IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO E-354 of 1989

BETWEEN	DOJAP INVESTMENTS LIMITED	PLAINTIFF
A N D	WORKERS TRUST AND MERCHANT BANK LIMITED	DEFENDANT

MR. ENOS GRANT AND MISS J. HALL FOR PLAINTIFF

MR. R. HENRIQUES, Q.C. AND MR. DAVID BATTS FOR DEFENDANT

HEARD: JANUARY 8, 9, 10, 11, 12, 15, 16, 18, 30, 31
FEBRUARY 2, 6, 7, 8, 21 and
JUNE 25. 1990.

ZACCA, C.J. :

In an action against the defendant, the plaintiff asked for an order for specific performance. In the alternative a claim was made for relief from forfeiture.

On October 5, 1989, the defendant under powers of sale of a mortgage, offered for sale at public auction six parcels of land (hereinafter referred to as "the property"). The property was 57 - 59 Half Way Tree Road and 19 - 21 Carlton Crescent in the parish of St. Andrew. The auction sale was conducted by the firm of D.C. Tavares and Finson Company Limited. The property was registered in the name of Dona Clar Properties Limited but occupied by Vehicles and Supplies Limited.

Mr. Donald Panton is the Managing Director of Vehicles and Supplies Limited and a Director of Dona Clar Properties Limited. He is also the Managing Director of the plaintiff Company Dojap Investments Ltd.

The defendant bank held a first mortgage from Dona Clar Properties Limited and the Jamaica Citizens Bank Limited also held a mortgage.

/ .....

When the mortgage was granted by Jamaica Citizens Bank to Dona Clar Properties Limited, it was agreed between the defendant bank and Jamaica Citizens Bank Limited that the second mortgage would rank in priority to the first mortgage held by defendant bank. The effect of this was that Jamaica Citizens Bank Ltd. became first mortgagee and the defendant bank became second and third mortgagees.

Mr. Raymond Clough, Attorney-at-Law attended the auction sale on October 5, 1989. He attended on behalf of the plaintiff company and took part in the bidding. The property was sold to him for $11,500,000.

The auction sale was subject to certain conditions of sale which were made known to Mr. Clough prior to the bidding. Under the conditions of sale a deposit of 25 per cent of the purchase price was required and Mr. Clough paid the Auctioneer the required deposit which amounted to $2,875,000.00.

It is necessary to set out the relevant conditions of sale :

4. Immediately after the sale the purchaser shall pay to the Auctioneer at his Auction Rooms a deposit of TWENTY FIVE PERCENT of the amount of the purchase money of the property and sign the agreement endorsed hereon for the completion of the purchase according to these conditions. The purchaser shall pay the remainder of the purchase money together with the amount payable by the purchaser under paragraph 6 hereof within FOURTEEN (14) days from the date of the sale to the vendor's Attorney-at-Law SHIRLEY-ANN EATON---- of No. 153-155 East Street, Kingston. Immediately upon such payment the vendor pursuant to the provisions of Section 106 of the Registration of Titles Act will execute a transfer to the Purchaser and lodge same for registration.

5. If from any cause whatsoever other than the wilful default of the vendor the purchase shall not be complete on or before the expiration of thirty (30) days from the date of the auction the purchaser shall pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of the purchase money from the time hereby fixed for the payment of the same until the same shall be actually paid. This condition is without prejudice to any right or remedy reserved to the vendor by any other of these conditions.

13. If the purchaser shall fail to observe or comply with any of the foregoing stipulation on his part his deposit shall be forfeited to the vendor who shall be at liberty (without tendering any transfer) to re-sell the property either by public auction or private contract at such time and in such manner and subject to such conditions

as the vendor may think fit and any deficiency in price which may result on and all charges costs and expenses attending a re-sale or attempted re-sale, together or rendered useless by such default, shall be made good and paid by the defaulting purchaser at the present sale and be recoverable from him by the vendor as liquidated damages. Any increase of price on a re-sale shall belong to the vendor.

15. Whenever under these conditions an act shall be performed or a payment made at or within a stated period time shall be of essence of the contract.

Condition 4 provided for the balance of the purchase price to be paid within 14 days from the date of the sale. The effect of this is that the balance should have been paid by October 19, 1989.

The evidence disclosed that certain discussions were taking place between Mr. Clough and the defendant bank after the public auction sale and prior to October 19, 1989.

On 17th October, 1989 Miss Shirley Ann Eaton acting on behalf of the defendant bank wrote to Mr. Raymond Clough enclosing a draft transfer and a statement of account. Her explanation for waiting until this date was because of the discussions which were taking place. It appeared that there was an error in the statement of account and Mr. Clough telephoned Miss Eaton informing her of the mistake.

In a letter dated October 18, 1989 Miss Eaton forwarded to Mr. Clough an amended statement of account.

On October 19, 1989 Mr. Clough wrote to the defendant enclosing a transfer duly executed along with a letter of undertaking from the Jamaica Citizens Bank. The letter from the Jamaica Citizens Bank Limited which was dated October 18, 1989 and addressed to the Workers Trust and Merchant Bank was as follows :

/ ....

"Dear Sirs,

Re: 19-21 Carlton Crescent and 57-59 Half Way Tree Road

This is to confirm that we are prepared to make a loan of $10,000,000 to Do Jap Investments Limited (nominee of Mr. Raymond Clough) to enable Do Jap to complete the purchase of the above properties.

We have been authorised to disburse the loan funds by paying $8,992,730.50, to you to be applied towards the purchase price of the properties and costs of transfer.

Please note that our obligation to make the loan is subject to the satisfaction of certain conditions precedent (including the granting of certain securities to us) which will all have to be satisfied and complied with prior to any disbursement (including disbursement to you).

Kindly let us have :

(a) Executed Transfer impressed with stamp duty and transfer tax ;

(b) your cheque to cover registration fees; and

(c) all relevant duplicate Certificate of Titles.

On our undertaking not to deal with same in any way prejudicial to your interest unless in a position to pay you the aforesaid sum of $8,992,730.50 and to return same to you on your request at any time prior to our paying to you the aforesaid sum.

Yours truly,

Jasmine L. Chin (Mrs.)
General Manager
Credit & Marketing

Elon Beckford,
Managing Director "

Assuming that this letter of undertaking was acceptable then the balance of the purchase price would have been paid within the time stipulated in Condition No. 4.

The defendant, however, regarded this undertaking as a conditional undertaking and refused to accept it. In reply the defendant on October 19, 1989 wrote to the Jamaica Citizens Bank and Mr. Clough in the following terms :

"Mr. Elon Beckford,
Managing Director,
Jamaica Citizens Bank Limited,
King Street,
Kingston.

Dear Sir,

RE: 19-21 Carlton Crescent and 57-59 Half Way Tree Road
Dojap Investment Limited

I refer to your letter dated October 18, 1989 to advise that the contents therein do not fulfill the express terms and conditions of sale by which the Purchaser is legally bound.

Under the conditions of sale the Purchaser must pay the balance of purchase price and costs within Fourteen (14) days from the date of the sale i.e the aforestated payment must be made on or before October 19, 1989.

An undertaking from you to pay the balance of purchase price and costs would have to specifically undertake to pay over the said balance on or before Thirty (30) days from the date of the auction which took place on October 5, 1989 as well as undertaking to pay interest at the rate of Twelve Dollars ($12.00) per centum per annum on the unpaid amount of the purchase price from the time fixed for payment i.e. as of October 19, 1989.

Upon receipt of payment, my clients would execute the Transfer and lodge same, for registration.

I trust that the foregoing will serve to clarify the terms and conditions under which captioned premises was offered for sale.

Yours truly,
SHIRLEY-ANN EATON
Attorney-at-Law.

c.c. Mr. Raymond Clough
Mr. Trevor Patterson - Myers Fletcher & Gordon"

The letter to Mr. Clough was as follows :

"Messrs. Clough, Long & Co.,
81 Harbour Street,
Kingston.

