JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 8/83

BEFORE: THE HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN

GAUNTLETT B. COLQUHOUNE PLAINTIFF/APPELLANT

AND

RUDYARD ERROL LAWSON DEFENDANT/RESPONDENT

Carl Rattray, Q.C., instructed by Messado, Woodham & Pickersgill for Plaintiff/Appellant.

D.M. Muirhead, Q.C., instructed by Silvera & Silvera for Defendant/Respondent.

December 12 & 13, 1983; July 17, 1985

ZACCA, P.:

I have had the opportunity of reading the judgment of White, J.A., and I agree with his reasons.

WHITE, J.A.:

The following are the reasons for the judgment of the Court delivered on the 13th day of December 1983, when the appeal by the Plaintiff/Appellant was dismissed, and the order of the Court below was affirmed. That order dismissed the Originating Summons brought by the plaintiff; the learned judge refused the declaration sought, with costs to the defendant/respondent.

By the Originating Summons the Court was asked to determine whether the appellant was entitled in law to rescind an agreement entered into on or about the 24th day of March 1982, in respect of premises registered at Volume 1123 Folio 291 and Volume 1111 Folio 312 of the Register Book of Titles, and to the return of the sum of $30,000.00, which he had paid in pursuance of the terms of that agreement for sale. This deposit was paid in two instalments of $15,000.00 each on the purchase price of $300,000.00. The date fixed for completion was the 30th June 1982. The other usual provisions were included.

There were, in addition, two Special Conditions of which the second is material to the deliberations in which the Court was engaged. It reads as follows:

> (ii) It is understood and agreed that the purchaser shall apply to a lending institution for the loan of not less than $160,000. on the security of the said premises; and in the event of the Purchaser not obtaining and delivering to the Vendor's Attorney-at-Law a written commitment for such loan by the 6th day of May 1982, either party shall be entitled to rescind this Agreement within 14 days from that date, failing which this Agreement shall remain absolute and binding on the Parties hereto. In the event of this Agreement being rescinded all monies paid hereunder shall be refunded without interest and free from deductions SAVE AND EXCEPT that the

"Purchaser hereby agrees to pay to the Vendor's Attorney-at-Law fees in the sum of $250.00 for professional services rendered in respect of work incidental hereto and the purchaser irrevocably authorises the Vendor's Attorney-at-Law to deduct that amount from the Deposit paid to the Vendor's Attorney-at-Law under this Agreement".

The focal point of the dispute in this Originating Summons is the date by which the written commitment for the loan should have been obtained and delivered by the Purchaser to the Vendor. The copy of the Agreement for Sale exhibited to the affidavit of the appellant shows a blank space for the relevant date. He explained in his affidavit that "the date in Special Condition (ii) of the said Note or Memorandum was left blank, because the Defendant and I agreed that this important date should be the subject of an oral side agreement and would be filled in when the agreement was finalised". He further said that after the signing of the agreement the parties had a discussion and they both agreed "that the operative date of Special Condition (ii) aforesaid would be May 15 1982, as the date six weeks from the date of the payment of the second instalment of the deposit mentioned above". But the appellant "was amazed to hear and learn that the Defendant had filled in, or caused to be filled in, the date of May 6th as the operative date in the aforesaid Special Condition (ii) without my authority or consent".

As to this Walker, J., before whom the matter was argued, rejected the evidence of the appellant. He accepted the evidence given by Mrs. B.A. Tomlinson, Attorney-at-Law for the respondent, that the date "6th May, 1982 expressed on page 2 of the Agreement as being the date by which the Plaintiff should have obtained and delivered to the Defendant's Attorney-at-Law a written commitment for a loan to

1015

him (the Plaintiff) of not less than $160,000. was the date agreed on by the Plaintiff and Defendant for the fulfilment of that event and that that date was inserted into the agreement after discussion by the Plaintiff and Defendant and before it was signed by the parties in Mrs. Tomlinson's Office".

This finding by the learned trial judge was not challenged at the hearing of the appeal. It is clear from the affidavits and the oral evidence that the appellant did not by that date obtain and deliver to the Vendor's Attorney-at-Law a written commitment from a lending institution for the loan of $160,000. In fact, when it became clear that the appellant would not be able to obtain a mortgage from a reputable financial institution he instructed his Attorneys-at-Law, Messrs. Messado, Woodham and Pickersgill to send to the respondent a notice rescinding the Contract of Sale. The notice states:

> "We the undersigned, as Attorneys-at-Law for and on behalf of GAUNTLETT BARRINGTON COLQUHOUNE of No. 34 Cherry Drive, Kingston 8 in the parish of Saint Andrew, Manager, (hereinafter called the 'Purchaser) hereby give you notice as follows:-
>
> 1. That by Special Condition No. 2 under Contract of Sale dated 24th March, 1982 for the purchase of lands known as Lots Nos. 102 and 103 Nightingale Grove, in the parish of Saint Catherine, being the lands comprised in the Certificates of Title duly registered at Volume 1123 Folio 291 and Volume 1111 Folio 312 of the Register Book of Titles, between the said Purchaser and the said Vendor herein Rudyard Errol Lawson. The date fixed for obtaining the Mortgage Loan was on or before the 15th May, 1981 (sic).
>
> 2. That I have not been able to obtain the said Mortgage Loan.
>
> 3. That as a result of my failure to obtain the said Mortgage Loan on or before the 15th May, 1982 the said Purchaser hereby rescinds the Agreement, and terminates same as the Purchaser is so entitled hereto.
>
> Dated the 27th day of May 1982".

