IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 356 OF 1998

BETWEEN	ROBERT SYDNEY AMRITT	1ST PLAINTIFF
	MADELINE FRANCOIS AMRITT	2ND PLAINTIFF
A N D	DUNCAN BAY DEVELOPMENT COMPANY LIMITED	DEFENDANT

Heard: May 2 and 24, 2001 and August 13, 2001
Huntley Martin, Esq., for Plaintiffs.
Carol Davis, Esq., instructed by Davis Bennett & Beecher Bravo for Defendant.

JUDGEMENT

Roy Anderson, J.

In this matter, there are two (2) Summonses before the Court. The first is a summons filed on behalf of the defendant, Duncan Bay Development Company Limited, seeking to strike out the Action commenced by the Plaintiffs by Writ of Summons dated July 3, 1998. That summons seeks relief by way of an order in the following terms:

1. That the action herein be struck out.
2. That the action herein be struck out as scandalous and vexatious and/or an abuse of the process of the Court.
3. That the action herein be struck out in that the Plaintiff's right (if any) to bring the suit herein to enforce the contract dated December 11, 1969 and/or to recover the said land as specified in the Statement of Claim did not first accrue to the Plaintiff within six years or in the alternative within 12 years before commencement of the action, and the Plaintiff's alleged claim was and is barred by section 3 and/or by section 46 of the Limitation of Actions Act and the

aforesaid were and are extinguished by virtue of section 30 and/or section 46 of the said Limitation of Actions Act.

4. That the action herein be dismissed for Want of Prosecution on the ground that there has been inexcusable and inordinate delay.

5. Further and other relief

6. Costs

The second summons is one filed by the Plaintiff seeking Summary Judgement in the instant suit. That summons also seeks some consequential orders and the application for relief is in the following terms:

1. That judgement be entered for the Plaintiff

2. For the specific performance of the written contract dated December 11, 1969 mentioned and referred to in the Writ of Summons and Statement of Claim.

3. That the Defendant execute a Transfer of the lands being Lot number 377 on the Plan of Duncan Bay comprised in Certificate in Certificate of Title registered at Volume 1094 Folio 858 of the Register Book of Titles in favour of the Plaintiff, Robert Sydney Amritt.

4. That the Defendant deliver or caused to be delivered, the above Transfer and the Duplicate Certificate of Title for Volume 1094 Folio 858 to the Plaintiffs Attorney-at-Law; or

5. Alternatively Directions as to the pleadings in and further conduct of this action.

6. The costs of this Application be the Plaintiff's

7. That the Plaintiff have such further or other relief as may be just

It will, undoubtedly, be useful to set out the history of this matter and how it has now arrived at this point. There is, perhaps somewhat surprisingly, a large amount of historical data which is not in dispute, and I will try to delineate that history.

The plaintiffs who were at all relevant times, husband and wife, entered into a written Agreement of Sale and Purchase of land dated December 11, 1969. The number of the contract was 669 and the subject matter thereof was lot 377 Duncan Bay Estate. That property is now comprised in Certificate of Title registered at Volume 1094 Folio 858 of the Register Book of Titles. The vendor was the defendant company and the purchase price was Eight Thousand Seven Hundred United States dollars (US $8,700.00). The plaintiff had completed payment for the property purchased as witnessed by a letter dated February 23, 1973 from the defendant company and signed by its then Deputy Director for Sales, North America, to its then Attorneys-at-Law, Messrs. Milholland, Ashenheim and Stone, acknowledging the fact that payment for the lot had been completed and that the lot should be transferred to the Plaintiffs. It may well be that this un- contradicted piece of evidence which is from the defendant company and is an admission against interest, is sufficient to dispose of at least a part of the issue in this matter. Put in the form of a question: Does this admission raise an estoppel against the defendant in its efforts to resist the plaintiff's claim for Summary Judgment in its application for specific performance of the Agreement for Sale? (See my comments at the end of my judgment).