Attention: Mr. Raymond Clough

Dear Sirs:

RE: Sale of 57-59 Half-Way-Tree Road and
19-21 Carlton Crescent, St. Andrew

I refer to your letter dated October 19, 1989 and advise that under the terms of the Particular and Conditions of Sale, you were to send to me the balance of purchase price and costs within Fourteen days from the date of the sale which took place on the 5th October, 1989.

Further, any acceptable undertaking to pay over the balance of purchase price and costs would have to specifically undertake to pay over the said balance on or before thirty (30) days from the date of the auction and undertake to pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of the purchase money from the time fixed for payment, that is, the 19th October 1989.

My clients have generously agreed to allow you a further twenty-four hours within which to comply with the above, but without prejudice to any right or remedy reserved to my clients under the conditions of sale.

The aforestated does not constitute a waiver of my clients' right to remedy contained in the conditions of sale.

/ ....

Yours truly,

SHIRLEY-ANN EATON
COMPANY SECRETARY &
MANAGER, LEGAL DEPARTMENT.

c.c. Mr. Elon Beckford, Managing Director, Jamaica Citizens Bank
Messrs. Myers, Fletcher & Gordon, Manton & Hart "

On receipt of these letters, the Jamaica Citizens Bank in a letter dated October 20, 1989 replied as follows :

"Miss Shirley-Ann Eaton
Attorney-at-Law,
153-155 East Street
Kingston.

Dear Madam,

Re: Do Jap Investment Limited - Purchase of 19-21 Carlton Crescent and 57-59 Half-Way-Tree Road

We acknowledge receipt of your letter dated October 19, 1989 in response to ours of October 18, to Workers Trust and Merchant Bank Limited undertaking to pay them the sum of EIGHT MILLION NINE HUNDRED AND NINETY TWO THOUSAND SEVEN HUNDRED AND THIRTY DOLLARS AND FIFTY CENTS ($8,992,730.50) being the proceeds of a loan to the captioned customer on fulfilment of certain conditions.

As requested by you, we further undertake to pay interest at the rate of 12% per annum on the aforesaid sum of $8,992,730.50 from October 19, 1989 to the date of payment which we verily believe will be on or before November 3, 1989. In all other respects we ratify and confirm ours to you of October 18, 1989 and in particular we reaffirm that our obligation to make the loan to Do Jap Investment Limited is subject to the satisfaction of certain conditions precedent (including the granting of certain securities to us) which will all have to be satisfied and complied with prior to any disbursement (including disbursement to you).

Yours sincerely,
JAMAICA CITIZENS BANK LIMITED

Elon Beckford,
Managing Director

Jasmine Chin (Mrs.)
General Manager
Corporate Banking "

This letter was received by the defendant on Friday October 20, 1989 and on Monday, October 23, the defendant wrote to the Jamaica Citizens Bank and to Mr. Clough.

The letter to the Jamaica Citizens Bank stated:

"Mr. Elon Beckford,
Managing Director
Jamaica Citizens Bank,
4 King Street
Kingston.

Dear Sir,

Re: 19-21 Carlton Crescent and 57-59 Half Way Tree Road - Dojap Investments Limited

/........

"I refer to your letter dated October 20, 1989 and advise that your "undertaking" being as it is conditional upon the occurrence of many uncertain events is not acceptable to my clients.

Yours faithfully,
SHIRLEY-ANN EATON
COMPANY SECRETARY/
MANAGER, LEGAL DEPT.

cc. Messrs. Clough, Long & Co.
Attorneys-at-Law
81 Harbour Street
Kingston. "

The letter to Mr. Clough was as follows :

"Messrs, Clough, Long & Co.
Attorneys-at-Law
81 Harbour Street
Kingston.

Attention: Mr. Raymond Clough

Dear Sirs,

Re. Sale of 57-59 Half Way Tree Road & 19-21 Carlton Crescent, St. Andrew

I refer to your letter dated October 20, 1989 and advise that letter dated October 20, 1989 from the Jamaica Citizens Bank Limited is not acceptable to my clients given the conditions precedents on eventualities contained therein.

My clients hereby advise that in keeping with Clause 13 of Particulars and Conditions of sale, deposit paid by you is forfeited.

Yours faithfully,

SHIRLEY-ANN EATON
COMPANY SECRETARY/
MANAGER, LEGAL DEPT.

cc Dojap Investments Ltd.
19-21 Carlton Crescent
Kingston 5

Jamaica Citizens Bank
4 King Street,
Kingston "

In the letter to the Jamaica Citizens Bank it was stated that the undertaking was conditional and was therefore not acceptable. The letter to Mr. Clough stated that the letter of undertaking sent by the Jamaica Citizens Bank was conditional and therefore unacceptable and that in the circumstances, in keeping with Condition 13, the deposit paid by the plaintiff was forfeited.

The Attorney for the plaintiff responded in a letter dated October 24, 1989 protesting the action taken by the defendant and stating that the terms and conditions of sale had been varied and made reference to Condition 5.

This letter was in the following terms :

"Workers Trust & Merchant Bank Ltd.,
153-155 East Street,
Kingston.

Attention: Miss Shirley-Ann Eaton

Dear Sirs,

Re. 57-59 Half-Way-Tree Road
19-21 Carlton Crescent, St. Andrew

We refer to your letter dated the 23rd October, 1989, received today at 10.00 a.m., and must protest that your actions are in breach of the Conditions of Sale and correspondence herein varying terms and conditions of same which now forms part of the said Contract/Conditions of Sale.

We also refer you to Clause 5 which reads :

> "If from any cause whatsoever other than the wilful default of the vendor the purchase shall not be complete on or before the expiration of thirty (30) from the date of the auction the purchaser shall pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of the purchase money from the time hereby fixed for the payment of the same until the same shall be actually paid ...."

It is, therefore, certain that we have thirty (30) days from the date of the Auction to complete.

Please accept this as formal notice that we are ready, willing and able to complete the Contract within the next twenty-four (24) hours, certainly within thirty (30) days of the date of the Auction, and shall be sending you the cheque for the remainder of the purchase price of $8,992,730.50 plus costs of Transfer within the next twenty-four (24) hours and on or before the 3rd day of November, 1989.

Yours faithfully,
CLOUGH, LONG & CO.
Per: Raymond Clough

cc. Jamaica Citizens Bank Ltd.
Mr. Trevor Patterson "

On October, 26, 1989 Mr. Clough again wrote to the defendant enclosing a letter from the Jamaica Citizens Bank Limited also dated October 26, 1989. A cheque for $9,612,579.82 representing the balance of the purchase price and interest was also enclosed.

The letter from the Jamaica Citizens Bank Limited stated :

/ .....

"Workers Trust & Merchant Bank Limited
153-155 East Street,
Kingston.
Dear Sirs,

Purchase of 19-21 Carlton Crescent and
57-59 Half Way Tree Road, Kingston 10
(Dojap Investments Limited)

We enclose herewith our cheque in the amount of NINE MILLION TWELVE THOUSAND FIVE HUNDRED AND SEVENTY NINE DOLLARS EIGHTY TWO CENTS ($9,012,579.82) made up as follows :

Balance purchase moneys and costs	8,992,730.50
Interest at 12% on balance purchase money of $8,625,000 in respect of period October 20 to 26, 1989 i.e. 7 days at 12% on $8,625,000	19,819.32
	$9,012,579.82

This cheque is sent on your undertaking to let us have in exchange therefor :

(a) duly executed Transfer in registrable form in favour of the purchaser Dojap Investments Limited to enable us to register the new mortgage which we have taken from the purchaser

(b) the sum of $10,723,706.43 due to us as first mortgagee in respect of the said properties. Interest continues to accrue daily at the rate of $4,293.76.

It is understood that to the extent necessary, you will cooperate with us by signing any other document(s) which will be reasonably necessary to have our mortgage registered.

Yours truly,
JAMAICA CITIZENS BANK LIMITED

ELON BECKFORD
MANAGING DIRECTOR"

The letter from Mr. Clough was as follows :

"Workers Trust & Merchant Bank Ltd.,
153-155 East Street,
Kingston.

