at 2B Beechwood Avenue, Kingston 5 in the parish of St. Andrew. Representing its interest in these proceedings and acting as its sole witness is Mr. Lloyd S. Wiggan, one of its directors.

THE CLAIM

3. The claim is for specific performance of a contract for sale of land entered into on or about September 2, 2003. The claimant, acting through Mr. Ronald Prendergast, entered into this agreement with the defendant, acting through Mr. Wiggan and his wife as directors, for purchase of a plot of land situate at Belle Vue in St. Catherine and forming part of land comprised in certificate of title registered at volume 1112, Folio 251 of the Register Book of Titles. This agreement was reduced into writing and duly executed on September 2, 2003 and later stamped.

4. The claimant, by an amended fixed date claim form, filed January 22, 2008, has brought this claim against the defendant alleging breach of the said contract of sale. It seeks the following redress as summarized:

(1) A declaration that a valid and binding agreement exists between the claimant and the defendant in respect of the agreement for sale entered into on September 2, 2003.

(2) Specific performance of that agreement.

(3) Damages in lieu of specific performance and/or for breach of contract.

(4) An injunction to restrain the defendant from selling the land.

(5) An injunction restraining the defendant from entering or trespassing upon the land or in any way disturbing the claimant's possession of the land.

THE DEFENCE

5. The defendant denies breach of contract contending that the agreement of sale was validly cancelled and that the claimant is not entitled to any of the relief it is claiming. The defendant, in turn, counter-claims against the

claimant for damages for breach of contract and for recovery of possession of the land in question.

THE UNDISPUTED FACTS

6. There is not much dispute as to facts between the parties. The dealings between them are substantially evidenced by written documents that stand as being undisputed. The written agreement reveals, in part, the following terms that are immediately relevant to the issues in the case.

(I) The defendant agreed to sell and the claimant agreed to purchase the land in question for $4,500,000.00.

(ii) A deposit of $2,250,000.00 was to be paid by the claimant on signing of the agreement. This broken down would be (a) $450,000.00 as deposit and (b) the sum of $1,800,000.00 as further payment on account.

(iii) Completion was to be 180 days from the date of signing of the contract in exchange for the duplicate certificate of title duly transferred in the name of the claimant.

(iv) Vacant possession was to be given to the claimant on payment of the deposit.

(v) The agreement was subject to the claimant obtaining a mortgage and delivering to the defendant's attorney-at-law a letter of undertaking within 45 days of the signing of the agreement. If the claimant should fail to do so, the defendant would be entitled to rescind the contract within 14 days of the date of the breach.

(vi) The claimant agreed that the defendant should have use of the amount of $1, 250,000.00 in consideration for granting to the claimant vacant possession rent free and interest free.

(vii) The sale was subject to the defendant obtaining sub-division approval for the said lot.

(viii) Mrs. Grace McKoy was appointed the defendant's attorney with carriage of sale while Mr. Sean Kinghorn would act as the claimant's attorney.

Chronology of events

7. Pursuant to the agreement, the sum of $2,250,000.00, being deposit and a further payment, was duly paid by the claimant's attorney to the defendant's attorney. This is evidenced by a stamped receipt dated September 2, 2003. Following on this payment, the claimant was let into possession of the land in keeping with the terms of the agreement.

8. The defendant made an application to the St. Catherine Parish Council for sub-division approval in or around December 12, 2003. Preliminary approval was granted on October 4, 2004 but the sub-division plan was not delivered to the defendant until October, 2006.

9. On October 20, 2006, Mrs. McKoy wrote to Mr. Kinghorn requesting letter of undertaking for the balance purchase price in keeping with the terms of the agreement at special condition 5. This was accompanied by a statement of account. There was no response from Mr. Kinghorn to this correspondence.

10. In April, 2007, the final sub-division approval was obtained and the duplicate certificate of title was issued to the defendant. Subsequent to receiving this, Mrs. McKoy again wrote to Mr. Kinghorn on April 16, 2007, informing him that the sub-division approval had been obtained. A copy of the relevant duplicate certificate of title was sent to him with this correspondence. In that letter, it was expressly indicated that the defendant was in readiness to complete. Once again, Mrs. McKoy requested from Mr. Kinghorn the letter of

undertaking that was requested in the letter of October 20, 2006 and which was not forthcoming.

11. The response to this correspondence by Mr. Kinghorn did not come until May 11, 2007. In that letter, Mr. Kinghorn gave his undertaking that the balance purchase price, as stated in the statement of account forwarded to him, being $2, 403, 995.00, would be paid on completion.

12. On May, 13, 2007, two days after receiving the letter of undertaking from Mr. Kinghorn, Mrs. McKoy sent instrument of transfer for execution by the claimant. Again, there was delay in the claimant responding and so on June 1, 2007, Mrs. McKoy, upon not receiving the executed instrument of transfer, wrote to Mr. Kinghorn requesting its return.

13. On August 2, 2007, Mr. Kinghorn replied by letter with the instrument of transfer enclosed. Mr. Kinghorn then explained that Mr. Prendergast was abroad and that due to inadvertence, the notary public's certificate was not affixed.

14. On August 10, 2007, Mrs. McKoy returned the transfer document and wrote back to Mr. Kinghorn indicating that the claimant's seal was also not affixed to the copy of the transfer and she requested that that be done. She also asked that the county clerk's certificate also be attached to the document. In this letter of August 10th was also enclosed a notice to complete from Mrs. McKoy addressed to the claimant. According to the letter, the notice to complete was served in view of the claimant's *"inordinate delay in completing"* having been advised in April, 2007 that the duplicate certificate of title was issued and that since then, the defendant had not been placed in a position to complete the transaction.