Also in 1973, an executed Transfer was sent to the Plaintiffs. It had been executed by the defendant and was sent under cover of a letter dated February 14, 1973

from the defendant's then Attorneys-at-Law aforesaid. According to the first plaintiff's affidavit evidence, the Transfer was sent to him at a time when he was quite ill and he is unsure whether he did in fact execute and return it. However, he did receive titles to two (2) other lots in the sub-division which had been purchased by him, (presumably at the same time), but he did not receive a title in respect of lot 377.

Several years later, on May 18, 1993, the first plaintiff wrote to the defendant's then Attorney-at-Law, Messrs. Clinton Hart & Company, advising them that he had completed payment for the subject property. Later in the same year, he retained the firm of Robinson, Phillips & Whitehorne to act on his behalf in furtherance of his efforts to obtain title for the property.

On the other hand, in support of the application to strike out and in response to the summons for Summary Judgment filed by the plaintiff, an affidavit dated November 6, 2000, was sworn by Mr. Keith Russell, the Managing Director of the defendant company. This affidavit helps to further clarify the history of the matter. He states that on or around 1992, another company of which he was also Managing Director, Ocean Point Limited, purchased all but one of the shares, then owned by Guardian Investments Limited, in the defendant company. He further states that at the same time "we (presumably, Ocean Point Limited) also purchased approximately 99 lots of land that were in a development owned by the Defendant Company, and a list of titles purchased was included in a document entitled "Annex A" as part of the sale." He deponed further, that "lot number 377 registered at Volume 1094 Folio 858 and now claimed by the plaintiff was included in the lots sold for my company."

The deponent then goes on to state: "That the consideration paid by my company to then owner of the defendant company was paid specifically in relation to the lots owned by the Defendant company, including lot 377 aforesaid now claimed by the Plaintiff. That at the time we made the purchase, my company was unaware of the Plaintiffs claim. The title for lot 377 was duly handed to my company by the then owners of the Defendant company and we were unaware of any interest of the Plaintiffs herein."

It is useful to pause here to look more closely at the evidence being given on behalf of the defendant company by Mr. Russell. The affidavit in paragraph 3 speaks to the grant and exercise of an option to purchase the shares of the Defendant Company, for a particular price. This price is detailed in the Option Agreement entered into, with an effective date of March 11, 1992. The Option Agreement is appended to the affidavit of Mr. Russell as "KR1". Clauses 8 and 9 of that Option Agreement are important for reasons to which I will return later, and are in the following terms.

8. The Vendor has represented to the purchaser that the Company is the registered proprietor of ALL THOSE PARCELS of land set out in the list entitled "Annex A" to this option.

9. The Purchaser has entered into this Option on the basis of this representation and in the event that same shall be false, the Purchaser shall have the right to re-transfer the Shares to the Vendor or as the Vendor may direct at the cost of the Vendor and to a refund of any sums paid to the Vendor in consideration for said Shares.

It will be clear from these clauses that it is incorrect and perhaps misleading to say that Ocean Point Limited "also purchased 99 lots that were in a development owned by the Defendant Company". All that Ocean Point Limited purchased, were the shares of Duncan Bay Development Company Limited. The vendors of the shares represented that they were the rightful owners and registered proprietors of the lands listed in "Annex A" to the option. By clause 9, quoted above they effectively made this representation a warranty, for the breach of which the purchaser was able to repudiate the Option Agreement, and would also have the right " to re-transfer the shares to the vendor or as the vendor may direct at the cost of the Vendor and to a refund of any sums paid to the Vendor in consideration for said Shares." The inference contained in Mr. Russell's affidavit, that the purchase of the lots was something of a collateral transaction to the purchase of the shares is totally inconsistent with the evidence contained in the attachments to the affidavit.

It should also be noted that in his affidavit, Mr. Russell accepts in paragraph 18 that "after on or about 1995 out of sympathy we did initially try to assist the Plaintiffs by referring them to the previous owners of the defendant company". That assistance consisted of the sending of a draft notice requiring specific performance. This must have been premised upon the view that the plaintiffs had a sustainable claim for that remedy. Yet, in the same affidavit at paragraph, Mr. Russell acknowledges that the defendant company was conducting negotiations with regard to the development including lot 377, and according to paragraph 25 of the same affidavit, had arranged for the sale of the subject lot.