Attention: Miss Shirley-Ann Eaton

Dear Sirs,

Re: 57-59 Half-Way-Tree Road,
19-21 Carlton Crescent, St. Andrew

We refer to our letter dated the 24th October, 1989.

Enclosed find :

Letter dated the 26th October, 1989 from Jamaica Citizens Bank Ltd. enclosing cheque for the balance purchase moneys, costs and interest in accordance with the your statement received by us on the 19th October, 1989.

In accordance with the Conditions/Contract of Sale we have completed the purchase of the above premises and ask that you immediately effect transfer herein.

/ .....

interest as of the 20th October, 1989 to today at the rate of 12% in accordance with Clause 5, Conditions of Sale, have been added to the balance purchase moneys of $8,625,000.00.

Yours faithfully,
CLOUGH, LONG & CO. "

The cheque was returned to the Jamaica Citizens Bank by the defendant in a letter dated October 27, 1989.

It is not in dispute that the sale is governed by the conditions of sale and that the plaintiff was aware of these conditions prior to the sale.

At the trial the plaintiff in support of an order for specific performance relied on the following propositions .

1. There was delay on the part of the defendant in forwarding the draft transfer and statement of account. This effectively denied the plaintiff the opportunity of completing the sale by October 19, 1989. The plaintiff was therefore entitled to a reasonable time to complete.

2. The defendant was not in a position to complete the contract on the 19th October or on the 20th October, 1989 in that there was no discharge of the mortgage held by Jamaica Citizens Bank.

3. There was ambiguity between Conditions 4 and 5 in that although Condition 4 provided for a completion date within 14 days of the date of the auction, Condition 5 also provided for a completion date within 30 days of the date of the auction.

4. The letter of the 19th October, 1989 from the defendant to the Jamaica Citizens Bank and Mr. Clough varied the terms of the agreement by extending the completion date to 30 days from the date of the auction.

5. By extending the completion date either to the 20th October, 1989 or to 30 days from the date of the auction, time was no longer of the essence and the defendant was obliged to serve a new notice making time of the essence.

6. In any event the balance of the purchase money was paid on the 26th October, 1989 and therefore paid within 30 days of the date of the auction.

7. By extending the completion date to the 20th October 1989 time was no longer of the essence and the defendant not having served a new notice making time of the essence, then the payment of the balance of the purchase money on the 26th October, 1989 effectively completed the sale.

8. The defendant had no right to forfeiture.

In the alternative the plaintiff claimed relief from forfeiture. It was the case for the plaintiff that a deposit of 25 per cent of the purchase price was not a true deposit but a penalty/ The plaintiff was therefore entitled to relief from forfeiture.

For the defendant it was submitted that there was only one completion date provided for by Condition 4. That this date was extended for 24 hours and that time was still of the essence.

It was the case for the defendant that the extension of time merely substituted the extended date for the original date and that time remained the essence of the contract.

It was also submitted that Condition 5 did not provide for a completion date of 30 days from the date of the auction, nor did the letter of the 19th October, 1989 extend the completion date to 30 days from the date of the auction. The defendant was therefore entitled to forfeit the deposit as the balance of the purchase money was not paid on the 20th October, 1989.

As to the plaintiff's claim for relief from forfeiture, it was contended that the deposit was a true deposit and that the plaintiff was not in those circumstances entitled to any relief.

Delay:

It was the evidence of Miss Eaton that after receipt of the deposit, Mr. Clough made a proposal which was communicated to the Workers Bank with recommendations. She therefore took no action whilst these proposals were being considered by the Workers Bank. The proposals were not accepted and on the 17th October, 1989 she sent the draft transfer and statement of account to Mr. Clough. She admitted in cross-examination that she is under a duty to be prompt in the transaction although there was no stipulated duty under the contract to act promptly.

In Crane and another v. Debono, 1988 3 ALL ER 485, it was held that although it was customary for a completion statement to be sent to the purchaser of property and agreed between the parties prior to completion so that the parties would know in advance of completion what their respective obligations were, / .....

there was no legal obligation on a vendor's Solicitor to provide a purchaser with a completion statement. Furthermore, the purchaser was under a duty to tender the correct purchase price notwithstanding any error in the completion statement as to the amount due. Since the purchaser had not tendered the purchase price on the due date he was in breach of contract.

Sir Nicholas Browne Wilkinson V.C. at p. 488 said :

" I can now turn to the main point which the purchaser himself urged. It is clear on the master's finding that time was of the essence for the completion of the contract on 5 February. That being so, it is surprising to find no completion statement and no attempt to agree the sum due on completion until 10.10 am on that morning, apart from a telephone communication the previous day What is more, in the respects that I have mentioned, the completion statement was wholly defective. What had proceeded in an extremely dilatory matter had suddenly become the most urgent procedure that I personally have come across, viz no completion statement being provided until the very morning of the crucial day. The purchaser asks what was he to do; his solicitors were in funds but what had been asked from them was the payment of a sum which, on the face of the completion statement, was the wrong sum. The purchaser submitted, in effect, that the vendors were in breach of contract in that they failed to send in good time a completion statement specifying the right amount due. He also relied on special condition 12.h which deems any notice given by other parties under the agreement to have been served on the expiration of 48 hours after it had been posted. Applying that to the faxed completion statement he said it had to be deemed not to have been received until two days after the crucial date on 5 February.

I have no doubt that he is wrong on that latter ground. Condition 12(h)is a deeming provision which does not exclude the possibility of proving an earlier receipt. It is not a statement that for all purposes the document shall only be treated as having been received at a particular time.

Sympathise though I do with the purchaser, I do not think his general submission can be right either. Although it is a customary step in conveyancing procedure that completion statements should be sent and agreed so that the parties should be clear well in advance of the date of completion what their respective obligations are, so far as I am aware, that is merely a matter of practice and not of law. So far as the authorities drawn to our attention are concerned, there is no legal obligation on a solicitor to provide a completion statement.

In those circumstances, what was the purchaser to do when faced with an erroneous completion statement? The master held that it was his duty to tender the correct amount of the purchase money and that as the purchaser had done nothing and had not tendered the purchase price, he was in breach. The master reached that conclusion in reliance on a statement by Megarry J in Schindler v Pigault (1975) 30 P & CR 328. In that case, time had been made of the essence for completion on 5 November. The contract had not been completed on that day. An action by the purchaser claiming that he had rescinded the contract and for return of his deposit was successful.

/ ....

> " The claim was based on a number of different grounds. One of the grounds put forward, which was not successful, was that the vendor had submitted a completion statement demanding interest to which he was not entitled under the contract. Megarry J. in addressing that point, held that, notwithstanding the error in the completion statement, it was the purchaser's duty to attend at the time and place fixed for completion and to tender the correct amount of the purchase money (at 335).
>
> I agree with that view. There being no contractual obligation to provide a completion statement, in my judgment, it is not a repudiation by the vendor if in the completion statement he asks for more than that to which he is entitled. So to hold would give rise to great disputes in vendor/purchaser matters since the exact calculation of the purchase money is often a matter of some difficulty. The completion statement is often the subject of negotiation between the parties to arrive at the correct figure.
>
> What then happens if there is no agreement as to that amount? In my judgment, there would be a complete stalemate in the conveyancing procedure if it were open to the puchaser merely to say: 'I do not agree your statement and I will therefore do nothing'. In my judgment, Megarry J. was right in saying that the duty then is for the purchaser to come forward and tender the money which he says is the amount due if he wishes to avoid being in breach of contract."

In my view the plaintiff cannot complain of delay. The plaintiff knew that Condition 4 provided for completion within 14 days of the date of the auction and he was under a duty to tender the balance of the purchase price and all monies due by the date specified in Condition 4.

In any event the plaintiff contributed to the delay, if any, by putting forward certain proposals which were being considered by the Workers Bank.

