AG

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.224/90

BETWEEN	PARK TRADERS (JAMAICA) LTD.	PLAINTIFF
A N D	BEVAD LIMITED	1ST DEFENDANT
A N D	TRANSOCEAN SHIPPING LTD.	2ND DEFENDANT

Mr. D.A. Scharschmidt Q.C. and Mr. Hector Robinson instructed by Patterson, Phillipson & Graham for Plaintiff.

Mrs. Pamela F. Benka-Coker Q.C. and Miss Turner-Brown instructed by Jennifer Messado & Co. for 1st Defendant.

Miss Minette Palmer and Miss Nicole Lambert instructed by Myers, Fletcher & Gordon for 2nd Defendant.

Heard: June 9, 11, 23, 24, 25, August 5, 6, 7 and September 19, 1997.

LANGRIN, J.

This is an action in contract brought by Park Traders Jamaica Limited against Bevad Limited and Transocean Shipping Limited.

By a writ dated 27th July 1990, the following relief was sought.

(1) Specific Performance of an agreement evidenced in writing made between the Plaintiff and the First named Defendant for sale by the First named Defendant to the Plaintiff of certain freehold property known as Apartment No.1B Old Church Court, 1B Old Church Road, Kingston 8 in the parish of Saint Andrew and being a portion of all that parcel of land comprised in Certificate of Title registered at Volume 1222 Folio 473 and Volume 1183 Folio 272 of the Register Book of Titles.

(2) Damages for Breach of contract in lieu of or in addition to specific performance.

(3) All other necessary and consequential accounts, directions and enquiries.

(4) Further or other relief as may be just.

The plaintiff agreed to buy and the first defendant agreed to sell an Apartment 1B Old Church Court situated at 1A Old Church Road in the parish of St. Andrew. The agreed purchase price was

$450,000. This agreement was never completed and the purchase price was never paid by the plaintiff.

By Notice dated 16th January, 1990 the first defendant made 'time of the essence of the contract' between itself and the plaintiff and the plaintiff having failed to complete the sale, the first defendant terminated the contract on the 30th January, 1990 by letter of the said date.

In February of 1990 the first defendant entered into a written contract for the sale of the same premises with the second defendant who was put in possession of the premises. The Registrar of Titles declined to register the transfer in the name of the second defendant because on or around the 8th February, 1990 the plaintiff had lodged a caveat preventing such registration.

The plaintiff's case is not one which on a first impression is overburdened with merit and is not significantly improved by a closer examination of the background. However I will have to determine whether the plaintiff is right in law and if there is any equity which assists the defendant.

I turn therefore to a more detailed consideration of the pleadings and background facts relevant to the issues.

The Pleadings

In my judgment the pleadings are somewhat embarrassing for the plaintiff.

Notwithstanding the endorsement on the writ stating that the agreement made between the plaintiff and the first defendant was evidenced in writing the further amended statement of claim at paragraph 4 states that the agreement was in writing. No date of the agreement was pleaded. The plaintiff at paragraph 7 pleaded that a deposit of $75,000 was paid by him to the first defendant pursuant to the said agreement. In paragraph 8 the plaintiff refers to the undertaking given by the Citizen's Bank dated 29th January, 1990 to pay the balance of the purchase price. In paragraph 9 the plaintiff avers that the agreement for sale was executed by the plaintiff in or around the month of January, 1990. Other relevant averments state that the first defendant was in breach of the said agreement when it purported to terminate the contract on 30th January, 1990. Also that the defendant wrongfully failed to complete the

contract and at all material times the plaintiff was ready to fulfill all its obligations under the contract.

The first defendant avers that the agreement to sell the subject property to the plaintiff was orally made around the 14th June, 1989. It was in pursuance of this oral agreement that the plaintiff paid the deposit of $75,000 on the 14th June, 1989. This oral agreement was evidenced by a memorandum in writing which had been signed by the first defendant on or about the 19th June, 1989. This memorandum in writing contained all the material terms of the oral agreement and constitute a valid contract for the sale of the premises which came into existence from the 14th June 1989. The contract became enforceable on or around 19th June, 1989 when it was signed by the first defendant. It was contended by the first defendant that the plaintiff failed and or refused to sign the said memorandum until the 22nd January, 1990 when the first defendant had already taken effective steps to terminate the oral agreement evidenced in writing for the sale of the said premises.

In the Plaintiff's Reply it asserts that the first defendant elected to treat the contract as not coming into existence before the 22nd January, 1990. Then in an Amended Reply filed at the hearing of the action on 9th June, 1997 the plaintiff now states that through its agent Stanford Cocking it became interested in the development of the 14th June, 1989, paid a deposit of $75,000 and indicated how the balance of the purchase price would be paid. The plaintiff also states that it requested that an agreement for sale be prepared and sent to John Graham, Attorney-at-Law for his perusal and approval. Also for the first time the plaintiff alleged that the agreement for sale was not signed by the first defendant.