It will be observed that this notice to cancel the Contract of Sale stated that the mortgage should have been obtained "on or before the 15th May, 1981" (it must be assumed that the reference to the year 1981 was in error). But, as the learned trial judge found, if the material date was the 5th May 1982 as asserted by the respondent, the appellant's notice was out of time. It was out of time even had he found that the 15th May 1982 was, as contended for by the appellant, the material date for obtaining and delivering the letter of commitment. Furthermore, he held that the effective date was not the date of the notice but the date on which the notice was delivered, that is, on the 1st June 1982. He therefore went on to hold that the appellant did not cancel the Agreement in accordance with its terms. Although the appellant sought to cancel the agreement, notwithstanding he was out of time in giving the requisite notice, it should be noted that the Contract of Sale did not go off at that stage because there was still remaining the provision that the contract thereupon became binding and absolute on the parties thereto. In other words, without more, the appellant was obliged to pay the balance of the purchase money by the 30th June 1982. This certainly would not preclude him from obtaining, belatedly, a letter of commitment for the whole of the balance of the purchase money.

Mr. Rattray argued before us that this Court should not regard the agreement as having become unconditional and absolute despite the fact that the appellant was now bound to complete the sale by the 30th June 1982. The basis for this proposition was the service of a notice by the Respondent's Attorney-at-Law dated 1st July 1982 requiring

completion by the 31st July 1982. This notice made time of the essence. Mr. Rattray presented his proposition on this point by questioning whether the notice to cancel the contract having been given outside the time period stated in the contract, there was a cancellation of the contract necessitating the return of the deposit. He extended his argument with the submission that there was an extension of time when notice to complete was served. Accordingly, he posited, "when you have a date inserted for something to be done by that time, that time must be interpreted to mean and include or within a reasonable time thereafter". He further submitted, in dependence on Howe v. Smith [1884] 27 Ch. D. 89, [1881-5] All E.R./Rep. 201, that in every contract for the sale of land the terms of the contract must be looked at to see whether the deposit is forfeitable. Whether it is to be forfeited in the circumstances of a particular case, must be answered by bearing in mind the nature of the deposit. In this case, said Mr. Rattray, the appellant when he served the notice rescinding the agreement for sale, was not abandoning the contract. He intended to act under it, and since a time was given to him within which he can rescind the contract and recover the deposit, then if the notice when given falls outside the stipulated period he must be allowed a reasonable time thereafter to exercise that right. These further considerations would follow said Mr. Rattray. If he exercises that right within such reasonable time he would have acted under the contract. This would be so because stipulations as to time in contracts have been interpreted to mean such time as is reasonable or any reasonable time thereafter. This interpretation is applicable not only to the completion of the agreement, but to any other thing required to be done

by a certain time in pursuance of the contract. For instance, as in the instant case, if rescission is to take place by a certain time, if that rescission takes place within a reasonable time after the time limited, the respondent would not be entitled to forfeit the deposit paid as he has claimed to do in this case. It does not make much difference that both sides have a right to rescind.

The answer to these submissions must in part lie in the terms of the agreement for sale. These have already been set out and analysed somewhat in the previous discussion. What really concerned Mr. Rattray was the demand for the return of the sum of $30,000.00 paid as the deposit. In part his reliance on Howe v. Smith (supra) and on Keeble v. Stickney [1915] A.C. 386, [1914-15] All E.R. Rep. 73 must be conditioned by the fact not only of what the contract in those cases provided for, but the remedy which was sought. The exposition of the law in both cases is relevant. In Howe v. Smith the Court held that the purchaser was guilty of such delay in completion as in the opinion of the Court amounted to a repudiation of the contract. The purchaser was held not to be entitled to the return of the deposit. What the purchaser sought was the equitable remedy of specific performance, although he was not at any time ready with the money in order to purchase the estate, and was therefore not able to perform the contract. At page 205 D-E, [1881-85] All E.R. Rep., Cotton, L.J., remarked:

> "It may not be that in all cases where this Court would refuse specific performance the Vendor ought to be entitled to claim the deposit. It may well be that there may-be circumstances which would justify the court in declining, and require the Court, according to its ordinary rules, to refuse, specific performance, in which it could not be

"said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the Vendor to retain the deposit.

In my opinion in order to enable the Vendor so to act, there must be those acts on the part of the purchaser which not only amount to such delay as to deprive him of the equitable remedy of specific performance, but which makes his conduct amount to a repudiation on his part of the contract".

Towards the end of his judgment Cotton, L.J., added at page 295 E:

"The contract was to be performed according to the arrangement on April 24. It is not necessary now to enter into the question of how far time would be considered as of the essence of the contract, because since the Supreme Court of the Judicature Acts, 1873, when the question whether time was of the essence of the contract arises, all contracts must be governed by the rules of the courts of equity concerning that subject. What took place was this. Not only was the contract not performed on that day, but there was a delay from time to time, the purchaser asking for, and at one time under hard terms of payment of costs, obtaining an extension of that time. He obtained further time knowing that the Vendor considered it of importance, as it was of importance, that the contract should be performed, if not the very day, at least within a reasonable time. It was not performed within a reasonable time..........".