It must also be observed that the delay complained of by the plaintiff did not prevent the plaintiff from sending an undertaking to the defendant within the 14 days. Unfortunately the undertaking was a conditional one and rejected by the defendant.

It cannot be said that the plaintiff was unable to complete within the 14 days if an acceptable undertaking had been sent to the Workers Bank. It was the act of the plaintiff which contributed to the non-completion of the agreement.

2. <u>Was defendant in a position to complete the sale by the 20th October, 1989 ?</u>

The defendant was never placed in a position to complete the agreement as the plaintiff failed to forward the balance of the purchase price by the 20th October, 1989. In any event the mortgage held by the Jamaica Citizens Bank ranked in priority to the other mortgage and had to be discharged by the Jamaica Citizens Bank the same bank which was giving an undertaking to pay the balance of the purchase price.

There is no evidence to suggest that if the plaintiff had completed the agreement, that the mortgage would not have been discharged. The submission that the defendant was not in a position to complete the agreement because there was no discharge of the mortgage therefore fails. It is to be observed that the first time that the question of a discharge of mortgage was raised was at the trial.

3. <u>Ambiguity between clauses 4 and 5</u>

In my view there was no ambiguity between clauses 4 and 5. Clause 4 provided for a completion date within 14 days of the date of the auction.

Clause 5 provided for the payment of interest. If there had been an agreement between the parties for an extension of time beyond the 14 days and the balance of the purchase price was to be paid at a later date, then interest would become due if the purchase was not completed on or before the expiration of 30 days from the date of the auction.

Clause 5 did not provide for an alternative completion date and therefore did not provide for a completion date within 30 days of the date of the auction.

4. <u>Letter of the 19th October, 1989</u>

It was submitted that the letters of the 19th October, 1989 from the defendant to the Jamaica Citizens Bank and to Mr. Raymond Clough extended the completion date to 30 days from the date of the auction.

What was demanded was a specific undertaking within 24 hours. The fact that the specific undertaking would have permitted the plaintiff to pay the balance of the purchase price within 30 days does not extend the date of completion to 30 days.

The defendant was prepared to accept an undertaking to complete the sale but this undertaking would have to be acceptable to the defendants. If an acceptable undertaking had been sent to the defendant within the 24 hours, then the balance of the purchase price could have been paid within the 30 days.

It is clear that the completion date was being extended by 24 hours and that an acceptable undertaking within the 24 hours would be acceptable to complete the sale and the sale should have been completed by the 20th October, 1989.

The undertaking sent on the 20th October, 1989 was not a specific undertaking as requested but was one which contained conditions precedent which indicated that the payment of the money was conditional on the happenings of certain events.

The letter of the 19th October, 1989 did not create an extension of the completion date to 30 days but was a request for an undertaking to be given within 24 hours.

5. Extension of completion date - time of the essence

It was submitted by the attorney for the plaintiff that once the time for completion has been extended, then the provision that time is of the essence is no longer valid and that a new notice making time of the essence is required. It was argued that since the time had been extended by 24 hours then a new notice was required and none having been given, then payment of the balance of the purchase price on the 24th October was a valid completion.

The Attorney for the plaintiff relied on two Canadian cases for this proposition.

The first case was that of Whittall v. Kour 1969 8 D.L.R. (3rd) 163 where under an agreement for the sale of land ...... completion date was set for November 10, 1967. The contract contained a clause whereby "time shall be of the essence".

It was agreed that an extension of time for closing to December 15, 1967 would be granted.

It was held that when the vendor requested the extension of time, she waived the benefit of the "time is of the essence" clause and could no longer insist on compliance with the provision that time was of the essence with respect to matters stipulated to be carried out on the extended date.

Bull, J.A. at p. 166 said.

> " It has long been held that the equitable remedy of specific performance will not be granted to a party who is in default in observing the precise time fixed by a contract for completion if that contract expressly stipulate that time shall be of the essence thereof.
>
> Steedman v. Drinkle 25 D.L.R. 420, 1916 1 A.C. 275, 9?, W.R. 1146, Brickles v. Snell 30 D.L.R. 31, 1916 2 A.C. 599, 1917 1 W.W.R. 1059. But if that stipulation be waived, either expressly or by implication, by the party claiming entitlement to strict timely performance, the remedy of specific performance may still be available in proper cases to the defaulting party. The learned trial judge, in finding waiver of the clause in question, did not set out the basis of such finding. It is therefore, necessary to consider whether or not it can be supported.
>
> It appears to me that there are two bases upon either of which waiver should have properly been found. The first flows from the fact that the parties formally agreed to vary the date set out in the interim agreement for the payment of the balance of the cash portion of the purchase price from November 10, 1967, to December 15, 1967. In Kilmer v. B.C. Orchard Lands Co. 10 D.L.R. 172, 1913 A.C. 319 3 W.W.R. 119, as explained in Steedman v. Drinkle, supra, and further explained in Brickles v. Snell, supra, it was decided that when a new day for payment of an instalment of the purchase price was set and default of payment made on that new day, the vendor could not "any longer" insist that the clause providing that time was of the essence had application to that instalment at least, and that stipulation as to time had ceased to be applicable. Authority to the contrary, namely, that an extension of time is only a waiver to the extent of substituting the extended time for the original time, is found in such cases as Barclay v. Messenger 1874, 43 L.J. Ch. 449, 30 L.T. N.J. 351. But in Canada the matter seems to be laid at rest by the

judgment of Rinfret, C.J.C. and Kelloch, J. delivered by Kelloch, J., and with which Estey, J. appears to have agreed in effect, in Hanson v. Cameron, 1949 1 D.L.R. 16, 1949 S.C.R.101. In that case Kelloch, J. carefully analysed the two lines of authority and concluded that the view of Jessel, M.R., in Barclay v. Messenger, supra, was not the view accepted by the Privy Council that "an extension of time with respect to a particular instalment destroys the essentiality of time with respect to that instalment at least". As far as I can ascertain, that view taken by the Privy Council and the Supreme Court of Canada has not been seriously questioned in this country.

In the case at bar, it was the day for completion and for the payment of the instalment of cash balance that was extended. Accordingly, on the authority of the decisions mentioned above, I consider that the result of that extension is that the appellant must be considered as having waived and could no longer insist on compliance with the provision that time was of the essence with respect to matters, stipulated to be carried out on the extended date."

In Looley v. Hadwen, 1918 41 D.L.R. 190 there was an agreement for the sale of land. There was a clause in the agreement making time of the essence. An extension of time for payment was granted.

In his judgment, Walch, J. at p. 194 stated:

" In Barclay v. Messenger 43 L.J. Ch. 449, Jessel, M.R. held that where by an agreement time is originally of the essence an extension of the time to another definite date makes the substituted time also of the essence. Stuart, J. says of this in Wilson v. Patterson, 39 D.L.R. 642, at 644,
that decision has never been directly questioned as far as I can ascertain although the decision in Kilmer v. B.C. Orchard Lands Ltd. 10 D.L.R. 172 (1913) A.C. 319, as explained in Steedman v. Drinkle, 25 D.L.R. 420 (1916) 1 A.C. 275, would appear to do so.

I think that the effect of the judgment in the Kilmer case as explained in the Steedman case is not only to question but to destroy the authority of Barclay v. Messenger, upon this point. In the Kilmer case the defendant, the purchaser, not only resisted the vendor's attempt to rescind the contract because of his default in paying an instalment of the purchase money, but he counterclaimed for specific performance notwithstanding such default. Time was made of the essence by that contract which provided that, unless the payments were punctually made, it should be null and void and of no effect. An instalment of principal with interest fell due on June 14, but was not paid by that date and the time for payment was extended to July 7 following. On July 8, Kilmer wrote the company explaining the circumstances which prevented his making the payment on the 7th but promising to pay without fail on the 12th. On the 9th, the secretary of the company sent a telegram saying the deal was off and on August 1, following, the company brought its action and the money which should have been paid on July 7 was paid into court to the credit of that action.