15. By this notice to complete dated August 10, 2007, the claimant was required to pay over the balance agreed in the contract of sale and all cost and

interest pursuant to Special condition 8 of the Agreement on or before the 10th day of September, 2007. The claimant was thus given 30 days to complete. Also, time was made the essence of the contract by virtue of clause 3 of the notice to complete and it was stated that in making time of the essence, the defendant was ready, willing and able to complete.

16. Following on the issuance of the notice to complete, the defendant heard nothing from or on behalf of the claimant until October 22, 2007 (being a little over two months later) when Mr. Kinghorn wrote to Mrs. McKoy stating:

> ***"Please find enclosed Instrument of Transfer in duplicate duly executed by the purchaser and bearing the company's seal."***

Nothing was said in this letter about the balance purchase price that was requested to be paid in accordance with the notice to complete.

17. On the said date, by letter, Mrs. McKoy wrote to Mr. Kinghorn in the following terms:

> ***"I refer to previous correspondence herein.***
>
> ***I have been instructed to advise you that pursuant to Notice to Complete dated 10th August, 2007 the sale is now rescinded.***
>
> ***Please be guided accordingly."***

18. It is this last piece of correspondence from the defendant's attorney that has led the way to these proceedings. The claimant is now contending that the cancellation is invalid and is seeking, among other things, a declaration that a valid contract subsists on which a decree of specific performance should be granted in its favour.

THE DISPUTE

Claimant's contention

19. In terms of the claimant's particulars of claim, it is averred that the defendant's purported cancellation of the agreement was invalid for the following reasons:

(a) The defendant's notice to complete was premised or predicated on a false statement of account which did not reflect the true balance of the purchase price to be paid by the claimant to the defendant. The statement of account and the notice to complete did not take into account the sum of $1,000,000.00 paid by the claimant to the defendant. The notice to complete made demand for a sum that was overstated and not an accurate reflection of what was truly owing to the claimant.

[b] The notice to complete was not personally served upon the claimant despite the fact that it was addressed to the claimant personally. The notice is required by law to be served on the claimant personally unless an alternative method of service is agreed between the parties.

(c) The defendant was in breach of the agreement of sale by not putting itself in a state of readiness to complete within the stipulated 180 days and was not ready to complete until three years later.

(d) The claimant's attorney explained to the defendant's attorney that the CEO was overseas and that there was a difficulty in obtaining a notary public's certificate in respect of the instrument of transfer signed overseas at the time.

Defendant's contention

20. The defendant, in its response, averred that the balance due and payable by the claimant to complete was not incorrectly stated. The balance due was

$2,403, 995.00 as outlined in the statement of account sent to the defendant's attorney in letter of October, 2006. Counsel, in giving his undertaking, did so in relation to the said sum. No objection was raised on the ground that the said sum was erroneous.

21. In relation to the failure of the defendant to complete within 180 days, this was because sub - division approval had to be obtained and the claimant had known this at the time of the purchase. It was on that basis that the sale had commenced and it was agreed that the claimant would have been put in possession upon signing with free liberty to use and enjoy the property without any payment being made until the duplicate certificate of title was transferred into the name of the claimant. Following on this, the claimant, at all material times, enjoyed full control of the property without any additional charges. The title was eventually issued by the National Land Agency and so the delay in obtaining the title prior to April, 2007 was not as a result of the negligence or omission of the defendant

22. The defendant averred that it had acted reasonably in cancelling the said agreement given the delay of the claimant to complete upon been served notice to complete and upon time been made the essence of the contract. Pursuant to that notice, the defendant had elected to treat the sale as rescinded. The cancellation is, therefore, valid and so the contract no longer exists.

THE ISSUES

23. The issues to be examined and resolved are identified as follows:

1. Whether the claimant gave the defendant the sum of $1,000,000.00 towards the purchase price that should have been taken into account in the statement of account and notice to complete.

2. Whether the failure of the defendant to take into account the sum of $1,000, 000.00 rendered the statement of account erroneous thereby affecting the validity of the notice to complete.

3. Whether the notice to complete was properly served on the claimant by service on his attorney –at- law.

4. Whether the defendant acted improperly and unreasonable in rescinding the agreement.

5. Whether the claimant is entitled to a decree of specific performance/ and or damages based on the defendant's purported cancellation of the agreement.

6. Whether it was the claimant who breached the contract thereby entitling the defendant to damages for breach of contract and recovery of possession of the land as counter-claimed.

ISSUE#1: Whether $1,000,000.00 was paid to the defendant by the claimant which should be taken into account as part of the purchase price

24. The claimant, through its sole witness, Mr. Prendergast, is contending that pursuant to the agreement of sale, the claimant paid over to the defendant the sum of $1,000,000.00 on or about the 15th day of August, 2003. This sum was paid in two parts; first in the sum $600,000.00 and then on August 15, 2003 in the sum of $400, 000. 00. Mr. Prendergast has presented a receipt in respect of the sum of $400,000.00. This receipt (exhibit 11A) shows in so far as legibility allows:

> ***"Received from Mr. Prendergast the sum of $400,000.00 for this 'to be' (not legible) payment on demand."***

25. Mr. Prendergast explained that he did not demand a receipt for the sum of $600,000.00 paid over to the defendant as the relationship between himself and Mr. Wiggan was amicable and honourable so the thought did not occur to him to ask for a receipt. Mr. Wiggan, however, has accepted that the sum of $1,000,000.00 was paid to him by Mr. Prendergast but he denied that it was towards the purchase of the property. He maintained that that sum was the subject of a separate arrangement between himself and Mr. Prendergast and that it was a loan to him to be paid back on demand. He has admitted owing that sum to Mr. Prendergast but that Mr. Prendergast had never demanded it and so it is not yet repaid. He maintained that the sum paid over towards the purchase price by the claimant to the defendant was $2,250,000.00 as shown in the written agreement of sale and no more.