In our view the reference to performance within a reasonable time does not by any means give to the purchaser carte blanche as to what is a reasonable time. He has to go further and show that he was ready and willing to complete at the material time. It is clear that in the circumstances giving rise to Howe v. Smith the purchaser had been given reasonable extensions of time to allow him to complete the agreement. In the event, he lost not only the right to specific performance but also the right to sue for damages for its non-performance at law. In that case, therefore the deposit was not recoverable.

What Howe v. Smith definitely shows is that the performance of the contract according to the terms of the contract, and the performance within a reasonable time, have to be considered in the light of the conduct of the parties also. To say, as Mr. Rattray argued, that the evidence disclosed that the appellant tried to conform to the terms of the contract as he understood it, and that, therefore, the rule regarding stipulations as to time must apply not only to completion, but also to any other thing required to be done by a certain time, appears to us to show that he is oblivious of the agreed terms that (a) the time for completion was the 30th June 1982, and (b) the raising or not raising of the letter of commitment and the advice thereof did not by itself terminate the contract of sale. It could not be successfully argued that failure on that ipso facto went to the root of the contract. Indeed, Mr. Rattray himself said that the mere failure to deliver the commitment was not an automatic cancellation. The only way the appellant could have been able to rescind is if he had apprised the respondent within 14 days of that date of the failure to obtain the letter of commitment; (c) the efficacy of the notice to complete by the 31st July 1982.

This notice had made time of the essence, and be it noted was issued after the date for completion the 30th June 1982, was passed. The respondent did not accept the notice to rescind, but in fact insisted on the completion of the agreement for sale by the 31st July 1982.

The case of Stickney v. Keeble (supra) provided an opportunity for the House of Lords to give an exposition of S. 27 of the Supreme Court of Judicature Act, 1873 which has its counterpart in the Jamaica Legislation, The Judicature

(Supreme Court) Act, S. 49(g). The section reads:

> "Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity shall receive in all Courts the same construction and effect as they would have had heretofore received in equity".

The factual background in Stickney v. Keeble (supra) was that the appellant had agreed to purchase a farm from the respondents under an agreement for sale in which the time fixed for completion was October 11, 1911. Vacant possession was to be given the appellant on April 6, 1912. The purchase was not completed on October 11, 1911, and after a considerable amount of correspondence, in which the purchaser complained of the delay and pressed for completion, he gave on January 30, 1912, a final notice to the respondent that unless the purchase was completed on or before February 19, 1912 he would treat the contract as at an end, and demand the return of his deposit.

The purchase was not completed on the day named, and on February 15, the appellant issued a writ claiming that he was entitled to treat the contract as at end, and demanding the return of the deposit with interest and damages. The headnote summarizes the opinions of their Lordships:

> "The date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief against a breach of that term of the contract where a party seeks to make an unfair use of the letter of his contract in this respect. The granting of this relief is discretionary; it will always be refused when to grant it would be essentially unfair. It will be granted where a court of equity, looking, not at the letter but at the substance, of a contract to purchase land, sees that neither by the express stipulation of the contracting parties, the nature of the property, or the circumstances of the case is an intention disclosed that the time limited for completion, or for any step towards

1092

> "completion, is to be strictly adhered to, provided that that can be done without substantial injustice. The Vendor's conduct may disentitle him to relief; in order to ascertain whether he is so disentitled his conduct both before and after the date fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by a vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Time may become of the essence of the contract where a vendor has been guilty of unnecessary delay and the purchaser serves him with a notice limiting a reasonable time at the expiration of which he will treat the contract as at an end.
>
> By s. 25(7) of the Supreme Court of Judicature Act, 1873 (18 Halsbury Statutes (2nd Edn.) 467). 'Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity'.
>
> Held: in considering whether it will apply this subsection and give relief in an action on a contract the court should take into account all the circumstances proved up to the date of judgment and not merely consider whether at the date of the institution of the action time would in equity have been considered of the essence; the section has no application if it be established that prior to the Act of 1873 equity would not under the then existing circumstances have granted specific performance to the defendant or restrained the action".

The real complaint of the respondents in that case was that notice given to them by the appellant was ineffectual to make time of the essence of the contract, inasmuch as the time allowed by it to do all that remained to be done by them was, under all the circumstances of the case, unreasonably short. In the circumstances of Stickney v. Keeble, the House of Lords held that the notice to complete given in that case was reasonable. To argue, as was projected in the instant case, that a reasonable extension of time should have been given to enable the appellant to

obtain and serve the letter of commitment is to ignore the effectual nature of the notice making time of the essence. Indeed, the arguments propounded by Mr. Rattray before us are similar to two propositions advanced by counsel for respondents in Stickney v. Keeble, which Lord Atkinson described as untenable. Those propositions are recited, [1914-15] All E.R., at page 79, H-I:

> "I feel myself quite unable to assent to the two propositions following, which, as I understood, were laid down by counsel for the respondents. (i) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale and purchase of land-though, indeed, it be measured by years-a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone. (ii) That where no time for completion is fixed in the contract, and the law imports into it a provision that it is to be completed in a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he would do while it was running. If I misunderstood him, I apologise. I think the authorities I have cited show that these propositions are untenable".