The Judicial Committee restored the judgment of the trial judge who had decreed specific performance of the contract by the plaintiff as prayed by the defendant in his counterclaim. The judgment of the Board upon this branch of the case gives absolutely no reasons for the conclusion thus reached. The argument of Kilmer's counsel was that "as they (the Company) had submitted to postpone the day of enforcing payment they were no longer entitled to say that time was of the essence of the contract. The rigid date having been altered they were not entitled to say that the substituted date was rigid to the extent of being unalterable." So that the precise point determined by Barclay v. Messenger, supra, was undoubtedly before the Board. The Judicial Committee was, of course, confronted with this judgment when it came to deal with the Steedman case and this is how Viscount Haldane explained it a P. 422.

But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view and on that footing alone to have decreed specific performance as counter-claimed.

Under this authorative explanation of the Kilmer Judgment, I think that I am bound to hold upon the facts of this case that the vendor cannot insist that time was of the essence with respect to this overdue interest."

Reference was also made to the case of Kilmer v. British Columbia Orchard Lands Limited 1913 A.C. 319. The facts of this case involved the sale of land where the price was to be paid by instalments. There was also a forfeiture clause and time being of the essence. The date of payment of an instalment was extended. Payment was not made by the extended date and the vendor sought to forfeit.

In a claim by the vendor for a declaration that the sale was null and void, the purchaser counterclaimed for specific performance. The trial judge made an order for specific performance. On appeal the Court of Appeal allowed the appeal and dismissed the counterclaim. On appeal to Privy Council, the appeal was allowed and the trial judges' order restored.

Lord Moulton in delivering the judgment of the Court stated that the circumstances of the case brought it entirely within the relief in the case of In re Dagenham (Thames) Dock Company Ex Parte Hulse 1873, L.R. 8 Ch. 1022.

In both of these cases it was held that the condition of forfeiture was in the nature of a penalty and relief from forfeiture would be given.

No reasons were given as to the grant of specific performance. Indeed no cases were cited or referred to. The case of Barclay v. Messenger 1874. T.L.R. 437 was not referred to.

An attempt was made to explain the decision in the Kilmer's case by Viscount Haldane in Steedman v. Drinkle and another 1916 A.C. 275 where at p. 279, Viscount Haldane stated:

> " For Kilmer v. British Columbia Orchard Lands (1) was an appeal in which the facts were that the company had sold land for a price to be paid in instalments at specified dates with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred, the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counter-claimed for specific performance. This Board held that as regards the company's claim the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.
>
> So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel

who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed."

Apart from the reference to the Kilmer case, no cases were cited by their Lordships as to the question of whether the new date is merely substituted for the original date.

However, in the High Court of Australia in the case of Tropical Traders Ltd. v. Goonan and another 1964 111 C.L.R. 41 both Kilmer's case and Barclay v. Messenger (supra) were discussed and explained.

In the Tropical Traders case there was an agreement for the sale of land for ≠47,500 payable by a deposit of ≠10,000.00 (≠500 before the signing of the agreement and ≠9,500 on 6th January, 1958) four sums of ≠5,000 each payable at twelve monthly intervals from the date of the agreement, and the balance, ≠17,000, 60 months from that date.

The agreement provided for forfeiture and also made time of the essence of the contract.

The ≠9,500 balance of deposit was paid and accepted on 7th January, 1958 although payable one day earlier. The first three instalments were paid three, thirteen and five days late respectively. The fourth instalment was paid a few days early. The last day for making the final payment, 6th January 1963, was a Sunday. The vendor, however, extended the completion date to 14th Janaury, 1963. The purchaser failed to make payment by the 14th January, 1963. On 15th January the vendors forfeited all moneys paid and rescinded the agreement.

It was held (1) That the acceptance by it of late payment of the earlier instalments did not preclude the vendor from insisting that time should continue to be of the essence. (2) That the extension of time merely substituted a later date for the original date, so that time continued to be of the essence though in respect of the late date. (3) That the rescission was valid.

In his judgment Kitto, J., discusses the case of Barclay v. Messenger and Kilmer v. British Columbia Orchard Lands Ltd. and follows the decision in Barclay v. Messenger. Kilmer's case was distinguished. It is necessary therefore to quote extensively from the judgment of Kitto, J. where at pages 52 - 55 he stated:

> " It is a strong thing to place upon a few days' indulgence in respect of instalments payable during the course of a contract a construction which means that in relation to the time for completion of the payment of purchase price a stipulation that time shall be of the essence may be regarded as abandoned. I do no think that such a construction can properly be placed upon the appellant's conduct in accepting the late instalments in the present case.
>
> Nor do I think that a conclusion to the effect that cl. 12 was waived or dispensed with is assisted by adding to the acceptance of late instalments the granting on 8th January of an extension of time until 13th January for payment of the balance of purchase money. On the contrary, the extension was granted with a plain intimation, both in the telephone conversation and in the letter of the following day, that the appellant was insisting upon its strict rights under the contract except to the extent of the indulgence it was offering. In the face of the letter the respondents had no reasonable ground for a belief that if they should fail to pay the £17,500 and an additional £50 before 14th January they could still count on being allowed further time.
>
> The real questions which arise in relation to the granting of the extension are first whether it amounted to a binding election not to rescind for non-payment of the £17,500 on 6th January, and secondly, if it did amount to such an election, whether it was ineffectual to fix 13th January as a date in respect of which time was of the essence. In Kilmer v. British Columbia Orchard Lands Ltd. (1), the Privy Council proceeded on the footing that the vendor in that case could not insist that time was of the essence after having given an extension of time for payment of an instalment. The case is clear authority for the proposition that a stipulation making time of the essence may be rendered no longer applicable by the granting of an extension of time in particular circumstances; but it is not authority for the more general proposition that every grant of an extension of time deprives such a stipulation of effect for the future. Council had cited to their Lordships the case of Barclay v. Messenger (2), in which Jessel M.R. dealt with the effect of an extension of time under a contract making time of the essence and held that "a mere extension of time, and nothing more, is only a waiver to the extent of substituting the

extended time for the original time, and not an utter distruction of the essential character of the time" (3) This was a pronouncement upon a point which had been one of difference between Lord Romilly and Lord Cranworth in Parkin V. Thoroid (4) Sir George Jessel accepting the opinion of the latter in accordance with the view of Lord St. Leonards: Sugden on Vendors and Purchasers 14th ed. (1862) p. 270. It is hardly to be supposed that Lord Moulton, who delivered the judgment in Kilmer's Case (1), would have intended to overrule without even mentioning it a case which for forty years had stood as settling a point formerly disputed at so high a level. Evidently the time clause was disregarded because of something special in the facts. That is the explanation of the case which was adopted in later cases in the Privy Council: Steedman v. Drinkle (2); Brickles v. Snell (3): "The stipulation as to time being of the essence of the contract did not apply as the facts stood". The authorised report does not reveal what the material facts were, but the report in the Law Journal (4) is more informative. Three days before an instalment became payable the purchaser requested the vendors to draw upon him for the amount of the instalment and interest at five days after sight. This was done and the purchasers accepted the bill. Thirteen days after the contract date for payment of the instalment the purchaser requested the vendors to hold the bill for ten days, and they agreed to do so. The purchaser, believing that this gave him three days' grace after the end of the ten days, made no arrangements to meet the bill; and on the day after the expiration of the ten days he wrote to the vendors that the bill would be paid on a day four days later still. The vendors then called the deal off. But by that time (as appears from the report of the counsel's argument) the bill was outstanding in the hands of the vendors' bankers; and the cases of Davis v. Reilly (5) and In re a Debtor; Ex parte the Debtor (6) were cited to the Privy Council, presumably as showing that at the time of the purported determination of the contract there was subsisting and binding upon the vendors an agreement, implied from the making and acceptance of the bill, that the debt should not be enforced while the bill was in the hands of a third party. It is hardly surprising that Lord Moulton treated the provision that time should be of the essence as irrelevant to the determination of the appeal, and considered only the equitable jurisdiction to relieve against for feiture of the purchase moneys paid and (though he did not discuss this separately) to decree specific performance notwithstanding a rescission which was valid according to the terms of the contract.