I have thought to spend some time on the issue here because I believe it could have important implications for the case, and I shall return to it later.

The plaintiff also gives evidence in his affidavit, supported by the affidavit of Adma Amritt, which evidence I accept, that in 1994 he paid arrears of taxes for the years 1988 – 1995 and has continued to pay taxes on the land in issue since then. Further that a surveyor's report was obtained and the land cleared and bushed on the instructions of the first plaintiff in 1994. This is undoubtedly being advanced by way of supporting the proposition that the Plaintiff had taken possession of the property and had exercised and continues to exercise proprietary rights over the property.

In the evidence that has been presented, there is more than sufficient confirmation of the essential matters which are alleged in the first plaintiff's affidavit. Further, there is documentation forming part of the affidavit evidence, that in March 1995 and June 1996, respectively, the Administrator of Ocean Point Limited, (Shirley Sriram) the current beneficial shareholders of all the shares in the Defendant company, wrote to the first plaintiff and the first plaintiff's agent, Adma Amritt, enclosing draft notices, *which Ocean Point had prepared,* to be sent to the Defendant company's previous attorneys-at-law, Clinton Hart & Company, requiring specific performance of the agreement pursuant to which the subject property had been purportedly acquired. The letter to the first plaintiff is in the following terms:

> "With reference to your claim for the above Lot, we are recommending that you arrange for your attorney-at-law to immediately serve on Messrs. Clinton Hart & Co., a notice requiring specific performance.
>
> Such notice could perhaps be drafted along the lines of the sample notice which we have hereto attached for your information".

The letter therewith enclosed the draft notice to the defendant company, through its attorneys-at-law, which is in the following terms:

NOTICE REQUIRING SPECIFIC PERFORMANCE

"Duncan Bay Development Company Limited

30 Duke Street

Kingston.

I, the undersigned, attorney-at-law, for and on behalf of my client, (state profession) of (state Address), in the Parish/State of (state Parish/State) the purchaser of all that parcel of land being lot (state Lot No.) Duncan Bay, in the Parish of Trelawny, Jamaica, and being the land registered at Certificate of Title Volume (state Volume No.) Folio (state Folio No.) of the Register Book of Title, contracted to be sold by you by an Agreement dated the 5th day of June 1974, and made with the Purchaser, hereby give you notice that the day fixed by the aforesaid Agreement for completion of the sale is now long past and that the Purchaser, on the day of 19 , made final payment of the purchase price, and is therefore entitled to a Transfer from you of the fee simple in the land comprised in the said Agreement, in accordance with the conditions and stipulations of same, and that the purchaser requires you, within fourteen (14) days of the date hereof (and in respect of this demand makes time of the essence) to complete the sale by executing the Instrument of Transfer, and delivering Duplicate Certificate of Title at Volume Folio duly endorsed in the name of the Purchaser, as provided by the said Agreement.

AND I FURTHER give you notice that the Purchaser will hold you liable for all losses or damages which may be incurred by him by reason of the delay or default on your part in completing the said sale or otherwise in relation to the said Agreement, including costs of enforcing same, and will take such steps against you by action at Law or otherwise as may be advised for Specific Performance.

DATED the day of 1995.

Attorney-at-Law for the Purchaser

cc. Messrs. Clinton Hart & Co., Attorneys-at-Law for the Vendor

It is difficult to see how this critical evidence may be construed as being other than an admission on the part of the defendant company, that the Plaintiff had acquired an equitable interest in the subject property, which could be enforced by an order for specific performance. In any event, there appears to have been attempts between 1996 and 1998 involving attorneys-at-law at one time or the other connected with the defendant company either before the change in share ownership or after. These did not produce the result that the plaintiffs desired and on the 3rd day of July, 1998, they filed an action in the Supreme Court, claiming specific performance of the alleged contract, damages for breach of contract; an order for the transfer of the land to the plaintiffs and such further and other relief as the court thinks fit. An appearance was entered on behalf of the Defendant company on August 31, 1998, and a defence to the plaintiffs' statement of claim was filed in September of that year. In February 2000, a notice of change of attorney was filed and served and a Notice of Intention to Proceed was filed on March 21, 2000. On May 11, 2000, the Defendant took out a summons to strike out the plaintiff's action for want of prosecution.

