IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/M256

BETWEEN	LLOYD McGREGOR	1ST PLAINTIFF
A N D	MARY McGREGOR	2ND PLAINTIFF
A N D	CECIL BIRD	DEFENDANT

Miss Dawn Satterswaite for Defendant

Miss Antoinette McKain and Mr. Robin Sykes instructed by Alton E. Morgan & Co. for Plaintiffs

IN CHAMBERS

Heard: September 19, October 19, 1995

Application to remove Caveat

HARRISON, J. (Ag.)

Both plaintiffs and defendant are parties to a written Agreement for the Sale of Land whereby the defendant as registered owner of land agreed to sell and the plaintiffs as purchasers agreed to purchase:

> **"ALL THAT** parcel of land part of Billy Dunn being Lot Number 5 in the Parish of St. Andrew registered at Volume 1112 Folio 896 of the Register Book of Titles."

The purchase price for this land was fixed at Four Million Dollars ($4,000,000.00) which was payable by a deposit of Four Hundred Thousand Dollars ($400,000.00) and a further payment of Two Hundred Thousand Dollars ($200,000.00) on the signing of the contract, with the balance being paid on completion. It was expressly provided as a speical condition that time was to be of the essence of the contract. There were other special conditions relating to the payment of Stamp Duty, Transfer Tax and Attorneys Costs. Completion of the contract of sale was agreed and set for on or before the expiration of sixty (60) days from the 2nd day of March 1995 on payment of all sums due and owing.

As a result of the defendant rescinding the contract of sale, the plaintiffs on June 7, 1995 filed a Writ of Summons in the Supreme Court

claiming inter alia, relief of specific performance of the Contract for the Sale of Land dated March 2, 1995 and an injunction restraining the defendant, his servants or agents from transferring encumbering, selling or otherwise dealing with the said land in a manner prejudicial to the plaintiffs' interest.

The defendant by his Summons dated August 29, 1995 is seeking an order to have the Registrar of Titles remove from the Certificate of Title, Caveat No. 867008, which was entered at the instance of the plaintiffs.

The plaintiffs ("the caveators") by lodging this caveat against the registered title of the defendant ("the caveatee") are therefore seeking to prevent the caveatee as vendor and in whom the legal estate is vested, from disposing of the land pending the trial of the action.

Miss McKain who appears for the caveators, places this caveat in the same category as an interlocutory injunction. She submitted that the case of **Eng Mee Yong v. Letchumanan** [1980] A.C. 331 is authority for this proposition.

Eng's case was an appeal from the Federal court of Malayasia. In that case the caveatees were registered proprietors of land while the caveator was the purchaser of the said land. The caveator had defaulted on the final payment of the purchase price on the date due under the terms of the written contract with the caveatees as vendors. On that default the caveatees had served notice on the caveator terminating the contract for breach. The caveator started an action for specific performance of the contract and had entered a caveat against the registered title. On appeal to the Judicial Committee of the Privy Council, it was held inter alia, that where an application to the Court under the section dealing with the removal of caveats was by the registered proprietor of the land, the caveator had to satisfy the court that there was a serious issue to be tried, and having done so, to show that on a balance of convenience, the status quo should be maintained until trial.

The issue therefore for determination in the matter before me, is whether the caveators have satisfied this court that there is indeed a serious issue to be tried. In deciding this issue I will therefore have to consider the affidavit evidence presented. If there is a conflict of affidavit evidence

this would surely indicate that there is a serious issue to be tried and it would be most inappropriate to resolve that conflict on a affidavit evidence. So, as Lord Diplock puts it in **Eng's case**, once the caveators have met the first requirement that there is a serious question to be tried, the balance of convenience would in the normal way and in the absence of special circumstances be in favour of leaving the caveat in existence until the proceedings brought and prosecuted timeously by the caveators, for specific performance of the contract of sale has been tried.

I must look at and examine the affidavit evidence in the case before me.