The authority of Barclay v. Messenger (7) is therefore unimpaired by Kilmer v. British Columbia Orchard Lands Ltd. (1). In Fry on Specific Performance 6th ed. (1921) par 1126, p.523 the case is described as having decided that the letter by which the vendors there agreed to an extension of time for payment was "only a qualified and conditional waiver of the original stipulation". This, in my opinion, is an accurate way of describing the action of the appellant in the present case in allowing the respondents time to pay the final balance of purchase money. Time being of the essence the appellant became entitled, as soon as 6th January 1963 had passed, to elect for or against rescinding the contract. Any act done by it and consistent only with the continuance of the contract on foot the law would hold to constitute an election against rescinding; and an election once made could not be retracted. But the appellant was not bound to elect at once. It might keep the question open, so long as it did nothing to affirm the contract and so long as the respondents' position was not prejudiced in consequence of the delay: Clough v. London & North Western Railway Co. (1); Scarf v. Jardine (2). By telling the respondents it would not rescind before Monday, 14th January, and that they would have to pay ₤50 for the additional accommodation to cover interest, costs and expenses, the appellant did no more than promise that it would not elect to rescind the contract before 14th January and that if the ₤17,500 and the additional ₤50 should be paid before that date the contract would stand affirmed. In the language of Fry L.J. in Howe v. Smith (3), "this was not a stipulation postponing the time for completion generally, but merely limiting the exercise of a consequential power" (4).

The granting of the extension of time, therefore, far from constituting an election by the appellant to affirm the contract, was the announcement of an intention to refrain from electing either way until either the ₤17,500 should have been paid or 14th January should have arrived."

In his judgment, Menzies, J. at p. 60 stated:

" I have had the advantage of reading the judgment of Kitto, J. with which I am in complete agreement.

Upon the main point, it appears to me on principle that a vendor becoming entitled to rescind for non-payment of purchase money upon the stipulated date for payment, who does no more than give the purchaser the opportunity to pay within a limited time thereafter, is not thereby electing not to rescind for non-payment on the due date nor is he representing that time is not of the essence; rather he is intimating that "he intends to exercise his right to rescind unless payment is made within the time of grace. Kitto J's examination of the cases disposes of the contention that authority has established the contrary and requires the decision that a vendor who shows such forebearance has inevitably done so at the expense of his contractual right to rescind."

I will now consider the cases relied on by the Attorney for the defendant for his proposition that an extension of time does not waive the condition of time being of the essence but merely substituted the new date for the original date.

In Barclay v. Messenger 1874 43 L.J. Ch 449 time was made of the essence of the contract. The date of payment - 31st July was extended to 26th August. There was default in payment on the extended date. It was held that the extension of time did not operate as an absolute waiver of that condition but merely substituted the new date for the original date.

In his judgment the Master of the Rolls at p. 455 said :

" Now the first point to be considered is, was time originally of the essence of this contract? I am clearly of opinion that it was."

Now having arrived at the conclusion that time was originally of the essence of the contract, a proposition which I did not understand the Counsel for the plaintiff seriously to contest, the next question is, has it been waived? Now I cannot find any evidence of waiver."

Again at p. 456 :

" If a man says a contract is to depend upon a payment of money by a certain day and the party entitled to receive the money says, 'I will extend your time, I will give you a week or a month', why that should put the party in a better position than if it had been originally put in the contract I cannot conceive. It appears to me plain that a mere extension of time and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of time. If that is so, on the 26th August the vendors were entitled to say that the contract was at an end. On the 2nd of October they gave formal notice to terminate, stating that the contract was at an end."

/ ......

Luck v. White and another, 26 P CR 89, the facts of which may be distinguished from the instant case, is of some assistance.

Goulding, J. at p. 95 said :

> " The notice to complete had expired early in September. The vendors did not then as they had threatened, either rescind the contract or resell the property. Instead they continued to discuss the possibilities of completion and ultimately agreed to November 16.
>
> It would have been easy for the vendors to reserve their rights in express terms. They might for example, have extended the period for compliance with the notice to a specified day, time to be of the essence in that regard. <u>Indeed, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect."</u>

Again in Buckland v. Farmer and Moody, 1979 1 W.L.R. 221, Buckley, L.J. at p. 231 had this to say.

> " It is common ground between the parties that if a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date, the time remains essential."

It is to be observed that no reference is made to Kilmer v. British Columbia Orchard Lands Limited in either Luck v. White or Buckland v. Farmer and Moody.

In Wilson v. McGee, 1925, N.Z.L.R. 241, the head note reads:

> " On a conract for sale and purchase of land when time is of the essence of the contract and there has been no waiver a purchaser in default cannot insist upon specific performance, but in a proper case will be relieved from forfeiture or penalties. Where time is of the essence, but there has been waiver by an extension of time to a fixed date, the purchaser will be entitled to specific performance if he is ready and willing to complete on the extended date, and a notice of rescission based upon the earlier default given before the extended date has passed is inoperative."

In his judgment, Adams, J. at p. 242, said :

> " The defendant, having waived the exact performance of the contract as to time and consented to an extension to the 10th January, could not rescind the contract unless and until default had been made on that date. Barclay v. Messenger (1) is an authority for this. In that case time was expressly stated to be of the essence of the contract. The defendants, however, had in a letter to the plaintiff written after the date fixed for payment of the balance of purchase money given formal notice that unless certain works which had to be done on the property were commenced as promised the balance must be paid within one week. Jessel, M.R. said that this was a qualified waiver of the stipulation for payment on the date fixed by the contract, but only to the extent of substituting the extended time for the original time.
>
> Kilmer v. British Columbia Orchard Lands Co. Ltd. (2) was a case in which an agreement for sale of land for a price payable in instalments provided that on default in punctual payment of any instalment the agreement was to be null and void, and all payments made were forfeited to the vendor. Time was declared to be of the essence. Default was made, and the company brought action for a declaration that the agreement was null and void. The appellant counterclaimed for specific performance and relief from forfeiture and penalties. The trial Judge dismissed the action and decreed specific performance on the counterclaim, and also granted the other relief claimed. The Court of Appeal reversed this judgment, granted the declaration on the claim, and dismissed the counterclaim. On appeal to the Privy Council this judgment was in its turn reversed, and that of the trial Judge was restored. The report of the case does not show the grounds upon which specific performance was decreed, but this is explained in Steedman v. Drinkle (3). "

And at p. 244, Adams, J. states :

> " Upon these authorities, it is clear (i) that where time is of the essence of the contract and there has been no waiver a purchaser in default cannot insist upon specific performance, but in a proper case will be relieved from forfeiture or penalties ; (ii) that when time is of the essence, but there has been waiver by an extension of time to a fixed date, the purchaser will be entitled to specific performance if he is ready and willing to complete on the extended date; (iii) I think, also, that the cases establish that when time is of the essence and one party to the contract is in default, but the other party has by his conduct, either by continuing negotiations on the footing of an existing contract after default

/ .....

"or in other ways, clearly indicated that he no longer insists on exact compliance with the stipulation as to time, the stipulation is waived. In such cases time may again be made of the essence by proper notice. (iv) Even in cases where a purchaser in default cannot obtain a decree for specific performance he may nevertheless be entitled to relief from forfeiture of purchase-money paid, and may, in a case where there are circumstances such as existed in Brickles v. Snell (1), be entitled to a return of his deposit."

Adams, J. expresses the view that Barclay v. Messenger is still regarded as authority.

In Voumard, Sale of Land, 3rd Edition, the author at p. 303 expresses the following view :

> " A mere extension of time will not in general constitute a waiver of the benefit of the time clause, but will only substitute the extended date for the original date, time remaining essential as to the substituted date. "

The author relies on the cases of Barclay v. Messenger (supra) and Tropical Traders Ltd. v. Goonan (supra) for the above proposition.