As a footnote to the above historical outline, it is worth mentioning that the second-named plaintiff, the wife of the first named plaintiff, died in January 2000, and the first named plaintiff is contending, *inter alia*, that he is now solely entitled to lot 377, by rights of survivorship.

In an affidavit sworn on May 11, 2000, in support of the initial application to strike out the plaintiffs' action for want of prosecution, Ms. Davis, the defendant company's attorney at law, had stated that in light of the long delay in pursuing the matter, "the defendant verily believed that the plaintiff was no longer interested in the contract therein". It was further stated in that affidavit that "The defendant has remained in possession of the said land, and has now proceeded to make other arrangements for the sale of the land the subject matter herein". It seems to me that the averments in this affidavit fly in the face of the weight of the evidence. Certainly, the suggestion contained in the letters of March 1995 and June 1996, from Ocean Point Limited, (as pointed out above, presently the beneficial owner of all the shares in Duncan Bay Development Company Limited), clearly indicate that within a comparatively short period after acquiring control of the defendant company, the new shareholder knew of the claim being asserted by the plaintiffs, and indeed was actively co-operating in the efforts to have the property properly vested in the plaintiff. Secondly, the only evidence in relation to any possession of the subject property, is that in 1994, the plaintiff had the property bushed, cleared and surveyed, paid taxes then due, and has since continued to pay the taxes. There is no evidential support for the assertion in the affidavit under reference, that the defendant "had remained in possession" of Lot 377 for the period from the execution of the Agreement for Sale to the present.

I had previously referred to the Option Agreement for the purchase of the shares of the defendant company. A look at paragraph 9 which I quoted earlier, strongly suggests that the purchaser would have had a legitimate cause of action for breach of warranty against the Vendors in relation to the list of properties contained in "Annex A". Further, that the letters to the plaintiff in March 1995 must be taken to imply that they were aware of this possibility within 2-3 years of exercising the option to acquire the shares of the defendant company.

The Submissions

As noted above, the summons presently before me on the --- of May 2001, was the one filed in the Supreme Court Registry on January 18, 2000. In its first two (2) paragraphs, it prayed that "the action be struck out", and "That the action be struck out as scandalous and vexatious and/or an abuse of the process of the court". In the absence of any submissions to the contrary by the defendant's attorneys, I proceed on the basis that this is really one prayer, and that the latter includes the former. In this regard, it was submitted by Ms. Davis for the Defendant that where the plaintiff's statement of claim discloses that the cause of action arose outside of the limitation period as determined by the Limitation Act, the claim is to be struck out as frivolous and/or vexatious. The defendant had, in fact, amended its defence to plead that the action was statute-barred. In support of her submissions, Ms. Davis cited, *inter alia*, **Riches v The Director of Public Prosecutions**, [1973] 2 All E.R. 935, **Ronex Properties Limited John Laing Construction,** [1938] QB 398, the Limitation Act, and the White Book, Order 18/19/7. In this regard, she submits that section 3 of the Limitation Act prohibits an action to recover land or rent unless the right to bring such action arose within 12 years next before the filing of the action. In relevant part, section 3 states:

"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit shall have first accrued to some person through whom he claims, or, if no such right shall have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same".

Indeed, it is also true that **Riches** is authority for the proposition that where an action is statute-barred, it ought to be struck out as being frivolous and/or vexatious or an abuse of the process of the Court. As was stated by Davies L.J. in that case, at page 939 of the report:

"It is difficult to see why a defendant should be called upon to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail".

The Riches case was explained by Donaldson L.J. in Ronex Properties Ltd by saying that in a very clear case, where a defendant does plead a defence under the Limitation Act, he may seek to strike out the plaintiff's claim upon the ground that it is frivolous or vexatious and an abuse of the court's process. It is the burden of defendant company's submission that in the instant case, the claim is for the recovery of land. Reference is made to paragraphs 1 and 7 of the Agreement for Sale. These paragraphs are in the following terms:

"TRANSFER OF TITLE: The Vendor upon receipt of the full purchase price, as provided for herein, shall within thirty (30) days thereafter, prepare, execute

in Jamaica, and mail to the Purchaser by prepaid registered mail a Transfer of Title in accordance with the Registration of Titles law in Jamaica, and obtain in the name of the Purchaser a Certificate of Title for the said lot subject only to those easements, restrictive covenants and stipulations provided for herein and those imposed from time to time by governmental authority. Notwithstanding the foregoing, the Vendor shall not be obliged to transfer title until the expiration of 36 months from the date hereof".