26. The written agreement shows that the purchase price was agreed to be $4, 500,000.00. The deposit agreed to be paid on the signing of the agreement was to be $2,250,000.00. This was subsequently paid pursuant to the agreement. No reference whatsoever was made to a sum of $1,000,000.00 to be applied towards the purchase price. The written contract is, *prima facie*, clear and indisputable evidence of the parties' intention and arrangement.

27. The first thing worthy of note in considering whether the $1,000,000.00 was intended to be a part of the contract of sale is that the receipt being relied on does not make any reference to the claimant and defendant as parties to any transaction relative to this receipt. It has not been indicated anywhere, neither in evidence before me nor on the face of the receipt itself, that Mr. Prendergast and Mr. Wiggan were acting on behalf of the claimant and defendant in such transaction concerning the payment of that sum. Furthermore, there is nothing on the receipt at all referable to any transaction between the two companies relative to the land in question.

28. The written agreement, signed on behalf of the parties, makes no mention of any additional sum paid or to be paid as deposit except $2,250,000.00. If the two witnesses had known and had agreed that the sum of $1,000,000.00 was to be part of the agreement for sale of land between the two companies then certain questions arise as to (a) the reason for the informality in the dealing, (b) the reason for the absence of reference to that sum in the written agreement subsequently signed, and (c) the reason for the omission of any reference to this sum in the statement of account. In the end, the claimant has provided no sufficiently credible evidence, or, indeed, any evidence at all satisfactorily addressing these questions and so I am not placed in a position to accept its contention that $1,000,000.00 should now be taken into account as part of the purchase price when this is contradicted by the written contract.

29. What is happening in these proceedings is that the claimant is now attempting to contradict the terms of a written agreement entered between the parties. Its witness, Mr. Prendergast, is now coming to use oral evidence to contradict the written agreement of sale. Indeed, the parol evidence rule may be invoked to prevent him from doing so. By way of reminder, the rule, as stated, is that where parties have embodied the terms of their agreement in a written document, the general rule is that *"verbal evidence is not allowed to be given...so as to add to or subtract from, or in any manner to vary or qualify the written contract."* (**Goss v Lord Nugent** (1833) 5 B & Ad. 58, 64.) So, if all the terms of a contract are in writing, then there is a strong presumption that no evidence, supporting a different oral agreement, will be permitted to vary those terms: See **Hutton v Watling** [1948] 1 All E.R. 803.

30. However, as **Chitty on Contracts** (25th edn, para. 802) explains, the operation of the rule is not confined to oral evidence but also to extrinsic matters in writing such as drafts, preliminary agreements and letters of negotiations. It follows that evidence is not admissible of negotiations between

the parties nor is it permissible to adduce evidence to show that the parties' subjective intentions were not in keeping with the written contract.

31. While it is conceded that the parol evidence rule can be rebutted and that there are exceptions to the rule, I find that there is nothing in the particular circumstances of this case, as disclosed on the evidence, that could serve to rebut its application or to serve to bring this case within the exceptions. The effect, therefore, is that in all the circumstances of the case, the parol evidence rule applies and the claimant's claim that $1,000,000.00 was paid to the defendant on its behalf towards the purchase price of the property is unsustainable not only as a matter of fact but also as a matter of law.

ISSUE#2: Whether failure to take $1,000,000.00 into account invalidated statement of account and notice to complete

32. As I have already found, the payment of $1,000,000.00 by Mr. Prendergast to Mr. Wiggan, each evidently acting in his personal capacity, is not proved to my satisfaction to have had any bearing on the contract of sale between the claimant and the defendant as embodied in writing. I conclude therefore, that there would have been no need for that sum to be taken into account in the preparation of any statement of account concerning the balance purchase price. The statement of account and, by extension, the notice to complete, by not taking this sum into account, cannot stand as being erroneous on this basis.

33. Furthermore, I am a bit puzzled by the fact that Mr. Kinghorn himself accepted the statement of account as it stood without it reflecting this sum of $1,000,000.00 as having already been paid on account. Indeed, it was Mr. Kinghorn who had paid over the stipulated initial payment of $2,250,000.00 to the defendant's attorney as the deposit in keeping with the written agreement and no mention was made by him of an earlier payment of any sum towards

the purchase price. Later on, being three years later, he also gave his undertaking to pay the balance purchase price which made no allowance for this additional $1,000,000.00 supposed to have been paid as part of the land transaction. Nothing was said of this additional sum, allegedly paid over on account of the claimant, until 2008 when the amended statement of case was filed; this being five years after the payment was made.

34. In all the circumstances, I would be uncomfortable with any other finding than that the $1,000,000.00 paid over by Mr. Prendergast to Mr. Wiggan was never intended to be viewed as part of the agreement of sale between the claimant and defendant. Whatever it was for, it was never intended that it be taken into account in the written agreement for sale and purchase of the land. Therefore, I find as being unacceptable the contention of the claimant that the failure of the defendant to take into account the sum of $1,000,000 has rendered the statement of account erroneous thereby affecting the validity of the notice to complete.

ISSUE# 3: Whether the notice to complete was properly served on the claimant

35. The next issue to be determined is whether the service of the notice to complete was bad thereby rendering it invalid and as such ineffectual as a ground for cancellation of the contract. The complaint of the claimant is in these terms:

> **"The notice to complete was never personally served upon the Claimant despite the fact that it was addressed to the Claimant personally. The Notice to complete was erroneously enclosed in a correspondence addressed to the Claimant's Attorneys-at-law. The Claimant avers that such a Notice is required by law to be served upon the Claimant personally unless an alternative method of service is agreed upon between the parties. "**

36. It is a well established rule of conveyancing law that where completion is delayed, the innocent party, if he wishes to be rid of the contract, must first

serve a notice requiring completion by a specified date and indicating that if the defaulting party fails to do so then he will treat the non-performance of it as a repudiation of the contract.