In Farrand on Contract and Conveyancing, 4th Edition, the author at p. 183 states :

> " However, this consequence as quoted should be contrasted with that in a case where, time having been originally of the essence, delay to a particular date is allowed: that later date automatically becomes of the essence instead. "

The author refers to Buckland v. Farmer (supra) to support the above statement.

The case of Bernard v. Williams, 1928 T.L.R. 437 is also of assistance where Talbot, J. at p. 438 states :

> " Merely extending the time originally fixed does not waive the condition as to time when it is of the essence of the contract. "

/ .....

In this case, reference is made to the case of Barclay v. Messenger (supra).

It is clear that the decisions arrived at in the Canadian cases are based on the conclusion that Kilmer v. British Columbia Orchard Lands Limited (supra) was authority for the proposition that where time is of the essence and the date for payment is extended, then the clause making time of the essence has been waived. Having arrived at this conclusion, the Judges were of the view that Barclay v. Messenger (supra) had been overruled.

Having considered all the authorities and statements made by the authors, I am of the view that Barclay v. Messenger was not overruled by Kilmer's case and is still of persuasive authority. I do not read the judgment in Kilmer's case as authority for the proposition that where time is of the essence and the date is extended, then time is no longer of the essence.

The case of Tropical Traders Limited v. Goonan (supra) is also strong persuasive authority for the proposition that the extension of time merely substituted the later date for the original date, so that time continued to be of the essence though in respect of the later date.

In my view the English cases and the Australian case correctly states the principle and I am guided by them. It appears to be a logical conclusion and there is strong support for it.

I, therefore, hold that where as in the instant case time having been made the essence of the contract, and the date for payment extended for 24 hours, the extension of time merely substituted the later date for the original date, so that time continued to be of the essence, though in respect of the later date.

For all the reasons stated above, I would hold that the final date for completion was the 20th October, 1989. The plaintiff failed to complete by that date and the defendant was entitled as they did to rescind the agreement for sale.

/ ......

For these reasons I held that the plaintiff was not entitled to an Order for specific performance.

The defendant having forfeited the deposit, there was an alternative claim for relief from forfeiture.

Mr. Grant's submission was to the effect that the deposit was in the nature of a penalty and the plaintiff was therefore entitled to relief from forfeiture.

The cases relied on by Mr. Grant are all cases in which money was to be paid by instalments and in which it was held that the payments were a penalty and therefore the pruchaser was entitled to relief from forfeiture.

Mr. Henriques for the defendant submitted that the money paid by way of deposit was a true deposit and could not be regarded as a penalty.

As I understand the arguments there is no dispute that if the deposit is a penalty then there may be relief from forfeiture.

There seems to be no difficulty where payments are to be made by instalments. These are usually regarded as a penalty.

In what circumstances could the Court hold that one payment made as a deposit amounts to a penalty ?

<u>In Re Dagenham (Thames) Dock Company, ex parte Hulse 1873 8 Ch. APP. 1022</u> was a case in which the purchase price was £4,000.00. It was agreed that £2,000 was to be paid on execution of the agreement. Possession was given. Remaining £2,000 with interest from the date of the agreement to be paid on 1st November.

It was held that the money was paid towards the purchase price and was in the nature of a penalty.

<u>John E. Kilmer v. British Columbia Orchard Lands Limited 1913 A.C. 319</u> was a case in which there was an agreement for sale of lands, the purchase price being $75,000. A sum of $2,000 was paid on execution of the agreement; the purchaser was put into possession. The

instalments on specific dates. Default having been made, the company sued to enforce the forfeiture.

It was held that by the law of British Columbia and English Law the condition of forfeiture was in the nature of a penalty for which the appellant was entitled to be relieved on payment of the purchase money due.

Steedman v. Drinkle and another 1916 1 A.C. 275 was a case in which the purchase price was $16,000. On the signing of the agreement, $1,000 was paid. The purchaser was put in possession. Balance of purchase money was payable by six monthly instalments on December 1, of each year. There was default in payment of the first instalment.

It was held that the payment by instalments were part of the purchase price and that the forfeiture of the money paid was a penalty from which relief should be granted.

<u>Cornwall v. Henan 1900, 2 Ch. 298</u> was a case where the purchase money was to be paid by instalments. Only one instalment remained to be paid. Purchaser put into possession.

<u>Webster, M.R. at p. 312</u> said.

> "It is not necessary to deal with the question whether the plaintiff is entitled to a return of the instalments which he has paid, because he has not insisted upon that relief, but I feel very grave doubt as to whether the doctrine of Howe v. Smith would apply to a case in which the purchase money was to be paid in instalments."

The Master of the Rolls is here distinguishing between a case of deposit as distinct from a case where the purchase money is to be paid by instalments.

In his judgment, <u>Collins, J. at p. 304 states</u>:

> "If contract had contained an express stipulation that on the non-payment of an instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty and would have relieved him from it as was done In re Dagenham (Thames) Dock Co. Indeed the present case would have been a much stronger one, an instalment being only a twelfth part of the purchase money."

Fry, L.J. at 101 stated :

> " Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it should be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into and creates by the fear of the forfeiture a motive in the prayer to perform the rest of the contract. "

Soper v. Arnold and another, 1889 14 App. C. 429 dealt with the sale of land. The contract provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions, the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser failed to pay the balance of the purchase money and the vendors gave the purchaser notice that the contract was rescinded and deposit forfeited.

It was held that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit.

Lord Macnaghten at p. 435 stated :

> " Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes - if the purchase is carried out it goes against the purchase-money - but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not. "

In Stockloser v. Johnson, 1954 1 ALL E.R. 630 there was an agreement to purchase plant and machinery. The purchase money was to be paid by instalments. The agreement provided that, if the purchaser made default in payment of an instalment for a period exceeding twenty "from the view of Romer, L.J. Two things are necessary, first the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and secondly it must be unconscionable for the seller to retain the money."

And at p. 638, Denning, L.J. states:

" Again suppose that a vendor of property, in lieu of the usual ten per cent deposit stipulates for an initial payment of 50 per cent of the price as a deposit and a part payment and later, when the purchaser fails to complete, the vendor resells the property at a profit and, in addition, claims to forfeit the fifty per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages. These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates not because of the plaintiff's default, but because it is, in the particular case, unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense."

Linggi Plantations Ltd. v. Jagatheesan 1972 1 MLJ 89 dealt with the question of whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract. There was a provision in the contract for forfeiture in the event of the purchaser failing to complete.

There was to be a distinction between 'deposit' or 'earnest money' which were liable to forfeiture and 'instalments' or 'part payment' which were recoverable to the extent that they exceeded the "reasonable compensation" envisaged by the section.

eight days, the vendor was entitled, on giving fourteen days notice to rescind. The plaintiff defaulted in the payment of the instalments. The vendor gave notice to rescind the agreement.

It was held that the purchaser was not entitled to recover the instalments.

Denning L.J. at p. 637 said :

> " When one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in Hill's case. The claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression - see the valuable judgments of Sommerwell, L.J., and Hodson, L.J. in Cooden Engineering Company Limited v. Stanford.
>
> In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money handed to him as part payment of the purchase price and, as soon as it is paid, belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause - a forfeiture clause, if you please - permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer, the plaintiff, is to recover it, he must, I think, have recourse to somewhat different principles from those applicable to penalties, strictly so called. "

Again at p. 637 :

> " But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, or despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in Steedman v. Drinkle. The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somerwell, L.J., has said about it, differing herein

/ ......

<u>Lord Hailsham, L.C. at p. 91</u> said:

" In their Lordships' opinion therefore the contract means unambigously that in the event of a failure by the purchaser to complete and notice to terminate being given under clause 5, the vendor is at liberty to forfeit the deposit and to claim for any damage which he has suffered over and above the amount of the deposit, after giving credit for the amount of the deposit."