Paragraph 7 is headed "Default by The Vendor" and is in the following terms

"In the event that the Vendor shall default in respect of its obligations hereunder, then the vendor at its option, shall either cure such default within six months of being required by the Purchaser by notice in writing so to do or repay to the Purchaser any monies paid hereunder. In the event that it is required that the Purchaser shall execute any documents in order to assist the Vendor in curing such default, he shall immediately do so, but at Vendor's expense".

Based upon these provisions, Ms. Davis for the Defendant submits that failure to deliver title after thirty-six (36) months constituted a default under the terms of the Agreement. Accordingly, the limitation for filing an action upon that default commenced three (3) years after the signing of the Agreement. She submitted further, that since paragraph 7 gives the Vendor an option either to cure any default or repay the monies paid by the Purchaser, this is now in reality, an action for debt. As such it comes within the purview of section 46 of the Limitations of Actions Act, which was considered by the Jamaican Court of Appeal in Lance Melbourne v Christopher Wan, [1985] 22 JLR, p 131. Having looked at this case, I confess

that while it is an excellent exposition on the historical evolution of the forms of action, it does not take us any further than being support for the proposition that actions for debts or on contracts, must be filed within six (6) years of the obligation arising or the breach of the contract. The submission concludes by stating that where there is a breach of the statute of limitations by the plaintiff bringing his action outside the relevant period, it may only be pursued where one of the permissive exceptions is present. That in this case, no exceptions are applicable. The question which falls to be considered is whether on the basis of the above, there has been an action which has been commenced in contravention of the Limitation of Actions Act. With respect to the implications of paragraph 1 of the Agreement for Sale, it is trite law that in agreements of this nature, time is not to be treated as being of the essence of the agreement, unless it is expressly made so, or has been subsequently made so by the giving of appropriate notice. (See **United Scientific Holdings Ltd., v Burnley Borough Council** [1978] A.C. 904). This was not done in that paragraph. Moreover, and in any event, the obligation to provide title did not arise until 36 months had elapsed. There was, however, no outside time frame by which title should have been provided. Not having provided the title within thirty-six (36) months, is not a default which would cause time to commence running against the Purchaser, since the Purchaser did not effect a notice making time of the essence for such delivery.

With respect to paragraph 7, the option purportedly given to the Vendor to repay monies paid by the Purchaser, only arises once the *Purchaser has given notice in writing* for a default to be cured. It goes without saying that in this case, no such notice has been given. Ex

hypothesi, there is no option available to the Defendant, and there is no debt, an action to recover which, would be subject to the Limitation of Actions Act.

It should also be noted that whereas the Plaintiff, both in the endorsement to the Writ of Summons and in his Statement of Claim speaks of a breach of the Agreement for Sale and claims damages therefor, it is clear from paragraph 1 of the Agreement under review, that the obligation to provide title in the names of the Plaintiffs, does not arise until the Transfer which had been executed by the defendant was executed by the plaintiffs and returned to the Defendant company. According to the affidavit evidence of the first plaintiff, as well as the subsequent exchanges, it does not appear that this was ever done. The question therefore may be asked, whether the plaintiff may legitimately claim that there has been a breach of contract for which damages should be awarded. I come back to the question of breach later.

The defendant further prays that the plaintiff's action be struck out for want of prosecution. It is alleged that while the defence had been filed on September 25, 1998, no reply had been filed within the period limited for such reply, nor had a summons for direction been issued. It is common ground, however, that a Notice of Change of Attorney had been filed and served, and a Notice of Intention to Proceed was filed three weeks thereafter, within two (2) months of the death of the second plaintiff, whose illness it is asserted, contributed to the inability of the plaintiffs to pursue their claim more aggressively. According to defendant's counsel, apart from the foregoing, nothing had been done from the filing of the Defence until the filing of the defendant's summons to strike out the action for want of prosecution on May 11, 2000.