37. Also, it is settled on long established authorities that to be a valid notice to complete the notice must be served. It is stated that in practice most notices are served pursuant to an express term in the agreement. It is seen, however, that the agreement under consideration contains no provision for service of a notice to complete neither does it make any provision as to how documents should be served. There has been no authority cited to me by Mr. Kinghorn in support of his argument that the defaulting party must be personally served and so service on his attorney acting for him in the transaction would be bad. I have not managed to unearth any such principle of law.

38. What I have seen is the requirement that the notice must be served. I have come across no rule of law that seeks to restrict service to personal service. In fact, in the U.K., **Standard Conditions of Sale (SC)** are prepared as written guidelines to guide conveyancing contracts. **Standard Conditions of Sale,** 3rd edition at 1.3.2. (as recorded in Robert Abbey and Mark Richards, **A Practical Approach to Conveyancing** (supra), Appendix 2,] provide that *"giving a notice or delivering a document to a party's solicitor has the same effect as giving or delivering it to that party".* Of course, this has no binding application to our jurisdiction but it does afford an insight into the how matters of this nature are addressed in another jurisdiction and I find it to be rather instructive as it makes good sense.

39. It is my view that where the party to be served is represented by an attorney on the record there is nothing to preclude service on his attorney unless there is express provision to the contrary in the agreement itself or where such mode of service is barred, by necessary implication, on the terms of the agreement and/or from the course of dealing between the parties. In the

instant case, both parties were represented by counsel whose standing in the matter formed part of the written agreement. Mr. Kinghorn was on record as attorney for the claimant and acted as such at all material times. All dealings between the parties and on their behalf were done through their attorneys. Furthermore, Mr. Kinghorn, upon receiving the notice attached to the correspondence addressed to him, did not in any way raise the issue of invalid service with Mrs. McKoy nor did he elect to return the notice as being erroneously served as he is now contending. He must be taken, in light of his conduct and in all the circumstances of the dealing between him and Mrs. McKoy on behalf of their respective clients, that he accepted service on behalf of the claimant.

40. The ultimate consideration must really be whether the method of service selected was reasonably likely to bring the notice and its ramifications to the attention of the claimant. I find that the service on Mr. Kinghorn, as attorney on the record acting for and on behalf of the claimant, was more than reasonably likely to bring the notice and its meaning to the claimant. I conclude, therefore, in light of the prevailing practice in the U.K., the dealings between the parties and the absence of any express provision in the contract to the contrary, that the service of the notice on the claimant's attorney constituted good service. The notice to complete was therefore properly served on the claimant by service on its attorney and so I will not permit its validity to be successfully challenged on this ground.

ISSUE#4: Whether the defendant acted improperly and/or unreasonably in rescinding the agreement

41. The defendant has contended that the failure of the claimant to complete on the date set for completion in the notice to complete amounted to a repudiation that has given it the right to rescind. The law is clear that where a contract has not been completed and where a cause of action has arisen, an

innocent party to that contract can consider several available but different remedies. These are (a) specific performance (b) a claim for compensation by way of damages(c) rescission and (d) (in the U.K.), a vendor and purchaser summons: Robert Abbey and Mark Richards, **A Practical Approach to Conveyancing**, 2nd edn. p. 292. Here the defendant had elected to rescind and sue for damages which, of course, would be open to it to do if there was a breach by the claimant.

42. Rescission can be exercised without recourse to the courts, for it is not strictly a judicial process but the act of the party rescinding: **Hozler v Zorro** [1975] 1 All ER. 584. In practice, the court's aid is often sought to enforce or uphold the rights of the innocent party or to obtain consequential relief. Rescission is thus the act of the innocent party and not of the court.

43. An innocent party's right to rescind arises on a breach of a major term of the contract by the defaulting party. The question for contemplation, therefore, is whether the claimant breached the contract in a manner that would give rise to the right of the defendant to rescind. In other words, had the claimant defaulted on the agreement by October, 2007 when the defendant purported to rescind it? I will now proceed to examine this question.

Validity of the notice to complete

44. In order to properly determine whether the defendant's right to rescind the contract had actually arisen, one has to first consider the validity of the notice to complete. The written agreement reveals that the date set for completion was on or about 180 days from the signing of the contract. There was thus no specific date set for completion and the contract was, in any event, made subject to sub-division approval. This was understood and agreed on between the parties. The parties failed to complete within 180 days as stipulated in the agreement. The 180 days set in the agreement could therefore

not have been viewed as the completion date. Time was, therefore, not originally of the essence of the contract.

45. Where time is not originally of the essence, failure to complete on the agreed date does not entitle the aggrieved party to decline to proceed with the contract. One exception to this principle, however, is where the delay is so protracted as to justify the aggrieved party treating the default as a repudiation of the contract. A protracted delay means delay for an unreasonably long time. This is a question of fact to be decided in all the circumstances: **Cole v Rose** [1978] 3 ALL ER 1121.

46. Although it cannot be said that time was originally of the essence, the defendant had, however, served a notice to complete on the claimant that I accept as being validly served. By this notice, the claimant was given 30 days within which to complete and a date for completion was set to be September 10, 2007. Time was expressly made the essence of the contract.

47. The question now arises: did the defendant act properly in serving a notice to complete? It is the legal position that once the contract has been signed, it is clearly not open to one party to vary its terms by making the date specified in it of the essence of the contract, but it is settled that he may, after unreasonable delay by the other party, give reasonable notice to him to complete within a definite time provided the party serving the notice had carried out his own obligations: See: **Smith v Hamilton [1951] Ch. 174** and **Ajit v Sammy** [1967] 1 A.C. 255.