Lord Parker stressed that the time given by the notice to complete must be a reasonable one. At page 82 H, [1914-15] All E.R., Lord Parker said:

> "In considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case".

'A reasonable time' is with reference to the time within which the party upon whom the notice is served will be required to abide by, and fulfil, the obligations which he undertook under the agreement. In the case before us it was not argued that the time limited by the notice was not reasonable. Rather the argument was directed to show that the appellant should have had a reasonable time after

the fourteen days from the 6th May 1982, within which to obtain and present the letter of commitment. To bolster this aspect of the argument, attention was directed to the terms of a letter dated June 15, 1982 from Mrs. Tomlinson, on behalf of her client, to Messrs. Mossado, Woodham, and Pickersgill, the Attorneys-at-Law for the appellant. The letter is set out hereunder:

> "re: Sale of Pt. Nightingale Grove, St. Catherine R.S. Lawson to P.L. Colquhoune.
>
> With reference to your letter dated 25/5/82 enclosing Notice to Cancel Contract (dated 27/5/82). I am to inform you that under the terms of the Sale and Purchase Agreement the period during which either party was entitled to rescind ended on 20.5.82. A photo-copy of the Agreement is attached.
>
> I have however been instructed to inform you that my client is willing to extend to your client mortgage facilities in the amount of $160,000.00 on the following terms:-
>
> Security: a First Mortgage on the 2 Titles involved (Volume 1112 Folio 291 and Volume 1111 Folio 312)
>
> Rate of Interest: 15% per annum
>
> Period of Loan: Loan to be amortized over a period of 15 years subject to repayment upon 180 days notice,
>
> Monthly payment: $2,280.00 (which will be credited to principal and interest); and
>
> Insurance: To insure in the name of the Lender and for their full insurable value the buildings on the said lands with an Insurance Co., to be approved by the Lender.
>
> The costs of preparing, Stamping and registering the Mortgage will, of course, be payable by your client.
>
> Should your client wish to avail himself of this offer, kindly sign and return to me the attached carbon copy of this letter".

The appellant rejected this offer. By letter dated 17th day of June 1982, the appellant through his Attorneys-at-Law advised that he was unable to accept that offer, on the ground that he had specifically agreed and desired to deal with a reputable financial institution as regards the mortgage. In contrast, the respondent was not such within the contemplation of the Agreement for sale.

Two points developed from this and since they were urged by Mr. Rattray it is right that out of respect these points be dealt with. He sought to persuade us that the offer in that letter should be interpreted as an attempt to enable the appellant to approach a lending agency, considering, on his argument, that it was an extension of the time for raising the mortgage, and therefore the time for rescission would naturally be extended. But the appellant himself had served notice to cancel the agreement, this was not accepted by the respondent who regarded the contract as still in esse, hence the offer of this new mortgage which the appellant refused to accept. It is clear that when this offer was made, the 'within 14 days of the 6th May 1982' time limit had long passed, the notice to cancel was itself out of time, and the agreement for sale, by the time these above-mentioned letters were written had become absolute and unconditional. The appellant had been offered an alternative means of raising the mortgage, which he did not accept, and he cannot therefore be heard to say that the offer revived the terms of Special Condition (ii). There was no waiver of the condition. It was not a contract outside of, or subsidiary to, the Agreement for sale. It had a potential effect on the agreement for sale, but only if there was a failure to obtain the letter of commitment and the requisite notice was given within the time which

had been mutually agreed.

This is certainly not a ground upon which to apply the statutory direction regarding stipulations as to time in contracts.

There are other reasons why this judgment must reject the argument that stipulations as to time in contracts since the Judicature Act 1873 have been interpreted to be such time as stated or any reasonable time thereafter, and that this rule is applicable not only to completion, but to any other thing required to be done by a certain time. Let it be noted that the evidence does show that even if the argument for a reasonable time after the period limited is correct, at no time did the appellant indicate that within a reasonable time he would be able to comply with Special Condition (ii). It should be stressed that in this case the deposit was not forfeited merely because the appellant failed to present the letter of commitment within the time limited, but was forfeited because the respondent had made time of the essence, indicating for one thing, that he was ready and willing to complete. Thereafter the appellant failed to comply with the notice to complete.

The question of the performance within a reasonable time of the agreed completion date was exhaustively examined by the House of Lords in Raineri v. Miles and another (Wiejski and another, third parties). [1982] 2 All E.R. 145 H.L., affirming the decision of the Court of Appeal (E), [1979] 3 All E.R. 763; [1981] A.C. (C.A. & H.L. (E)) 1050.

Mr. Muirhead cited to us the report of the Court of Appeal proceedings. In that Court Buckley, Templeman and

bridge, L.JJ., were unanimous in dismissing the appeal, but since the matter was eventually aired before the House of Lords, I will incorporate these judgments in my consideration of this subject-matter. Indeed, Buckley, L.J. significantly stated the perspectives of the case as follows.

> "This case raises a point of general interest on the law of the sale of land. It seems surprisingly, to be devoid of direct judicial authority. If one party to a contract for the sale of land fails to complete the contract on the stipulated completion date for reasons unconnected with the making or accepting a good title to the land or other conveyancing reasons the other party then being able, ready and willing to complete, whereby the innocent party suffers damage and if the innocent party thereafter serves a notice to complete the contract within a stipulated reasonable time and the party in default does complete the contract within that time can the innocent party recover the damage he has suffered by reason of the original default".