It was submitted that where a plaintiff was guilty of inordinate and inexcusable delay in prosecution of the action, this provides ground for the dismissal for want of prosecution. (See **Allen v Sir Alfred McAlpine & Sons Ltd**., [1968] 2 Q.B. 229 and approved in **Birkett v James** [1978] A.C. 297. The proposition that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party, approved in **Birkett** (above) is an additional requirement to justify the dismissal for want of prosecution. It was submitted where a long delay before the issue of the writ had caused the defendant prejudice, he had only to show something more than "minimal prejudice" as the result of post-writ delay to justify the action being struck out. **Department of Transport v Chris Smaller (Transport) Ltd.,** [1989] 1A.E.R.897, was cited as authority for this proposition. However, in the same case it was stated that: "Inordinate and inexcusable delay was not a ground for striking out the action for want of prosecution *unless* (emphasis mine) the defendant had suffered prejudice from the delay or a fair trial of the issues was impossible". According to counsel for the defendant, the post-writ delay of approximately twenty (20) months from the filing of the defence to the issue of the summons to strike, was prejudicial to the defendant and it was "more than minimal". Evidence of this prejudice was stated to be the fact that according to the affidavit of Keith Russell, when the company was purchased in 1992, lot 377 was listed among its assets, and it was an integral part of its development plan.

Mr. Martin, in response to the submissions of Ms. Davis, submitted that action was not brought in breach of the statute of limitations. This was because the suit was not an action for

the recovery of land, nor was it an action for breach of contract. It was an action for specific performance pursuant to which the defendant would be ordered to execute a transfer and deliver title. The submission however, seems to ignore the plaintiff's own pleadings, which do speak of damages for "breach of contract" in both the endorsement on the Writ and in the Statement of Claim. It seems to me that this assertion in the Statement of Claim, is not fatal to the plaintiff's ability to resist the summons to strike, as this may be amended with leave to omit that claim. The plaintiff's pleadings do not reveal when the alleged breach took place. However, Mr. Martin in responding to the defendant's submissions on its summons to strike on the basis that the action was filed in breach of the Limitation of Actions Act, submits that the first point in time when it may be alleged with certainty that there was a breach would be in 1998 when there was a repudiation of the Agreement by the defendant's then attorney-at-law, Mr. Lloyd Perkins. According to the evidence which was before me, all the exchanges between the representatives of the parties up to June 1998 were on the basis that the plaintiff had a valid claim but the mechanics to effect the transfer were proving problematic. Some of the difficulties arose because of the change in ownership of the shares in Duncan Bay Development and the change of attorneys from Milholland, Ashenheim & Stone, to Clinton Hart & Co and then to Mr. Perkins after the share transfer. Notwithstanding that, however, Mr. Martin's affidavit of July 4th, 2000, contains the memorialized record of a telephone conversation with Mr. Perkins. In that conversation, Mr. Perkins stated that he had prepared the Transfer necessary to pass title to the Plaintiffs and sent it to the defendant. At that stage, the defendant allegedly refused to execute the transfer because of what it claimed was an agreement between the new owners and the previous owners of the defendant company, which entitled them to compensation for claims to ownership as in the plaintiff's case.

According to that affidavit, the plaintiffs were advised that they should proceed to sue the defendant company who would not resist the suit, and based upon the consequential order of the court, the transfer would be effected. I accept the submission and hold that repudiation of the Agreement for Sale, if it did take place, took place at this time. I do not accept as applicable here, Ms. Davis' submission which I understand to be in the following terms: that where a party to a contract undertakes to do an act, the performance of which depends entirely upon himself, and the contract is silent as to the time of performance, the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case. That repudiation is thus a matter of law, and takes place once there has been a reasonable passage of time without the terms of the agreement being fulfilled. As long as the parties are continuing to discuss giving effect to the Agreement for Sale, it seems to me that there has been no repudiation. If that were not so, then a defendant could merely carry on a protracted attempt at settlement of a dispute until the limitation period has passed and then rely on the limitation statute. I do not accept that this could be a correct view of the law.