Again at p. 91:

" But the law relating to deposits, as Fry, L.J. pointed out in Howe v. Smith, has a much longer pedigree, being imported from the civil law at least as early as Bracton, and, assuming the deposit or earnest to be reasonable, forfeiture of a deposit was not normally the subject of equitable relief. This appears clearly from the judgment of Jessel, M.R. in Wallis v. Smith at p.258 when he said:

' I come now to the last class of cases. there is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases, the judges have held that this rule (that is the rule relating to relief against penalty) does not apply, and that the bargain of the parties is to be carried out.'

It is also implicit in the decision of Howe v. Smith which is the source of all modern learning as to the nature of deposits, and it has been followed again and again ever since. In particular Lord Dunedin in Mayson v. Clovet establishes the fundamental difference between part payments which are recoverable in certain circumstances and deposits which are not."

<u>At page 93</u>

" It follows therefore, that, once it is decided that the construction of the contract is such that the sum of $377,500 was paid as a true deposit, that is, on the same terms as the deposit, in Howe v. Smith, and was thus to be liable to forfeiture under the contract, in case of failure, by the purchaser to complete, section 75 of the Contracts (Malay State) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not damage is proved. There is in their Lordships' judgment no difference in "this context between the expression "deposit" and the expression "earnest money". In this context they are two words for the same thing, although in common modern English usage "earnest money" has a slightly archaic ring. As Fry, L.J. said in Howe v. Smith at page 101 :

> ' It (i.e. the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract'

It is worth pointing out that the contract in Howe v. Smith provided that the sum of £500 there in question was as here paid "as a deposit and in part payment of the purchase money" and Cotton L.J. at page 95 in referring to the judgment of James L.J. in Ex parte Barrell said :

> ' What is the deposit? The deposit, as I understand... is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in accoreance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then ... he can have no right to recover the deposit.'

Or more simply in the words of Lord Macnaughten in Soper v. Arnold at page 435 "

> ' Everybody knows what a deposit is ... the deposit serves two purposes - if the purchase is carried out it goes against the purchase money - but its primary purpose is this, it is a guarantee that the purchaser means business, and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not. '

No doubt, as Cotton L.J. says in Howe v. Smith at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See Stockloser v. Johnson. It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and evena to forfeiture which turn out on investigation to be purely colourable and that in such a

/ ...

"case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage."

In Bridge v. Campbell Discount Company Ltd. 1962 1 ALL E.R. 385, Lord Radcliffe had this to say at page 396.

"I know. of course, that to travel to another branch of equity's relief jurisdiction, the precise reason why a deposit made on a sale of land is not recoverable if the bargain goes off by the purchaser's default is that it is treated as a guarantee (see Howe v. Smith) but, nevertheless, every penalty even a penal bond, is in some sense a guarantee for the dual performance of the contract. and I do not see any sufficient reason why, in the right setting, a sum of money may not be treated as a penalty, even though it arises from an obligation that is essentially a guarantee."

Looking at what the Text Book writers have to say about deposits, I now quote from J.T. Farrand's book on Contract and Conveyance, 4th Edition, where the author at page 204 states:

" Beyond these decisions, modern obiter dicta can also be discovered directly indicating that deposits may be treated as penalties even on a sale of land (see per Denning, L.J. in Stockhosen v. Johnson, 1954 1 Q.B. at page 491) giving the esaggerated example of a 50 per cent deposit plus resale at a profit, and per Lord Radcliffe in Bridge v. Campbell Discount Company Ltd. 1962 A.C. 600 at page 624. Nevertheless, it would still be over optimistic to expect an equitable attack to succeed against the traditional 10 per cent. Thus such an attack failed dismally in Windsor Securities v. Lorellel and Lester (1975) The Times 10, September, despite the circumstances that the sum forfeited totalled ≠235,000 and that a potential profit of ≠150,000 on resale was alleged.

> "According to Oliver, J., there is nothing in the facts of the present case to show that the forfeiture was unreasonable or in the nature of a penalty."

In the Law of Auction by Bateman at page 210, the author states.

> " It is the almost universal custom at Auction sales to require a part of the purchase money to be paid down as a guarantee for the fulfilment of the contract, and also if the contract is completed, as part payment of the purchase money. The purchaser cannot elect to forfeit his deposit and avoid the Contract.
>
> This sum which varies from 5 to 25 per cent (in the case of land usually 10 per cent) of the purchase money, is called the deposit."

In Voumard - Sale of Land, 3rd Edition, the author at page 421 states:

> " The mere fact that a payment under a contract is called "a deposit" does not of itself exclude the jurisdiction of the Court to relieve a purchaser, in appropriate circumstances, from forfeiture of the amount so paid. If the contract provides for the payment of an unreasonably large sum under the guise of a deposit, the Court may go behind the language of the contract and consider the true nature of such a stipulation; and if it concludes that the amount of the deposit is out of all proportion to the damage which the vendor is likely to suffer by reason of the purchaser's breach of contract and that, having regard to all the circumstances of the case, it would be unconscionable for the vendor to retain it, relief will be given."

In the instant case, evidence as to deposit was given by Mr. Raymond Clough, Attorney-at-Law who represented the plaintiff at the auction and also Miss Shirley Ann Eaton, Attorney-at-Law, for the defendant bank.

Mr. Clough stated that he attended the auction and bid on the property. He was aware of the conditions of sale prior to the bidding. In his evidence he stated and I quote:

> " It is not in my experience in auction sales for a deposit of 25 per cent to be required. I have seen 10 per cent, 15 per cent, 25 per cent, 40 per cent. It is not unusual to see a deposit of 25 per cent required in auction sales. In an auction sale, there is an additional auctioneer's costs and expenses. The auctioneer's commission is usually 5 per cent if the property is sold in addition to costs and expenses."

Shirley Ann Eaton in her evidence stated.

> " The deposit was 25 per cent. It is fixed at 25 per cent because:
>
> (i) there are attendant costs at auction sales which had to be paid immediately following the auction;
>
> (ii) it is a sum which is set to ensure that persons do not bid frivolously at the auction.
>
> The deposit required at auction sales by other banks is similar to the 25 per cent. There is one bank which requires 50 per cent deposit at auctions. This is the National Commercial Bank."

Under cross examination by Mr. Grant, Miss Eaton stated:

> " The deposit of 25 per cent is far above the amount required for the payment of transfer tax, stamp duty and registration fee. I am not sure what amount is now due to the auctioneer. I would have to look at the agreement with the auctioneer. The most I would have to pay would be the five per cent auctioneer's fee and the costs expended for the holding of the auction. This would include, e.g. auctioneer's fee. The expense would be about $3,000 (excluding auctioneer's fees)."

The authorities make it quite clear that where payments are by instalments they are regarded as a penalty and relief from forfeiture may be granted.

It would appear also that in certain circumstnaces a deposit may be regarded as a penalty and relief from forfeiture may be available.

Having regard to the evidence of Mr. Clough and Miss Eaton as to the practice in Jamaica and having considered the cases cited, I am of the opinion that the

Howe v. Smith 1884 27 Ch. Div. 89 was a case in which real estate was sold for £12,500. Purchaser paid a deposit of £500. The purchaser was not ready with the balance of the purchase money and after repeated delays the vendor resold the property for the same price. No damages suffered by the vendor. The contract did not contain a clause as to what was to be done with the deposit if the contract was not performed.

It was held that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit.

Cotton, L.J. at 94 said :

> " There is a decision under somewhat different circumstances from the present case in Depree v. Bedborough (5), where there was a purchase under a sale by decree of the Court. I will not refer further to that case, but it is in accordance with a subsequent decision of the Court of Appeal in Ex parte Barrell (6), where the purchaser had become bankrupt, and the trustee in bankruptcy had disclaimed the contract under which he sought to recover the deposit. That was refused. What Lord Justice James says is this (1), "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, Give me back the deposit. There is no ground for such a claim."
>
> There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit, but I think that the judgment of Lord Justice James gives us the principle on which we should deal with the case. What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit.