IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM 2011/HCV 05654

BETWEEN	**CLIVE BANTON**	**1ST CLAIMANT**
AND	**SADIE BANTON**	**2ND CLAIMANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INCORPORATED**	**DEFENDANT**

Contract- Sale of Land- Time of the Essence- Whether Special Conditions require notice of breach and of intention to terminate- Whether vendor in breach of contract.

Garth McBean for the Claimant instructed by Garth McBean and Company

Sandra Minott-Phillips QC for the Defendant instructed by Myers Fletcher and Gordon

Heard: 19th May 2014 & 4th July 2014

BATTS J.

[1] By Order dated 18th June 2013 a separate trial was ordered in respect of liability. That trial came before me on the 19th May 2014.

[2] Although both parties gave evidence and there was cross examination it is fair to say that there is no dispute as to the salient facts. These may be stated as follows:

- By Agreement for Sale dated 2nd March 2011 the Claimants agreed to purchase and the Defendants agreed to sell certain premises.
- The Defendants, at the same time they entered into the agreement for sale, agreed to grant a vendors mortgage to the Claimants. The mortgage is also dated 2nd March 2011.

- By letter dated 4th January 2011 the Defendant sent to the Claimant's attorney (1) Agreement for Sale (2) mortgage instrument and(3) Promissory note. The Claimants were asked to execute the documents and return them along with US$75, 000.00 and a separate cheque of J$60,000.00. A response within 14 days was requested.

- By letter dated 16th February 2011 the Claimant's attorneys returned the documents duly executed a well as the amounts requested

- By letter dated 4th March 2011 the Defendant wrote to the Claimants' attorney enclosing the signed agreement for sale, instrument of mortgage, promissory note and receipts for the amounts paid being the deposit and fourth payment. That letter ended with the words, "the agreement for sale, instrument of mortgage and promissory note have been sent to the Stamp Commissioner for assessment and as soon as we are in receipt of the assessment we will forward the statement of accounts to close and instrument of transfer."

- By letter dated 15th March 2011 the Defendant wrote to the Claimants' attorney enclosing a statement to close and transfer of land under Power of Sale in duplicate. That letter continued,

  "Kindly have your clients sign the transfer of land in duplicate, and return them to us along with manager's cheques payable to Jamaican Redevelopment Foundation Inc. and Nardia N. Sinclair, Attorney-at-Law in settlement of the outstanding sums indicated in the attached statements of account.

  Please note that the Agreement for sale is presently at the office of the Stamp Commissioner for assessment, however the original and copy mortgage and promissory note have been stamped.

  We advise that we have requested up to date certificate of payment of taxes and water rate bill and receipts and hereby give you our professional undertaking to forward them to you as soon as we have them in hand"

- The balance due as per the statement of account was J$508,765.01.

- By letter dated 8th April 2011 the Claimants' attorney wrote to the Defendant enclosing the duly executed instrument of transfer and sale. That letter stated:

> "Kindly be advised that the cheque for the balance outstanding will be forwarded to you shortly.

- On the 28th April 2011 VMBS forwarded to the Claimants' attorney cheques for J$508,765.01.

- By Letter dated 3rd May 2011 the Defendant wrote to the Claimants' attorney indicating that they had no option but to cancel the agreement. The reason advanced for the cancellation was the fact that "JRF has now been paid the principal interest and costs due to it" by the mortgagors the registered proprietors. They stated further in this letter that the mortgagor had a right to redeem. The letter also enclosed the cancelled agreement.

- By letter dated the 4th May 2011 the Claimants refused to accept the cancellation.

- The discharge of mortgage has been registered and it is common ground that the Defendant can no longer obey any order which may be made for specific performance.

[3] The Claimants contend that the Defendant acted in breach of the contract for sale of land when they terminated or purported to terminate the Agreement by the letter dated the 3rd May 2011. They rely on special condition 5 which provides,

> "Time is of the essence of this Agreement for sale in respect of all stipulations herein for payment of any sum(s) due by the purchaser or for the performance by the purchaser of any act or thing to be done by him. In the event of the failure of the purchaser on the due date of any payment to punctually remit such payment or punctually to do any act or thing required by this agreement to be done by him, the vendor shall be entitled to cancel this agreement upon seven (7) days' notice to the purchaser and the purchaser having failed to make good the default and to forfeit the deposit and without notice to the purchaser and without tendering any transfer of the lands to him, re-sell the property and apply the proceeds thereof to its own use provided however that the vendor shall be entitled at its option to allow the purchaser time to satisfy his obligation hereunder subject to the provisions of special condition 7 hereof."

Special Condition 7 allows for payment of interest at 12%, on any outstanding amounts in the event the time to comply is extended.

[4] The Claimants contend that no notice pursuant to special condition 5 was given prior to the termination of the agreement and that the failure to give a notice means that the act of termination was in breach of contract.

[5] The Defendant denies a breach. They allege that the Claimants failed to pay the costs as per the agreement. Completion was to be 60 days after the signing of the agreement. Although the balance purchase price US$150,000.00 was payable by vendor's mortgage which had been granted, the costs of $508,765.01 remained unpaid on the completion date.

[6] The Defendant put in evidence a calendar (exhibit 4) which demonstrated that the date for completion fell on a weekend. The first working date after the due date was Monday the 2nd May 2011. The Defendant contends that as time was of the essence of the agreement they were entitled to terminate on the 3rd of May 2011 and this is what they did by letter of that date. The requirement for notification of the payments due they contend was satisfied by the letter dated 15th March 2011 which sent the statement of account and indicated the amounts owing.