Dawn M. Satterswaite, the Attorney-at-law acting on behalf of the caveatee has deposed in her affidavit sworn to on the 29th day of August 1995, that she had sent off letter dated April 10, 1995 to the caveator's Attorneys-at-law reminding them that time was of the essence and that the vendor was insisting on the agreement being completed within the stated time.

Miss Satterswaite affidavit evidence further revealed that with the time for completion appproaching, the caveators' Attorneys who were then Frater Ennis and Gordon, wrote to her seeking an extension of time to complete.

By letter of the 27th April, 1995, the parties had agreed to a fourteen (14) days extension and for the payment of interest at the rate of 34% by the purchasers from the proposed date of completion to the actual date of completion. This letter also disclosed that the purchasers' Attorneys had advised that a letter of Undertaking for the payment of the balance of the purchase price plus costs would be issued on May 1, 1995.

By letter dated May 4, 1995 Miss Satterswaite once more reminded the purchasers' Attorneys of the terms and conditions of the Agreement.

The caveators failed to complete by May 15, 1995, hence by letter dated May 16, 1995 she advised their Attorneys-at-law that the Agreement was rescinded and that the deposit was forfeited.

By letter dated May 16, 1995, the caveators' Attorneys-at-law wrote to Miss Satterswaite informing her that they had received a letter of undertaking from National Commercial Bank to pay the balance of the purchase price and costs on behalf of the purchasers/caveators. A further undertaking was given by the

purchaser's Attorneys that based upon the Bank's undertaking they were prepared to pay the sum of $3,518,495.00 and interest exceeding $80,000.00.

On May 17, 1995 Miss Satterswaite promptly pointed out in her letter to the purchasers' Attorneys, that the vendor was not prepared to wait any longer. The caveatee further pointed out in his affidavit sworn to on the 14th September 1995, that he had suffered great financial loss as a result of failure to complete on the 1st May, 1995 and also within the time extended.

Thereafter, there were other correspondences passing between the parties concerning the payment of certain costs and the amount of the deposit to be refunded. Letters were also written by Miss Satterswaite to the Commissioner of Stamp and Estate Duties requesting the refund of Transfer Tax and Duties paid.

The caveators subsequently had a change of Attorneys. Alton Morgan and Company, Attorneys-at-law, presently appear for them. Their letter, Exhibit "DMS 11" addressed to Miss Satterswaite, advised her that they were instructed to take steps to recover the sum paid by the caveators under the contract which was unilaterally repudiated by the caveatee. Miss Satterswiate was advised that she should make good a refund of Six Hundred Thousand Dollars ($600,000.00) failing which they would proceed to file action for damages for breach and to secure an injunction for a caveat which was lodged against the vendor's title to remain in place.

Further affidavit evidence has revealed that the caveatee has since the filing of the Writ of Summons entered into another contract of sale with a third party for the sale of the said land with a completion dated being fixed for September 8, 1995. The purchase price in this new Agreement has been fixed at US$136,363.64. The caveatee has deposed that he is indebted to the Bank in a sum of US$3000,000.00 and that he would suffer great hardship if this Agreement for Sale was not completed.

Robin Sykes, has filed an affidavit in response. He has admitted save for Miss Satterswaite's place of abode, postal address and that she is an Attorney-at-law, paragraphs 3 - 13 inclusive of Miss Satterswaite's affidavit. The affidavit evidence which therefore seek to answer Miss Satterswaite's affidavit is contained in the relevant paragraphs set out hereunder:

"5. That the plaintiff's Attorneys letter dated May 24, 1995 exhibited at "DMS 11" mentioned and referred to at paragraph 11 of Satterswaite affidavit indicated to the Defendant's Attorneys-at-law that there was no acceptance of the unilateral repudiation of the Agreement for Sale sought to be effected by the Defendant's Attorney's letter dated May 4, 1995 and exhibited at "DMS 4" in the Satterswaite Affidavit.

6. That in fact the Plaintiff's Attorneys-at-law by letter dated the 16th May, 1995 (exhibited as "DMS 6" in the Satterswaite affidavit) gave an undertaking as to the balance purchase price thereby indicating the plaintiff's willingness and ability to complete.