I wish to pause here to refer to a matter mentioned earlier and to which I had said I would return, paragraphs 8 and 9 of the Option Agreement. It seems to me that the "agreement" referred to in the discussion between Messrs Martin and Perkins on June 12, 1998, related to the provisions which I described as a warranty from the previous owners of the defendant company to the purchaser of the shares. There is a letter to the plaintiff's then attorneys-at-law, Robinson, Phillips & Whitehorne, from Clinton Hart & Co over the signature of Richard Ayoub dated August 13, 1997, appended as an exhibit to the affidavit of Huntley Martin of July 4, 2000. This letter states:

"The duplicate Certificate of Title (Volume 1094 Folio 858) for lot 377 was handed over to the present owners of Duncan Bay Development Company Limited on the closing of their purchase of the company in 1993.

There are indeed certain arrangements in place by virtue of which we have obligations to the present owners of Duncan Bay Development Company Limited in respect of particular successful claims for lots by third parties. We do not, however, understand how these arrangements affect your client since:-

(a) your client's contractual relationship would be with Duncan Bay Development Company Limited; and

(b) our obligations under the abovementioned arrangements arise upon (not before) the release of the title to the claimant".

It is clear that as the new shareholders in Duncan Bay Development Company Limited, Ocean Point Limited would have a cause of action against the previous owners of Duncan Bay from whom they had acquired the shares. There is no indication that any attempt has been made to enforce this right. However, it seems that the defendant company thought that it could somehow get cover against the plaintiff's claim through this warranty. It is instructive to note that the time during which they may be able to rely upon this warranty has perhaps passed.

In answer to the submissions to strike for want of prosecution, it was submitted that in order to give rise to this right, there was a need for the following:- a) inordinate delay; b) inexcusable delay, and c) prejudice to the defendant, as defined by the cases. The delay to be considered here is the post-writ delay. It is my view, and I so hold, that the explanations given by Mr. Martin's affidavit concerning the fact of a change of attorney, the age of both plaintiffs, the

illness of Mrs. Amritt and the inability of either plaintiff to travel as a result thereof, coupled with the filing of a Notice of Intention to Proceed within a short time of the death of the second plaintiff, indicate that this delay, even if inordinate, as to which I make no finding, was excusable. Subsequent to the filing of the summons to strike out in May 2000, the defendant has also twice applied to amend its defence, on November 6, 2000 and February 2001. It seems somewhat inconsistent to be saying that there has been inordinate delay, while at the same time seeking to amend the defence. Leave was, in fact, granted by the court to amend the defence, and the plaintiff was ordered to file its reply within 14 days, and this was done.

In order to grant the application to strike for want of prosecution, there must also be a showing of prejudice. In light of the history of this matter, I do not believe for a moment that it would be possible to find that the defendant had been prejudiced. The defendant is a body corporate with a corporate personality and continuing corporate existence. It is the same defendant that sold the lot to the plaintiff; it collected the payments therefor; it acknowledged through its attorneys that it had done so; it acknowledged the right of the plaintiffs to get specific performance of its Agreement for Sale. Even while being aware of the claim of the plaintiffs, (which claims it cannot deny as it had sold the lot to the plaintiffs), and the existence of a caveat on the property filed in 1994 by the plaintiffs, of which it must be taken to have been aware, it proceeds to make arrangements and plans for developments without regard for the plaintiffs' interest in the disputed lot, which at various times, it intends to sell or incorporate into the development of a golf course. I hold that the defendant company is not prejudiced, but if it is, then any prejudice being faced is entirely self-induced, given the defendant company's corporate status, and it cannot complain thereof. Moreover, as is stated

in **Snell's Equity, Twenty-Ninth Edition**, by Baker & Langan, at page 610, in a passage which is very relevant to the submissions made in this case, and is perhaps dispositive of the "want of prosecution" summons: "..... delay in proceeding to trial after issue of the writ will not be fatal unless the defendant is led to believe that only damages are being sought". (See **Du Sautoy v Symes**, [1967] Ch. 1146).