[7] The parties cited various authorities to support their respective positions. It is fair to say that the authorities cited by the Claimants' counsel concerned many agreements in respect of which time was not of the essence. The issue being in those cases, whether the notice making time of the essence was effective in so doing: ***O'Sulliven v Moodie [1977] NRLR 643; Balog v Crestani*** **(1975)** ***132 CLR 289;*** **Bidaisee v Dorinda Sampath 46 WIR 461.** In one case ***Legione v*****. Hateley** ***(1983)*** **57** ***A.L.J.R.*** **292,** the contract made time of the essence but went on to state, "neither shall be entitled to enforce any of the rights and remedies other than those excepted above unless he gives to the other a written notice

specifying the default and stating his intention to enforce his rights and remedies unless the default is made good and proper legal costs occasioned by it to the party giving the notice are paid, both within a period of not less than fourteen days from the date of giving of the notice and the other fails within that period to remedy the default and pay those costs."

[8] The Defendant's counsel distinguishes this latter case on the basis that the agreement expressly stated what such a notice should contain. In the absence of such stipulation it was submitted that notification as to the amounts due or obligation owed would suffice. Reliance was placed on the case of ***Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514***. That case decided that where time was of the essence of the contract failure to complete on the specified date was a repudiating breach and it mattered not that the vendor was only slightly late. In effect the court agreed with the argument posited by Mark Hapgood QC for the vendor at page 516 of the report, viz:

> ***"An innocent party's right to terminate or rescind a contract for breach of a condition is an accrued right. There is no basis in principle for recognizing a power in the defaulting party to deprive the innocent party of that right by tendering late performance. Once the time for completion had passed performance of the contract by the purchaser was not possible. The vendor was thus entitled to rescind the contract"***

That case is however distinguishable from the case at bar because there the time of the essence clause was unqualified. Furthermore there appears to have been no issue as to whether the right to terminate had accrued.

[9] In the case I have to decide the issue is whether the right to terminate had accrued. This depends on a true construction of the agreement, that is, what is the nature of the notice required prior to termination pursuant to special condition 5. Notice is defined in the Oxford English dictionary as:

"1. Attention or observation,

2. Warning or notification,

3. A formal statement of the termination of a job or an agreement,

4. A sheet displaying information"

[10] The meanings at 2 and 3 are the germane ones. It seems to me that the intention of the parties, as expressed by the words of this agreement, is that although time is of the essence a party should prior to termination, have 7 days in which to correct or address any breach that would give rise to such termination.

In point of fact therefore the 7 days' notice should follow the offensive breach. Whether it does or does not however the notice is to be a notice which:

a. Informs the other party of the obligation
b. Informs the other party of the intent to cancel the agreement for breach of that obligation.

Termination will then follow if 7 days after the notice is given the breach has not been remedied. In effect therefore the agreement automatically waives time of the essence by 7 days.

[11] I am fortified in my construction of the agreement by the following:

(a) Special condition 5 uses the phrase (with my emphasis), "the vendor shall be entitled to cancel this agreement upon seven 7 days' notice to the purchaser <u>and</u> the purchaser having failed to make good the default…"

Clearly "Notice" is referrable to the entitlement to cancel. Further "default" ought to have already occurred which he having had 7 days' notice of the intent to cancel, has failed to make good.

(b) The parties in Legione (cited above) expressly placed in the contract their expectations of a notice. In this case this was not done but that is not to say that the word notice does not connote or rather denote something specific. That is

communication of the other party's intention and dissatisfaction and a last chance to make right a breach.

(c) The fact that any other construction will mean that a mere reminder that money is due on a certain date might be sufficient notwithstanding that the other party may be of the view, having regard to the course of dealings, that termination was not being contemplated.

(d) On any other construction, the requirement of 7 days' notice prior to termination would be redundant. Time is of the essence of the agreement and hence on a breach the party will have a right to terminate. If the interposition of a 7 days' notice period is to mean anything it must be, to alert the defaulter that termination will follow if the breach which has occurred is not remedied.

[12] On this construction of the agreement it is clear the Defendant has not given notice of the breach or their intention to terminate. The letter dated 15th March 2011 did neither. I hold it was not notice pursuant to special condition 5 or any notice whatsoever. Nor it appears was it intended by the Defendant to be such a notice. This is evidenced by the fact that the letter of termination dated 3rd May 2011 did not advert to the letter of the 15th March or purport to terminate for non-payment. That letter terminated for a reason which had nothing to do with any or any alleged breach by the Claimant. It is true that the reason for a breach of contract may be preyed in aid so long as it existed, even if it was not relied on at the time. However I am not here taking issue with that, I am using the fact that no reference is made to a breach when terminating as evidence that, when issuing the letter of the 15th March 2011, the Defendant was not issuing a notice and had in fact no intention to issue a notice pursuant to special condition 5.

[13] The parties have argued other questions before me, such as whether the obligation to pay costs even arose having regard to the contractual entitlement to pay these costs out of the deposit paid (see special condition 2),whether the mortgage had in fact been redeemed as the amount due had not actually been paid when the letter of the 3rd May 2011 was written, and whether a mortgagor

had a right to redeem even after the mortgagor had exercised its power of sale and entered into a valid agreement for sale.

[14] I do not find it necessary and hence will not venture a position on any of those issues because on my construction of the agreement and on the facts of the case, the Defendant breached its agreement for sale by terminating without first sending a notice as required in special condition 5 of the agreement. It is common ground that the agreement can no longer be specifically performed and hence the only remaining issue is the quantum of damages to which the Claimant may be entitled. That issue by Order of the court is to be dealt with before another court and on another occasion.

[15] For today there is judgment on liability for the Claimants against the Defendant. Costs will go to the Claimants to be taxed if not agreed.

David Batts
Puisne Judge