7. That in the premises on the 7th day of June 1995 the plaintiffs caused a Writ of Summons to be issued out of the Supreme Court claiming inter alia specific performance of the said Agreement for its breach.

8. The plaintiffs will argue at the trial of the action herein that even if time was stipulated to be of the essence under the terms originally agreed between the parties that stipulation would have been waived by the Defendant's Attorney's letter exhibited as "DMS 4".

8.(sic) That further, the plaintiffs will argue at the trial of the action herein that even if the said exhibit "DMS 4" could be interpreted to be a Notice to Complete it would not have provided sufficient notice at law and therefore the plaintiffs non compliance with its terms would not have given the defendant grounds on which to terminate the Agreement for Sale.

9. That at paragraph 3 of the Bird affidavit the defendant evidences his intention to wrongfully treat his agreement for sale with the plaintiffs repudiated exceeding a new agreement of sale.

10. That the plaintiffs are willing and able to give their undertaking that in the event that they are unsuccessful at the trial of the action herein they will compensate the defendant for damages he might suffer.

11. The discharge of the caveat No. 867008 would effectively permit the defendant to act upon his intended unlawful repudiation of the agreement for sale and practically put an end to the plaintiffs' claim for specific performance ..."

The caveators by their affidavit sworn on the 18th day of September, 1995, have deposed that they would be able and have given an undertaking that in the event the defendant is successful at the trial they would be able to compensate the defendant in damages. They have further deposed that they had contracted with the defendant for the specific purpose of building a home in which to raise a family. The evidence also revealed:

"8. That the size and location of the land are of critical importance to us for the size and style of house we wish to construct and another suitable lot of land of that size, topography and price in that residential community and location cannot now be found.

9. That we arranged at great expense and sacrifice to have the money available to make the $600,000.00 deposit and to complete the purchase of the said land as shown by the undertaking given to the Plaintiffs' Attorney -at-law ..."

There seems to be no dispute that the Agreement for Sale between the parties did make time of the essence. On the part of the caveators, it was contended however that the extension given to complete had waived the requirement for time to be of the essence. It was further argued that even if the letter of the 4th May, 1995 was interpreted to be a Notice to complete, sufficient time was not given to do so. To this end, it was submitted on behalf of the caveators that a serious question had been raised and therefore the status quo of the parties ought to be preserved until the trial of the action.

The letter of the 27th April 1995 which deals with the fourteen (14) days extension must therefore be examined fully, in light of these submissions.

This letter was exhibited at paragraph 6 of Miss Satterswaite's affidavit. The relevant paragraphs state as follows:

> "To reiterate, our clients the purchasers seek an extension of time to complete. Both parties have agreed to a 14 days extension and for the payment of interest by the purchasers from the proposed date of completion to actual date of completion, 14 days at 35% interst.
>
> We have been advised that a letter of undertaking for the payment of balance purchase price plus costs will be issued on May 1, 1995.
>
> We will ask that after production of the undertaking to you, that you expedite registration to our clients so that completion can be effected within the 14 days extension period."

On May 4, 1995 Miss Satterswaite wrote to Frater Ennis and Gordon. This letter is exhibited also at paragraph 6 of her affidavit. It reads inter alia:

> "...As you are aware, time is essential to the Agreement herein and indeed, it is so stated in Special Condition number 6 of the Agreement for Sale. My client is insisting on strict compliance of the said condition and is within his right in law and equity, to rescind the Agreement and forfiet the deposit of $400,000.00 the day after that set by the contract for completion, if your clients fail to complete. Further, no stipulation for payment of interest in the event of a delay was made in the Agreement for Sale, as this would have contemplated a possible postponement of completion and there was no such contemplation herein. Especially, in light of the fact that your clients did not sign the Agreement until more than ninety (90) days after the Agreement was made with my client, and, Mr. Bird was of the firm conviction, Mr. McGregor was now in a position to complete within the time stipulated.

> Please be advised, if your clients fail to complete the Agreement for Sale dated March 2, 1995, herein on May 15, 1995 my instructions are that the vendor will rescind the Agreement for Sale and forfeit the deposit of $400,000.00 together with interest in the sum of $47,234.60.
>
> ...."