It will be apparent from the analysis above, that I do not believe that the defendant is entitled to the grant of its application to strike out either on the basis of the Limitation of Actions Act, or on the basis of its failure to prosecute its action.

The second summons which was before me was the plaintiff's application for Summary Judgment. I regret that counsel for the plaintiff has not provided the Court with a great deal of assistance in support of its application for summary judgment, save to say that the amendments to the original defence were intended to respond to the application for summary judgment. In any event, it should be noted that specific performance is an equitable remedy. In those circumstances, the maxim "He who seeks equity must do equity" is relevant. One question which falls to be considered is whether there has been such delay as is sufficient to deprive a person of his right to claim specific performance of his Agreement for Sale, whether, in fact, the plaintiff has been guilty of laches. The principle has been described in the judgment of Lord Selborne in a Privy Council decision, **Lindsay Petroleum Company v Hurd**, [1874] L.R. 5 P.C. page 221 at page 239.

> "The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because

the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterward to be asserted, in either of these cases lapse of time and delay are most important. But in every case, if an argument against relief which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval".

As is noted in Snell' Equity, also at page 610, in dealing with the effect of a delay by plaintiff to enforce his remedies:

"Even when time is not of the essence of the contract, the plaintiff may have been guilty of such delay as to evidence an abandonment of the contract on his part, thereby, precluding him from obtaining specific performance. (See **Mills v Haywood**, [1877] 6 Ch. 298) For a plaintiff to obtain specific performance, he must have shown himself "ready, desirous, prompt and eager". (See **Milward v Earl Thanet**, (1801) 5 Vesey 720n, per Arden M.R.) *Where, however, the plaintiff has been let into possession under the contract and has obtained an equitable interest, so that all he requires is a mere conveyance of the legal estate, even many years delay in enforcing his claim will not prejudice him.* (Emphasis mine)

I am of the view that from the evidence, there is no issue of laches precluding recovery of summary judgment for the grant of an order for specific performance here.

Having said that, as I understand the principles which govern the right to secure a summary judgment, there must be no triable issues which would affect the right of the plaintiff to get that judgment. Put another way, if there is any unresolved issue raised by the pleadings, the resolution of which in any particular way may cause the determination of the action to be against the plaintiff, then summary judgment will not be available. On the basis of the italicized quote from Snell above, I would say that if I were satisfied that the plaintiff had "been let into possession under the contract", I would have been prepared to grant summary judgment and order specific performance of the contract. I am of the view that that issue is a live issue, and that the matter should therefore proceed to trial.

While no specific submission was made to Section 86A of the Judicature (Civil Procedure Code) Act, it appears that this is properly an application under that section. The section states:

> "In any action commenced by a writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit, the plaintiff may, (whether the defendant has appeared or not) on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the

Court or a Judge for judgment, and the Court or Judge may thereupon give judgment in the action unless the defendant by affidavit, or by his own "*viva voce*" evidence or otherwise, satisfies the Court or Judge that he has a good defence to the actions on the merits, or discloses facts sufficient, in the opinion of the Court or Judge, to entitle him to defend".

Here the plaintiff is applying for specific performance of the Agreement for Sale. The application is supported by an affidavit of the plaintiff indicating his belief that there is no defence to the application. During the course of his submissions, Mr. Martin raised the question of estoppel; whether in light of its conduct, the defendant was now estopped from asserting that the plaintiff was not now entitled to have title transferred to his name. In light of the decision that I have arrived at as stated above, I have not really canvassed this question. Nor have I considered, what could also be an interesting and relevant issue to be explored: that is, whether in any dealings with the title to lot 377, the defendant was, in any event, merely a trustee under a constructive trust for the plaintiff. As this matter unfolds, I have no doubt that all these areas will be explored in detail.

In the final analysis, my ruling is that the defendant company's application to strike out the action is denied, and the plaintiff's summons for summary is also regretfully denied, on the basis that the issue of whether the plaintiff had been let into possession under the terms of the contract, is a triable issue. Costs in both applications will be Costs in the Cause.

AUGUST 13, 2001.