There, the vendor of the land had failed to complete on the date fixed for completion. This failure was itself due to the failure of the third party/appellant to complete a contract for sale of a house to the defendant/respondent resulting in the defendant/respondent being in breach of his contract for the sale of his house to the plaintiff, whereby the plaintiff suffered damage. The defendant/respondent claimed an indemnity from the third party. Time was not of the essence between the third party and the defendant/respondent, it was made so as between the plaintiff and the defendant/respondent by the service of a notice to complete. The plaintiff did complete within a reasonable time after service on him of the notice to complete. Three essential questions arose:

i) the effect of delay in completion; and

ii) whether the third party was in breach where the contract was completed within a reasonable time of the date of completion if time was not of the essence;

iii) whether service of notice to complete deprived the defendant of any remedy accruing to him on the original failure of the third party to complete.

Their Lordships in the House of Lords dismissed the appeal by the third parties. The headnote gives the substance of that decision - [1980] 2 All E.R. 145, [1981] A.C. 1050:

"1) Failure to complete a contract for sale of land on the date specified in the contract constituted a breach thereof and entitled the other party to recover any damages properly attributable thereto, provided that the failure to complete was not due to some conveyancing difficulty or some difficulty with regard to title, notwithstanding that the time for completion was not expressed to be of the essence of the contract, for the fact that time had not been declared to be of the essence did not mean that the express date for completion could be supplanted by the court's treating it as a mere target date and in effect enabling the defaulting party to insert into the contractual provision some such words as 'or within a reasonable time'. The effect of s 41 of the Law of Property Act 1925 was not to negative the existence of a breach of contract where one had occurred but in certain circumstances to bar any assertion that the breach amounted to a repudiation of the contract. It followed therefore that, by failing to complete with vacant possession on 12th July, the third parties had committed both at law and in equity a breach of their contract with the defendants, but although that breach could not have been relied on by the defendants as a ground for avoiding an action for specific performance it afforded no ground for construing the contract otherwise than in accordance with its clear terms.

2) The service of a notice to complete under condition 19, which could only be served after the date fixed for completion had passed, by which time the innocent party had had accrued right to damages, added to the remedies available to the party serving the notice against the defaulting party in the event of the party served failing to comply with it without excluding the existing remedies. Accordingly the defendants had not been deprived of any cause of action in damages against the third parties which had accrued before they served the notice to complete".

What is interesting about this case is that according to Lord Edmund Davies at page 154a., 'the appellants argued that, in the absence of a clause expressly making time of the essence of that contract, the law regards a contract for the sale of land as unbroken for all purposes even if the date for completion is not adhered to provided that the party at fault nevertheless completes within a reasonable time thereafter and that s. 41 of the Law of Property Act 1925 (like its predecessor, s. 25(7) of the Supreme Court of Judicature Act [1873]) enjoins the courts to treat the present contract in that way'.

This argument Lord Edmund Davies described as 'unacceptable'. He opined that:

> "Although as Buckley, L.J., said in the Court of Appeal [1979] 3 All E.R. 763 at page 765; [1980] 2 W.L.R. 189 at page 192:
>
> .... direct authority is lacking, there are substantial grounds for holding that (with one exception referred to later) failure to complete a contract for the sale of land on the specified date constitutes a breach thereof and entitles the other party to recover any damages properly attributable thereto. The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. No case has been cited to your Lordships where they denied all relief to the petitioner who proved that the respondent had delayed in the due performance of his contract. But what they did in proper circumstances was to ameliorate the asperities of the common law. They differed from the common law courts in the granting of remedies and not in the recognition of rights, and, so, far from altering the substantive common law, they followed it and applied it in their own courts when they thought it right to do so. 'Contractual terms as to completion afford but one example of these general principles. At law time was always considered to be of the essence of the contract and (until a late stage) the party who failed to complete on the due date was without defence or remedy, so that on the vendor's default, the purchaser could repudiate the contract and recover his deposit together with the costs of investigating title, or claim such other

"damages as would meet his case'. And Phelps v. Prothero (1855) 7 DE.G.M. & G. 722 at 733-734 44 E.R. 280 at 285 shows that, 'had he instead proceeded in a court of equity he could recover damages whether or not he had also sought specific performance' ".

Contrary to the view of Viscount Dilhorne, Lord Edmund Davies further expressed the view at page 155f [1980] 2 All E.R.:

"The fact that time had not been declared to be of the essence does not mean that the express date for completion could be supplanted by the court's treating it as a mere target date and, in effect, enabling the defaulting party to insert into the contractual provision some such words '....... or within a reasonable time thereafter' ".

The pointed remark of Lord Fraser of Tullybelton at page 140 c-d [1980] 2 All E.R., can be repeated:

"A promise to do something on a certain date is not implemented by doing the thing within a time, reasonable, or otherwise, after that date. The argument to the contrary is made, if anything, more difficult by the words 'or before' which introduce a limited degree of elasticity and make it all the more impossible, in my view to imply any further elasticity".

In his further judgment Lord Fraser developed three propositions after he had examined the relevant authorities. The first proposition was:

"All these statements show that the noble and learned Lords who made them regarded any breach as to time in a contract for the sale of land as unquestionably a breach of the contract, although they said that a party in breach of that stipulation might be relieved of the full consequences of the breach to the extent of allowing him to obtain specific performance of the contract. There is no suggestion that he would be relieved from any liability for damages.