48. It is seen from the agreement that the parties agreed that the sale was subject to sub-division approval being obtained for the lot. This took sometime and there is no evidence that it was due to any wilful default or neglect on the part of the defendant. In April 2007, however, upon sub-division approval having been obtained, the defendant's attorney sent a copy of the duplicate certificate of title and reminded the claimant's attorney of previous

correspondence from October 2006. In October, 2006, the claimant's attorney was asked to give his undertaking concerning the balance purchase money pursuant to the agreement. This, as it were, was rather late in coming.

49. Several pieces of correspondence passed between the parties' attorneys-at- law leading up to the notice to complete. By the time of the notice (in August, 2007), the defendant's attorney had sent the instrument of transfer to the claimant for execution from May 14, 2007. The notice to complete was, therefore, issued roughly three months after the instrument of transfer was initially sent to the claimant. There was thus a delay on the part of the claimant to properly execute the transfer.

50. It is thus well accepted in conveyancing law that where the completion is delayed, the innocent party will normally be anxious to take action long before delay becomes protracted. If he wishes to be rid of the contract, he must first serve a notice requiring completion by a specified date, failing which he will treat the non-performance as a repudiation of the contract. The new date so fixed is then of the essence and the court will not assist the party served with the notice or the party serving it if he fails to complete by the new date: (See: **Stickney v Keeble** [1917] A.C. 386 and **Brickles v Snell** [1916] 2 A.C.599)

51. Now, turning to the facts of this case, it can be seen that following on the failure of the claimant to return the executed transfer, the defendant, in its effort to get rid of the contract, did issue a notice to complete. As D.G. Barnsley in **Barnsley's Conveyancing Law and Practice** (3rd edn. p. 376) explains:

> **"The purpose of giving such a notice is to put an end to the defaulter's right to seek specific performance, so leaving the server free to rescind at law without fear of equitable intervention."**

52. For the notice to be valid, there are three common law requirements that must be satisfied:

(1) The server must himself be ready and willing to complete at the time of service: **Quandrangle Development and Construction Co. Ltd. v Jenner** [1974] 1 All ER 729 at 731.

(2) The notice can only be served after unreasonable delay.

(3) The notice must allow a reasonable time for completion.

Was the defendant ready and willing to complete at time of service?

53. In terms of the first requirement, a completion notice is invalid if the party serving it is not, in fact, ready to carry out his obligations. In **Chaitlal and Ganga Persad Chaitlal) (in substitution for Kanhai Mhase, deceased) Jagalal and others v Chanderial Ramalal** Privy Council Appeal No. 36 of 2001 delivered February 5, 2003 (Trinidad & Tobago), the Judicial Committee of the Privy Council said on this limb:

> **"The related but distinct ground is that the party serving the notice purporting to make time the essence must himself be ready able and willing to complete at the date when the notice is served. This is an express requirement of the conditions commonly incorporated in contracts for the sale of land in this country, but it does more than express what would in any event be implied by law... It is evident that the requirement cannot be satisfied where the party serving the notice is himself in default..."**

54. The claimant, in its statement of case, has averred that the defendant was in breach of contract for not completing within the 180 days as sub-division was not obtained until three years later. I will, however, state that the operative date in relation to the requirement for the server to be in a position to serve notice to complete must be at the time of the service of the notice. It is at that material time that the server should be himself ready and willing to complete. The fact that he was not ready at some time prior to the date of service of the notice is not relevant to this particular requirement.

55. In this case, there is nothing to suggest that the defendant was not in a position to complete on the date the notice was served. By that date, the defendant had already obtained sub-division approval and had sent a duplicate certificate of title to the claimant evidencing that fact. At that time, the defendant also had expressly indicated that it was ready and willing to complete. To date, it is not shown by evidence from the claimant or otherwise that the defendant was not in a state of readiness or that the defendant had been in any default at the time of service. I conclude therefore, that the defendant was, indeed, ready and willing to complete when the notice was served. The first requirement is, therefore, satisfied.

Whether there was unreasonable delay by the claimant at the time of service

56. The second condition to be satisfied for the notice to be valid is that there must have been unreasonable delay on the part of the claimant at the time of service of the notice. On this question as to time to serve the notice, much uncertainty is said to exist. **Barnsley** (supra) has pointed out that one view, "on considerable judicial authority", is that the innocent party cannot serve his notice until there has been delay by the other party described as *"gross, unreasonable, improper or vexatious"*. The learned author further explains that this is the true rule when the contract sets no date for completion. Within such a case, completion is required to be within reasonable time from making of the contract (See **Johnson v Humphrey** [1964 1 All E.R] 460).

57. In an open contract, the notice to complete can only be served if sufficient time had elapsed so as to mean that any further delay would be unreasonable and unfair so far as the innocent party is concerned: Abbey & Richards, **Practical Approach to Conveyancing** (2nd edn. p. 290). Also, in **Joyce Chaitlal and others v Chanderial Ramalal** (supra), their Lordships stated:

"The first ground, the ground preferred by Mr. Dingemans, is that when time is not originally made the essence of the contract, one of the parties is not entitled by notice to make it so unless the other party is in default. In the case of an open contract, where it is implied that completion or the performance of any intermediate obligation will take place within reasonable time, it is only after the passage of such a time that a notice can be given because, until then, there has been no default in the performance of the contract."

58. See also **Green v Sevin** (1879) 13 Ch. D 589, 599, in which Fry, J. stated that one party to a contract has no right to limit a time when an act was to be done by the other ***"unless there had been such delay on the part of the other contracting party as to render it fair that if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract."*** (Emphasis added).

59. Applying these principles to the instant case, the material question now is: was there unreasonable delay on the part of the claimant? It cannot be denied by the claimant that after sub-division approval was obtained there was a history of delay on its part up to the date the notice was served. There was a four year delay in giving an undertaking for the balance purchase price. Although the contract had stipulated that it should have been given within 45 days of the signing and even when the defendant wrote for the undertaking in October, 2006, it came seven months later. Upon receiving the undertaking, the defendant sent the instrument of transfer for execution on May 14, 2007. This was not returned promptly. The defendant's attorney requested the return of the transfer. Up to August 10, 2007 when the notice was issued, the transfer was not returned properly executed. By this time, the claimant was in default of returning the properly executed transfer by three months (roughly 90 days) and counting. This was in respect of a contract that had been in existence from 2003.

60. A period of 90 days is usually given for completion of a contract of sale from signing of the contract even in circumstances where a mortgage is to be

obtained. It means that a period of 90 days would have been more than ample just for a document to be executed and returned in the circumstances of this case. The claimant is a company and the bare fact that its CEO was overseas is not a good reason to override the right of the defendant to serve a notice to complete. The completion of the contract was long overdue.

61. The question is whether the service of the notice to complete was justified. In light of the history of delay on the part of the claimant and the time that had elapsed since the signing of the contract, it seems to me reasonable for the defendant, in an effort to avoid further protracted delay, to have issued a notice to complete in the circumstances. Any further delay would, in my view, be unreasonable and unfair to the defendant.

62. I find that in August 2007 when the notice was issued, the completion of the contract was long past due. I am of the view that there was unreasonable delay on the part of the claimant of such magnitude to warrant it being served with a notice to complete by the defendant. The service of the notice was, therefore, justified.

Whether the notice allowed for reasonable time for completion

63. Also, to be effective, the notice must limit a reasonable time for performance. In an open contract, the period for completion should be what would be reasonable to allow completion to be effected when all the outstanding steps are taken into consideration. In determining this issue of reasonableness the court should consider all the circumstances of the case which would include what at the date of notice remains to be done to complete, the reasons for the delay and the attitude of the innocent party to it: **Stickney v Keeble** [1915] AC 386.

64. In the U.K., the general practice in this regard as gleaned from the **Standard Conditions of Sale, (SC 6. 8.3.** to be exact) is that in an open

contract after notice to complete had been served, the parties are to complete within 10 working days of giving the notice excluding the day on which the notice is given. Again, this proves rather instructive to the extent that it offers an insight into the practice in another jurisdiction as to the time frame allowed for completion following on service of a notice to complete.

65. In this case, the notice to complete gave 30 days for the claimant to perform its part in order for completion to take place. What was required to be done by the claimant to complete was to properly execute the instrument of transfer and provide the balance purchase price. The claimant's representative purportedly executed the document overseas but it was not properly done. It was returned by the defendant for proper execution in August, 2007. Mr. Prendergast has given no evidence that he experienced difficulties abroad in executing the document. In fact, he has given no evidence explaining any delay on the part of the claimant. It is the correspondence between the attorneys that have been admitted into evidence that have shown Mr. Kinghorn explaining that Mr. Prendergast was abroad and that there were some difficulties experienced in having the document executed. Given the delay in execution, Mr. Kinghorn did not write and explain to Mrs. McKoy about the problems the claimant was having nor did he ask for extension of time even when the deadline was approaching. This continued to be so even after the time set for completion had passed. Nothing was done by the claimant to explain the delay to the defendant. The conduct of the claimant in the circumstances seems unreasonable in my view.

66. Indeed, one is compelled to wonder about the plausibility of the excuse that Mr. Prendergast was overseas and that that resulted in the delay. The claimant is a company and if the CEO was going overseas knowing that there was a pending transaction that had been outstanding for a long time, one would expect that better arrangements would have been made for the company's affairs to be dealt with while he was away. Further, in this era of

advanced and sophisticated methods of communication, I find it difficult to accept that one month was not sufficient time to do what was required of the claimant to complete the contract. There was nothing complex or complicated left to be done by the claimant to complete at the time of the notice.

67. It is my view that the length of time given by the defendant for performance by the claimant was more than ample and reasonable given what was left to be done by the claimant. The reason advanced by the claimant's counsel for the delay is not sufficiently acceptable to override the right of the defendant to seek to expedite completion by notice to complete. The notice to complete was therefore a valid one.

Was time of the essence?

68. This notice purported to stipulate a set date for the claimant to perform an obligation in order to complete. Again, the claimant failed to do what it had to do under the contract by that date. The question now is: what was the effect of the claimant's failure to complete on the stipulated day? It has now been established in **Raineri v Miles** [1981] AC 1050 that whether or not time is of the essence, failure to complete on the agreed date is a breach of contract and the injured party is entitled to damages properly attributable to the delay. What further remedies may be available to him depend largely on whether or not the date for completion is of the essence.

69. The relevant authorities have all established that time will be the essence of a conveyancing contract if (a) the parties agree to it being written into the contract, (b) where a notice to complete has been correctly served, or (c) where time is of the essence by necessary implication from the surrounding circumstances of the case. In this case, a valid notice to complete was properly served falling within situation (b) above. The notice to complete also, in setting the new date for completion of performance by the claimant, expressly stated

that time was the essence of the contract. It follows, therefore, that the date fixed for performance was then of the essence.

70. It is settled that 'when time is of the essence there is no leeway for delay'. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.

71. This principle was firmly established by the House of Lords in **Stickney v Keeble** (supra), where the effect of a notice to complete on a contract for sale and purchase of land was thoroughly explored. A summary of the basic facts could prove rather useful in promoting greater understanding of the relevant principles. The appellant was the purchaser of land being sold by the respondent as vendor. By the terms of the agreement, completion was to be on October 11, 1911. On January 31, 1912, the appellant, being tired of the delay, served a notice on the respondent, requiring him to complete within fourteen days or else he would rescind the contract. At the time of the notice, the appellant's conveyance was awaiting the approval of certain mortgagees on the estate and required execution by eight parties residing in various parts of England. Upon the notice not having been complied with by the respondent, the appellant rescinded the contract and brought an action for return of his deposit. He was successful at first instance but that decision was reversed by the Court of Appeal.