Evidence

Stanford Cocking testified that he is the Managing director of the plaintiff and knows Jennifer Messado for twenty years. On 14th June 1989 he visited her office and became aware of the development. He made enquiries about the development and Jennifer Messado said there was a Unit available. He went and looked at the unit and said he was going to take it. He obtained a cheque and gave her but did not go into any details with her. He told Jennifer that it would be a cash sale and she should send to the Jamaica Citizen's

Bank on completion and the bank would send the balance of the purchase price. The witness continued by saying that Jennifer Messado told him that the purchase price was $450,000 and that the deposit would be $75,000.

John Graham, testified that he was the Attorney-at-Law acting for the plaintiff in the transaction. He admitted that he received all the letters directed to him by Jennifer Messado. He produced a photocopy of the document he had received from Jennifer Messado in June 1989 and at that time it was undated and not signed by the first defendant. This document was not produced in the process of the agreed discovery and was first referred to in the Amended Reply and Defence to Counterclaim on 9th June, 1997.

He admitted that in June 1989 he had received the agreement for sale which he had read and discussed with his client. He returned the agreement for sale in January, 1990. During the seven months which elapsed he retained the agreement in his possession. However, he thinks it could have been dealt with more expeditiously. He passed on all correspondence to his client and would seek instructions. The transfer was signed by the plaintiff sometime after December 8, 1989 but he did not return it. The half costs of the transaction was never sent to the vendor.

If as the plaintiff contends the agreement was sent to John Graham for his perusal and approval, why did it take him so many months to return it. The answer to this question is still outstanding.

Michael Thompson, Bank Manager, testified of two undertakings given by Jamaica Citizen's Bank to pay the balance of the purchase price in the sale of the apartment. He said there was no evidence on the relevant file that the plaintiff was asking for a loan since there was no mortgage application on file.

Jennifer Messado, Attorney-at-Law for the first defendant was the only witness called on behalf of the first defendant. She testified that the first defendant was developing a set of eleven apartments at Old Church Court in Drumblair. She knows Stanford Cocking for a considerable number of years.

More particularly she had a plan displayed on her wall at her office and standard form contracts in relation to the development

of Old Church Court. Early in June 1989 and before 14th June 1989 Stanford Cocking had displayed great interest in purchasing an apartment in the complex on behalf of the plaintiff. There were very few apartments left when he displayed an interest. He looked at the plans, took a fact sheet and left to decide what apartment he wanted. She decided on the price of the apartment with him which was $450,000 plus escalation. Stanford Cocking paid a deposit of $75,000. When he paid the deposit she understood the apartment to be sold and that the contract is to be prepared and sent to his Attorney-at-Law. The standard form contract would have been filled in with the particular apartment and the name of the purchaser put in. When the document marked 'Agreement for Sale' was sent to the plaintiff's Attorney-at-law it was signed by the first defendant and she had witnessed the signature. She agrees that the document was not dated. However, she admitted writing in the date - 22nd January, 1990. The reason she wrote in the date was because that was the time around which she got back the document. According to her she dated it because it would not be submitted for stamp duty until signed by both parties.

There was no indication from Stanford Cocking or his Attorney-at-Law that the plaintiff was in disagreement with any of the terms of the contract. Neither there was any indication that no contract was in existence. On the contrary reference was made by the plaintiff to the apartment as 'my apartment' and 'my title'. Under cross-examination by Mr. Scharschmidt Q.C. she said that the vendor had signed the document after the deposit had been paid by the purchaser although she represented in a letter to John Graham that the vendor had not signed the agreement. She had done everything possible to enforce the contract. It is because the vendor had signed why she was urging the purchaser to sign.

The fundamental questions which arise for determination are the following:

(1) Was there an oral contract of sale of apartment 1B Old Church Road between the plaintiff and the first defendant in June, 1989;

(2) Was there a memorandum in writing signed by the party to be charged.

(3) Was there a legal termination of the oral contract.

(4) Was the plaintiff by its conduct estopped from denying that an oral contract supported by the memorandum in writing came in effect in June 1989.

(5) Should Specific Performance be granted to the Plaintiff.

I now turn to a determination of the first question.

I. Was there an Oral Contract for Sale of the apartment?

It seems to me that this issue can easily be disposed of. The intention of the parties can be ascertained from what they did and said at the relevant time.

The first point raised by the plaintiff's attorney is that the plaintiff enterned into a written contract which speaks for itself. The contract came into effect on the date stated in the contract i.e. 22nd January 1990, since it was then that the agreement was executed by both parties. In my view, the evidence of Stanford Cocking is far from credible and cannot withstand any reasonable objective analysis. Mr. Cocking's demeanour including his unwillingness to be frank with the Court demonstrates quite clearly that he is not an honest witness. John Graham said that when he received the agreement in June 1989 he discussed it with Cocking. Stanford Cocking said that he saw it only in January 1990 when it was signed by the plaintiff. The evidence of Stanford Cocking is insincere. A person with such experience in real estate transactions would never have paid a deposit without having agreed to purchase the apartment. I have no difficulty in finding that there was an oral contract. A formal sale agreement was concluded on 22nd January, 1990, the significant feature being the date inserted by Jennifer Messado as the date when the agreement was returned. I cannot, however, find as a fact on the evidence before me that the agreement between the parties originated on 22nd January, 1990. That was not a point which was in anyone's mind. The parties had come to an oral agreement from as far back as June 1989 that the parties were conducting their affairs on the basis of the partially completed agreement in writing.