Failure to complete a contract for the sale of land on the due date has been treated by the court as a breach of the contract giving rise to a claim for damages if any have been suffered in several cases to which we were referred".

Again at page 163 d-e [1980] 2 All E.R.:

> "The principle which in my opinion emerges from the authorities to which I have referred is that breach of a contractual stipulation as to time which is not of the essence of a contract will not be treated as a breach of a condition precedent to the contract, that is, as a breach which would entitle the innocent party to treat the contract as terminated or which would prevent the defaulting party from suing for specific performance. Nevertheless it is a breach of the contract and entitles the injured party to damages if he has suffered damages. There are dicta in other cases to the effect that a provision for completion by a certain date should be read as a condition for completion on that date or within a reasonable time thereafter, but all except one were obiter dicta and none was made in a case where the issue was entitlement to damages".

Thirdly, at page 165 [1980] 2 All E.R., [1981] A.C. at page 195, with reference to the right to give notice under General Condition 19(2):

> "So the right to give notice under that condition only arose after the date fixed for completion had passed without completion taking place, that is to say, in the circumstances of this case and if my view of the law is correct after the appellants were in breach of the contract. The effect of the notice was simply to make the further period of 28 days fixed by the notice of the essence of the contract, but it did not expunge or cancel the breach which the appellants had already committed. If such a notice had the effect of cancelling the breach, the appellants could have cancelled their own breach of contract by serving a notice as soon as they were able to complete, as the condition provides that either party may give notice, and that would be absurd. Accordingly I reject the argument".

It will be observed that that case was different from the instant case in the substantial matter for discussion. There the issue was a default which delayed the completion of the contract which was nevertheless completed within the time made of the essence" by notice to complete. That breach was held to sound in damages. In the present

case the failure to obtain and produce the letter of commitment within the stipulated time did not by itself terminate the contract of sale. Had the proper notice of failure been given within the time stated for the notice, the respondent would have been bound by the rescission of the appellant. As it turned out, the contract became absolute and enforceable by its terms. Time was not originally of the essence where completion was concerned, and the failure to take advantage of Special Condition (ii) was compounded when the appellant failed to complete at all.

In the circumstances of this case the appellant's claim for the return of the deposit of $30,000.00 cannot be successful. This amount was no more than the 10% of purchase price which is the normal amount deposited on a contract for the sale of land. It was not an unconscionable or extravagant impost on the appellant. It was not a penalty, being not disproportionate to the purchase price. The money was expressly paid as a deposit, and since the buyer is in default he cannot recover the money at law at all. This is not a case which satisfies the requirements for the intervention of equity, to relieve the buyer and to compel the vendor to repay the money. See per Denning, L.J., in Stockloser v Johnson [1954] 1 All E.R. page 630 at page 637 F-G.

CARBERRY, J.A.:

I have had the opportunity of reading the judgment of White, J.A., in draft, and I agree with it. I add a few words of my own only because the point at issue was novel, and because the argument advanced by counsel for the appellant, though ingenious and not without some historical support, has recently been demolished by both the English Court of Appeal judgment in Raineri v. Miles [1980] 2 W.L.R. 189, (which was cited to us) and by the House of Lords judgment in the same case, reported at [1981] A.C. 1050 which affirmed the Court of Appeal.

Briefly put, the Plaintiff/Appellant was the purchaser under the terms of a written agreement of two lots of land, part of Nightingale Grove, in the parish of Saint Catherine. He agreed to purchase the same from the Defendant/Respondent vendor for the sum of $300,000.00. The agreement was made on the 24th March, 1982, and it provided for a deposit of $30,000.00 (ten percent of the purchase price) to be paid in two instalments of $15,000.00 each, the first on the signing of the agreement, and the second moiety on or before the 1st April. The balance of the purchase price was due on completion, which was set for the 30th June, 1982. Both sums were paid. There was no difficulty in making title, as both lots were covered by registered titles.

It appears from the evidence offered that the purchaser was in process of selling a house of his own elsewhere, and counted on that money, and as to the rest the contract contained a special clause, special condition (ii). It reads thus:

> "(ii) It is understood and agreed that the Purchaser shall apply to a lending institution for the loan of not less

> "than $160,000.00 on the security of the said premises; and in the event of the Purchaser not obtaining and delivering to the Vendor's Attorney-at-Law a written commitment for such loan by the 6th day of May 1982 either party shall be entitled to rescind this Agreement within 14 days from that date, failing which this Agreement shall remain absolute and binding on the Parties hereto. In the event of this Agreement being rescinded all monies paid hereunder shall be refunded without interest and free from deductions SAVE and EXCEPT that the Purchaser hereby agrees to pay to the Vendor's Attorney-at-Law fees in the sum of $250.00 for professional services rendered in respect of work incidental hereto and the Purchaser irrevocably authorises the Vendor's Attorney-at-Law to deduct that amount from the Deposit paid to the Vendor's Attorney-at-Law under this Agreement".

Before the learned trial judge there was some argument as to the date which appeared in special condition (ii). The attorney-at-law who drafted the contract kept the original and gave to each party a copy of it. In the original and the vendor's copy the date is recorded as the 6th May. In that given to the purchaser the date was inadvertently left blank. The purchaser alleged that the date should have been the 15th May. The learned trial judge found on this issue for the vendor, that the date was the 6th May, 1982. This finding has not been challenged before us and is clearly supported by the evidence.

Special condition (ii) is a little curious; it envisages that the purchaser will apply to a "lending institution" for a loan of $160,000.00 on the security of the land being bought, and that he would deliver a "letter of commitment" showing that the loan had been approved apparently before the 6th May. In the event of the purchaser not obtaining and delivering this written commitment, <u>either party</u> "shall be entitled to rescind this Agreement within 14 days from that date". Failing this cancellation by either party, the agreement was to

remain absolute and binding on the parties thereto. If cancellation did take place, the deposit or "all monies paid hereunder" would be refunded, without interest, subject to a deduction of $250.00 to go to the vendor's attorney-at-law.

In the event two things happened. It appears that the purchaser was unable to get his loan or letter of commitment from the source he had had in mind. How hard he tried does not appear. He then sent a notice, under the hand of his attorneys-at-law, dated the 27th May 1982, and delivered on the 1st June, 1982, to the vendor's attorney-at-law, purporting to exercise his right under special condition (ii) to rescind the agreement. Though the notice does not say so explicitly, the clear intent was that he wanted to recover his deposit. It has been conceded before us that whether the date in special condition (ii) of the agreement was the 6th May or the 15th May, this notice was clearly given out of time; according to the terms of the agreement it was now to "remain absolute and binding on the parties hereto".

The second thing that happened was that the attorney-at-law for the vendor wrote to the attorneys-at-law of the purchaser, on the 15th June, 1982, and pointed out that the period for rescission under the special condition had ended on the 20th May, but offered to allow the $160,000.00 to remain outstanding on a mortgage to himself, and specified the salient terms of the proposed mortgage. The vendor was clearly trying to save the sale. Unfortunately the purchaser would have none of it. He replied that he was unable to accept the vendor's offer, as he did not consider the vendor a "lending institution".

The original completion date was still some way off, viz., the 30th June, 1982. Acting with marked moderation, when it arrived, the vendor served a notice requiring completion by the 31st July, 1982, and making time of the e essence, and warning that failing completion the deposit would be forfeited.

The purchaser replied at once by taking out an originating summons, dated the 6th July, 1982, claiming that he had validly rescinded the agreement for sale, exercising his rights under special condition (ii), and demanding the return of his deposit. This summons raised a number of other issues which were explored before the trial judge, but have not been canvassed here. They were all decided against the purchaser.

Clearly the purchaser had evinced in the clearest terms that he was repudiating the contract: the main point in issue was whether he was entitled to recover his deposit, either on the basis that he had validly rescinded the contract under special condition (ii), or by praying in aid some arcane principle of equity. Walker, J., answered "no". He found in favour of the Defendant vendor, i.e., that the deposit had been rightly forfeited.

White, J.A., has set out in full the nuances of the arguments advanced on behalf of the Appellant purchaser. I hope I do no injustice to their ingenuity by saying that in essence the argument was that where a contract for the sale of land sets specific dates for the doing of various things, all of those dates are to be read as if they contained after them the words "or within a reasonable time thereafter": that is unless the said dates had been specifically declared to be "Time to be of the essence". This was said to be a consequence of the rule that "in Equity time is not of the essence", and the fact that since the

Judicature Acts it had been declared that the equitable rule should prevail. The provision referred to is to be found in The Judicature (Supreme Court) Act, Sec. 49(g). It reads:

> "Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity".

Traditionally the arguments in these cases have usually centered on the date of completion and the importance of it. In this respect, equity, in its anxiety to save the contract, has usually or often permitted the purchaser to complete by paying up the balance of the purchase money, even though he was out of time. This approach is set out very clearly in the speech of Lord Parker of Waddington in Stickney v Keeble [1915] A.C. 386 at pages 415-416. He said:

> "..........., in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.
>
> In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties,

> "for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.
>
> It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time".
>
> (emphasis supplied)

It will be noted that Lord Parker pointed out that equity would intervene only if this could be done without injustice to the parties, and further that that intervention was only done for the purpose of granting specific performance of the contract of sale.

In the instant case specific performance is the very last thing that this purchaser sought. It was clear, I think, that long before the time for completion arrived he had exhibited a firm resolve not to complete and to repudiate the contract.

Nevertheless the argument for the purchaser is that the approach equity takes to provisions relating to the date or time of completion applies to all other provisions with the result that they can all be broken with impunity, as if the words "or within a reasonable time thereof" were written after them.

The point arose in Raineri v Miles [1981] A.C. 1050 with specific reference to the effect of a breach of the contractual date of completion, in a contract that had in fact been later completed within the extended time fixed by a notice to complete which made time of the essence.