72. The appellant appealed to the House of Lords. The respondent's contention was that time not having been made of the essence of the contract by express stipulation of the contracting parties, the nature of the property or the circumstances of the case, the notice was ineffectual to make it so on the basis that the time allowed by it to the vendor to do all that remained to be

done was, under all the circumstances of the case, unreasonably short. The House of Lords, having examined what was left to be done by the respondent as vendor, concluded that the time given (being fourteen days) was sufficient. The appeal was therefore allowed and the decision of the Court of Appeal reversed. The headnotes, which is accepted as being reflective of their Lordship's decision, read:

> **"Where in a contract for the sale of land, the time for completion is not made the essence of the contract but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting time at the expiration of which he will treat the contract as at an end. And in determining the reasonableness of the time so limited, the Court will consider not merely what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the vendor and the attitude of the purchaser in relation thereto."**

73. One only needs to substitute the word *'purchaser'* for *'vendor'* and *'vendor'* for *'purchaser'* where the words appear and the principle would be applicable with equal force to a situation, as obtain in this case, where the purchaser is the party being accused of delay and the vendor has served a notice to complete.

74. In relation to the instant case, there is no question that the parties were behind time in the completion of the transaction. It is also evident that there had been previous delays on the part of the claimant to do what it was supposed to have done to complete. Lord Loreborn in **Stickney v Keeble** made the attractive point, which I would endorse, that *"people who are behind time in the transaction of business must expect such pressure."* So, I would say that the claimant, in all the circumstances, should have expected that some pressure would be brought to bear on it to complete after so many years and after so many opportunities given to it to make good its previous defaults.

75. On a totality of the circumstances, including the lapse of time, the history of delay on the part of the claimant and the several efforts made by the

defendant to remind the claimant of the things it needed to do to move towards completion, I find nothing wrong with the course taken by the defendant to serve a notice to complete making time of the essence of the contract. I conclude that the defendant acted properly and reasonably in all the circumstances and as such time had become the essence of the contract which means there was no room for further delay by either side. The failure of the claimant to complete within the time stipulated was, as Ms. Reid has submitted, a fundamental breach of the agreement. This means that the defendant would be entitled to exercise its rights to rescind. This is what the defendant opted to do.

ISSUE#5: Is the claimant entitled to specific performance/damages?

76. The claimant has claimed for specific performance on the basis that the cancellation of the agreement by the defendant was invalid which would, in effect, mean that the contract still subsists. As part of its case, it has averred that the defendant was at all material times in breach of the contract by not putting itself in a state of readiness to complete within the stipulated 180 days of the date of the agreement and so it is entitled to relief in equity.

77. Specific performance is an equitable remedy by way of discretionary order that is intended to compel the defaulting party to perform and complete the contract. So, it goes without saying that the defendant would have to be found to be in breach of contract or being the party in default before such a remedy may be granted to the claimant.

78. In examining the contention of the claimant, I find that the 180 days for completion initially stipulated was not of the essence of the contract. The claimant, even in the face of the defendant's delay in obtaining sub-division approval, had indicated no dissatisfaction with the delay during the period of waiting nor did it do anything to seek to compel the defendant to complete

within the three years that it is now complaining that the defendant was in default.

79. Also, although the claimant now complains about the delay, it is seen that it did not do all that it was to have done within the 180 days as set out in the contract. The evidence shows that the agreement was also subject to the claimant delivering to the defendant' s attorney a letter of undertaking within 45 days of the date of signing of the contract. This, however, was not done within the stipulated time and even after the sub-division approval was obtained and the defendant's attorney had written to the claimant's attorney concerning the undertaking, the undertaking did not come until May, 2007. This was years after the undertaking should have been given.

80. The evidence has, therefore, revealed that the claimant itself was in default during the time the defendant was awaiting sub-division approval and for some time thereafter. The reality is that both parties did not place themselves in a position to complete within the 180 days initially stipulated. I, therefore, find as unacceptable the claimant's contention that the defendant was in breach of the contract in awaiting sub-division approval. In the end, there is no evidence of the defendant being in default to render it liable for breach of contract.

81. Mr. Kinghorn, in seeking to advance the claimant's case for a decree of specific performance, argued that such a remedy would do justice between the parties despite the claimant's failure to keep the date set out in the notice. In support of his argument, he seeks to rely on the dictum of Alexander, J (Ag.) in **Vincent Williams v Manchester Beverages Ltd.** 21 JLR, 277,290 where the learned judge stated:

> **"A court of equity will indeed relieve against, and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps towards completion if it can do justice between the parties."**

82. On the other hand, Ms. Reid, in response and in advancing her argument that specific performance must be denied, relied on dictum in the same **Vincent Williams v Manchester Beverages Ltd** where the same learned judge, following **Stickney and Keeble**, stated at page 282:

> **"It follows from this that equity will not interfere in the following circumstances:-**
>
> **1. Where time has been made the essence of the contract;**
> **2. Where by the very nature of the property, time is of the essence;**
> **3. The surrounding circumstances."**

83. In **Stickney v Keeble,** Lord Parker of Waddington put it clearly when he stated:

> **"Although the vendor's conduct may not under the circumstances be alone sufficient to disentitle him to specific performance. *Yet if he has been guilty of unnecessary delay, and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract at an end, equity will not, after the expiration of such time, provided it is reasonable time, enforce specific performance or restrain action at law.* The time limited by such a notice is sometimes referred to as having become by virtue of the notice of the essence of the contract."** (Emphasis supplied]

84. Upon my review of the relevant authorities, I find that I cannot accept Mr. Kinghorn's submissions that a decree of specific performance should be granted on all or any of the bases he had put forward in his written submissions. In **Vincent Williams v Manchester Beverages,** the court found that there was no clause in that contract making time of the essence and further, that the vendor had not served a notice to complete making time of the essence. Time was not of the essence of that contract. The court also found that the vendor had improperly terminated the contract. The case is, therefore, for those reasons immediately distinguishable from the instant case. In this case, I have found that the defendant had acted properly and reasonably and had served on the claimant a valid notice to complete. By this notice, time had become the essence of the contract. The claimant, having been given

reasonable time within which to complete its performance under the contract, had failed to do what was required by the specified date and so equity will not, after the expiration of that time, come to its aid. It is abundantly clear that equity will not interfere in an agreement of sale where time has been made the essence of the contract.