By virtue of the plaintiffs' admissions to pararaphs 4, 5, and 6 of Miss Satterswaite's affidavit, it is abundantly clear that they have accepted that time was and continued to be of the essence of the contract. By letter dated April 10, 1995, Exhibit "DMS 2", an Instrument of Transfer was enclosed for execution by the caveators and they were reminded that time was of the essence. The caveators were further told that the vendor was insisting on the Agreement being completed within the time stated in the said agreement. By letter dated May 4, 1995, Exhibit "DMS 4", the plaintiffs were informed that if they failed to complete within the fourteen days period of extension the agreement would be rescinded. Paragraph 2 of the latter letter states as follows:

> "As you are aware, time is essential to the Agreement and indeed, it is so stated in Special Condition number 6 of the Agreement for Sale, My client is insisting on strict compliance of the said condition ..."

The plaintiffs' very response to the agreed extension, Exhibit "DMS 3", has stated that the parties have agreed to these fourteen days but that interest should be paid by the purchasers from the proposed date of completion to the actual date of completion. There is no evidence that the parties had agreed to this extension subject to any other condition apart from the payment of interest. What is clear is that they had agreed to complete the sale within the extended period.

Further, the caveators had advised the defendant's Attorney that they would receive a letter of undertaking concerning the payment of the balance of the purchase price on May 1, 1995. It would seem to me therefore that in light of the allegation in paragraph 2 of Exhibit "DMS 4" that the plaintiffs had not signed the Sale Agreement until 90 days had elapsed after the agreement was made, that there was apparent problems finding the balance of the

purchase price and with the date for completion being extended, the plaintiffs would of necessity point out what they had been advised about this letter of undertaking.

It is my understanding from a perusal of the authorities pertinent to the issues to be determined here, that the cases have expressed the principle that a mere extension of the period fixed for completion would have preserved the position that time was of the essence, without fresh stipulation to that effect. The principle has been further stated in **Luck v. White** (1973) 26 P & CR 89 by Goulding J, as follows:

> "If the party who is in the right allows the defaulting party to try and remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances."

See also the cases of **Buckland and others v. Farmer & Moody (a firm)** (1978) 3 All. E.R.; **Howe v. Smith** (1884) 27 Ch. D. 89 and **Lock v. Bell** [1931] Ch. 35, where the principle is clearly stated that once a vendor has served notice to complete making time of the essence, time will continue to be of the essence if the vendor extends time to a specified date provided the purchaser is informed of the extension.

But, is there any evidence in the present case suggesting that the conduct of the caveatee was such that it communicated to the caveators that he was not insisting on a punctual completion? If so, did this conduct encourage the caveators in the belief that there was a waiver in the requirement for time to be of the essence?

It seems abundantly clear to me that the affidavit evidence to which I have referred to above does suggest the contrary. I am of the view and I so hold that the plaintiffs are not quite genuine when they allege and submit that there is a serious question to be tried on the issue of time being of the essence. The evidence has shown that immediately after the extended time expired, the caveators' Attorneys were advised in writing that the sale was off.

The caveator's Attorneys, by their letter dated May 24, 1995, Exhibit "DMS 11" were at the very outset seeking a refund of their deposit in full, and that they would forebear suing for specific performance. A cheque for $380,400.00 representing what the caveatee's Attorney considered as a proper refund, was sent to the plaintiffs' Attorneys-at-law on their undertaking to let the defendant's Attorney have an executed withdrawal of the caveat. Neither has this cheque nor withdrawal of the caveat been returned to Miss Satterswaite.

I therefore hold that the affidavit evidence does not disclose any serious conflicts necessitating the status quo of the parties being preserved until the trial of this action. It would therefore be grossly unjust for this caveat to remain in force. In the circumstances, Caveat No. 867008 is hereby ordered to be removed by the Registrar of Titles from Certificate of Title registered at Volume 1112 Folio 896 of the Register Book of titles. In addition, there shall be costs to the Defendant to be taxed if not agreed.