Could the failure of the purchaser to meet the earlier contractual date for completion be termed a breach of the contract giving rise to a claim for damages, even though the contract had been later completed? The Court of Appeal (unanimously) and the House of Lords (with one dissentient) answered yes, and in doing so they found it necessary to consider the true meaning of the equitable approach to time not being of the essence, and the statutory provision to that effect which was similar in terms to our own provisions set out above. All the judgments used as their starting point the passage set out earlier from Lord Parker's speech in Stickney v Keeble (ante). The purchaser argued there, as here, that the completion date should be read as if it said "complete on that date, or within a reasonable time thereafter". In the Court of Appeal Buckley, L.J., said at pages 1058-1059:

> "At common law a term of a contract stipulating when the contract should be performed was always regarded as an essential term of the contract, but, as Lord Parker pointed out in Stickney v. Keeble [1915] A.C. 386, 415, in contracts for the sale of land equity, having a concurrent jurisdiction, did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieve the party in default by restraining proceedings at law based on such failure: see also per Lord Loreburn, at page 400, and Lord Atkinson, at p. 401. Since the statutory fusion of law and equity in 1873 it has been enacted (Supreme Court of Judicature Act 1873, section 25 (7) now re-enacted in slightly different language in the Law of Property Act 1925, section 41) that stipulations of a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract are also to be construed and have effect at law in accordance with the same rules. The third parties rely on section 41 on the point of construction. But, as was pointed out by Lord Cairns and Rolt L.J. in Tilley v. Thomas (1867) L.R. 3 Ch. App. 61, the construction of a contract

> "must be the same in equity as in a court of law: see also Stickney v. Keeble [1915] A.C. 386, per Lord Atkinson, at p. 402, and Lord Parker, at p. 417, and Lock v. Bell [1931] 1 Ch. 35, per Maugham J., at p. 43. A clause which provides in terms that the contract shall be completed on a named day cannot, in the absence of a clear context, be construed as meaning that it shall be completed on some later day. Its effect may be modified by equitable rules, but the meaning of the language cannot be.
>
> In equity a party to a contract who is seeking equitable relief was not barred merely by an earlier failure on his part to comply precisely with a completion date. So long as a court of equity would have disregarded a failure to comply with a time stipulation for the purpose of granting the equitable remedy of specific performance, it would have restrained an action at law based on that failure. In considering whether to restrain an action at law the Court of Chancery took cognizance of everything which had happened up to the date of the decree restraining the action at law. Since the fusion of law and equity the High Court is to have regard to all those events and is to grant or withhold the common law remedy of damages for breach of contract upon the principles which would have actuated the Court of Chancery in permitting or restraining proceedings at law: Stickney v. Keeble [1915] A.C. 386, 417, per Lord Parker. This is, in my opinion, the whole effect of the Law of Property Act 1925, section 41 relevant to this case. It does not negative the existence of a breach of contract where one has occurred, but in certain circumstances it bars any assertion that the breach has amounted to a repudiation of the contract".
>
> (emphasis supplied)

In that case, as in this, there had been a service of a notice calling on the purchaser to complete, by an extended date, and making time of the essence. Did this in effect absolve the purchaser's earlier breach? As to this Buckley, L.J., said at page 1060:

> "The service of a notice under the condition which pre-supposes that the sale has not been completed on the contractual date, makes new rights and remedies available to the party who serves the notice in the event of the party served failing to comply with it. There is nothing in its terms which has the effect of discharging any accrued right or cause of action vested in the party who serves the notice. ....

"Accordingly, in my judgment, the service of the notice to complete in the present case did not deprive the defendants (vendors) of any cause of action in damages which may have accrued to them before the service of the notice by reason of their (purchaser's) failure to complete the contract on July 12, 1977".

(emphasis supplied)

A very few citations from the House of Lords speeches affirming the Court of Appeal must suffice. Lord Edmund Davies, at page 1081 observed:

"The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. No case has been cited to your lordships where they denied all relief to the petitioner who proved that the respondent had delayed in the due performance of his contract. But what they did in proper circumstances was to ameliorate the asperities of the common law. They differed from the common law courts in the granting of remedies and not in the recognition of rights, and, so far from altering the substantive common law, they followed it and applied it in their own courts when they thought it right to do so".

at pages 1082-3:

"The fact that time had not been declared to be of the essence does not mean that the express date for completion could be supplanted by the court's treating it as a mere "target" date and, in effect, enabling the defaulting party to insert into the contractual provisions some such words as "....or within a reasonable time thereafter".

Lord Edmund Davies went on in effect to observe that equity interfered with the remedy at law only for the purpose of granting specific performance. (Citing Lord Parker in Stickney v. Keeble [ante]).

Lord Fraser of Tullybelton at page 1088 remarked:

"If the question in this appeal were one of pure construction it would in my opinion be out of the question to construe the words "on or before July 12" as meaning "on or before July 12 or within a reasonable time thereafter". A promise to do something on a certain date is not implemented by doing the thing within a time, reasonable or otherwise, after that date........".

(emphasis supplied)

The effect of the judgments in Raineri v. Miles is clear. Equity mends no man's bargains, and "the legal construction of a contract..... must be, in equity the same as in a court of law. A court of equity will indeed relieve against and enforce, specific performance, notwithstanding a failure to keep dates assigned by the contract, either for completion or for the steps toward completion, if it can do justice between the parties.........". Per Lord Cairns, L.J., in Tilley v. Thomas [1867] L.R. 3 Ch. App. 61 at 67.

The case before us, however, is not a case in which the purchaser is invoking "the elasticity of punctuality" for the purpose of securing equitable relief by way of specific performance. It is a case in which the invocation is being made to get out of the contract. The aid of equity is sought not to fulfil but to destroy. This purchaser was ill advised to spurn, as he did, opportunities offered to him by the vendor to complete. It has had the result of making his deposit forfeitable and forfeited.