85. The defendant had made it quite clear that upon the claimant's failure to comply with the notice to complete, it would rescind and that the deposit would be forfeited. It had also stated that it would not refund the sum of $1,250,000.00 that is to be retained in accordance with the agreement.. The claimant was thus fore-warned as to the consequences of its failure to complete. The fact of the contract having been rescinded was also communicated to the claimant. In keeping with this rescission, the contract was then officially cancelled as evidenced by the stamped copy agreement tendered into evidence by consent.

86. In all the circumstances, I find that the cancellation of the contract by the defendant stands as valid. As such, there is no contract subsisting in respect of which a declaration can be made as sought by the claimant. Also, there is no contract existing on which to decree specific performance as claimed. For all the foregoing reasons, I conclude that the claimant is not entitled to any of the remedies sought in its statement of case. The defendant, is therefore, entitled to judgment on the claim.

THE COUNTER-CLAIM

ISSUE #6: Whether the defendant is entitled to damages for breach of contract and recovery of possession

87. The defendant has counter- claimed against the claimant for damages for breach of contract and for recovery of possession. To succeed, the defendant must show that he can give good title and that he is ready and willing to complete the contract. This has been proved to my satisfaction on the available

evidence. There is no dispute that the defendant could not give a good title at the time notice to complete was served and as I have already found, there is no evidence that the defendant was not ready and willing to complete as stated in the notice to complete.

88. It is now clearly established by the decision in **Johnson v Agnew** [1980] AC 367, that a vendor rescinding for fundamental breach by the purchaser can recover all losses which may be fairly and reasonably considered as arising in the natural course of things from the breach, or as such as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach: (**Hadley v Baxendale** (1854) 9 Exch. 341.

89. It is established in law that the vendor's damages are measured by the amount of the loss actually sustained. In the absence of special circumstances known to the vendor, damages will normally be assessed by reference to the difference in value, if any, between the contract price and the value of the property at the date of the breach of contract. No evidence was led as to the market value of the property as at the time of the breach. So, there is no evidential foundation presented for substantial damages to be awarded on this basis. The defendant would, at most, be entitled to nominal damages as a symbol that its legal rights have been infringed.

90. However, the defendant as vendor would be entitled to forfeit the deposit given the breach of contract by the claimant. This right does not depend on any express contractual stipulation: **Hall v Burnell** [1911] 2 CH. 551. As Barnsley explains, the right to forfeit the deposit can be exercised notwithstanding that the vendor suffers no loss because, for example, he sells the land at a higher price (See **Barnsley's Conveyancing Law and Practice,** 3rd edn. p. 223 -224). The essential character of the deposit is as a security for due performance. It is well settled that provided the deposit is not exorbitant and unconscionable,

equity will not intervene to relieve against forfeiture of it. In this case, the forfeiture of the deposit being 10 % of the purchase price is a right accruing to the defendant that would reasonably be supposed to have been in the parties' contemplation at the time of making the contract. In fact, the forfeiture of the deposit was expressly stated in the notice to complete as being a consequence of the failure of the claimant to complete within the time specified. The defendant is entitled to forfeit the deposit (being 10% of the purchase price) as a remedy for the claimant's non-performance and for infraction of its rights as vendor. I am prepared to hold that the nominal damages to which the vendor is entitled is capable of being satisfied by forfeiture of the deposit.

91. The defendant is also entitled not to refund the sum of $1,250, 000.00 paid to it by the claimant in keeping with the agreement that that sum would be paid in consideration for granting to the claimant vacant possession rent - free and interest -free. This sum would, in my view, stand in lieu of a claim or an award for use and occupation of the land.

92. The defendant is also entitled, as claimed, to recover possession of the land (subject matter of the claim) that is presently in the occupation of the claimant.

93. By way of an aside, I will just state on the record since the issue of the $1,000,000.00 was raised in these proceedings, that I do not see the issue as being one between the claimant and defendant in this case but rather as one between Mr. Prendergast and Mr. Wiggan. As such, I see it as being totally unrelated to the contract of sale of the land in question. However, in an effort to avoid multiplicity of proceedings and in an attempt to end all controversy, I would recommend that the parties to that transaction make some arrangement for repayment given that Mr. Wiggan has admitted in court that he owes the sum but that it was never demanded by Mr. Prendergast. That is the highest I would go on this issue.

ORDER

94. In the premises, the order of the court shall be as follows:

1. On the claim and counterclaim, judgment for the defendant with costs to be agreed or taxed.

2. The defendant is entitled to forfeit the deposit in the sum of $450,000.00 being 10% the purchase price pursuant to the agreement of sale and the notice to complete.

3. The claimant to deliver up possession of the property, subject matter of this claim, being the parcel of land situate at Bell Vue in the parish of St. Catherine and forming part of land comprised in certificate of title registered at volume 1112, Folio 251 of the Register Book of Titles on or before August 31, 2009.

4. All other sums received by the defendant from the claimant pursuant to the written agreement of sale dated, September 2, 2003 to be refunded in accordance with the terms of the said contract; all repayments to be made on or before August 31, 2009.

5. Liberty to apply.