All the letters written on behalf of the first defendant by Jennifer Messado support the contention of the first defendant that an oral contract for the sale of the apartment had been entered into between the plaintiff and the first defendant from the 14th June 1989.

There is absolutely no evidence of any election to treat the contract as not coming into existence before the 22nd January, 1990.

In particular I find the following facts which are clear indicators that both parties conducted themselves in a manner which demonstrated that a contract for the sale of apartment 1B Old Church Court had been entered into from June 14, 1989.

(1) The agreement on a purchase price of $450,000.

(2) The identification of the property which was reflected on the receipt as Apartment 1B Old Church Court.

(3) The payment of the deposit of $75,000 on June 14, 1989.

(4) The undertaking from Jamaica Citizen's Bank to pay the balance of the purchase price in the sum of $375,000 dated the 31st August, 1989.

(5) The terms of the undertaking, usually those in which it is stated that the bank required the duplicate certificate of title in the name of the plaintiff and evidence of up to date payments of water rates, taxes, maintenance fees and a satisfactory surveyor's report and also the date at which the undertaking expired which is 31st December, 1989.

(6) Letter dated 22nd September, 1989 advising John Graham that the complex would be ready in six to eight weeks and required contribution from the plaintiff for the common area.

(7) The forwarding of a copy of the duplicate certificate of title to the apartment registered at Volume 1222 Folio 473 to Stanford Cocking.

(8) The forwarding of the Quantity Surveyor's certificate to Stanford Cocking stating the escalation costs.

(9) Sending of the Transfer in relation to the apartment by Jennifer Messado to John Graham on December 8, 1989.

(10) The sending of the Notice making Time of the Essence on 15th January, 1990.

(11) The sending of the architect's certificate of compliance.

In my judgment there was an oral agreement entered into on 14th June, 1989 which was evidenced in writing and the parties continued to act with each other in relation to the terms mentioned in the agreement. The mere fact that the date - 22nd January, 1990 was inserted in the document did not in my view alter or change the oral contract between the parties in June 1989. There is no evidence to indicate whether oral or documentary that the parties had changed their original position.

The second question is stated as follows:

II. Was there a memorandum in writing signed by the party to be charged?

It is trite law that an oral contract for the sale of land is valid. The Statute of Frauds does not render such contracts void but merely unenforceable.

Section 4 of the Statute of Frauds requires contracts for the sale of land to be evidenced by a memorandum in writing. The Section states:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

The authors of Cheshire - Law of Modern Real Property - 13th Edition at page 112 states:

> "The contract itself need not be in writing. All that is required is that before an action is brought, there should be a written memorandum containing not only the terms of the contract, but also an express or implied recognition that a contract was actually entered into."

Further at page 115 it is stated as regards the memorandum required to satisfy the Statute of Frauds that:

> "The memorandum need not be in any particular form ..... In fact any kind of signed document which contains all the essential terms that have been agreed between the parties will satisfy the statute ..... the signature must be that of party to be charged or his agent, or in other words, of the defendant in the action. If, therefore, in an agreement between A and B the memorandum signed by A only, it follows that B can enforce the contract, but A cannot.

Under the section, therefore, if there is an oral contract for the sale or other disposition of land, a party cannot be sued on it unless either he or his lawfully authorised agent has signed a memorandum or note of the Contract. Provided the memorandum or note contains what is necessary and provided it comes into existence before action is brought, it is not essential that it should have been prepared as a memorandum. The memorandum must set out as follows:

(1) The parties must be named.

(2) The subject matter of the contract must be specified.

(3) The memorandum must contain all the material terms of the contract.

(4) The memorandum must set out the consideration of the contract.

What is required is evidence of some genuine contract between the parties. It is no use having what appears to be a sufficient memorandum if in fact the parties have never reached a real agreement.

The memorandum may come into existence after the contract has been formed and in Barkworth v. Young (1856) 4 Drew I it was held that a memorandum made over fourteen years after the contract, sufficed.

It there follows that once it is established that there was an oral agreement between the parties on June 14, 1989, the agreement which was eventually signed by the parties by January 18, 1990 would be sufficient to satisfy the requirements of the Statute of Frauds.

There is contradictory evidence as to whether or not the agreement enclosed in the letter dated June 19, 1989 to the plaintiff's Attorney was signed by the Vendor. Jennifer Messado said that it was not the usual practice in conveyancing transactions for the agreement for sale to be signed by the Vendor before the agreement was signed by the purchaser. The usual practice is for the agreement to be sent to the purchaser for signing after which it is returned to the vendor's Attorney with the deposit. Her evidence is that the first defendant signed the agreement before

the plaintiff did in this case because the deposit had already been paid. On the contrary, John Graham said that the agreement sent to him was not signed by the vendor. He sought to support this evidence by relying on a document purporting to be a copy of that which was sent to him on June 19, 1989. Under cross-examination it became uncertain whether the document could be considered to be a copy of the agreement which was being relied on by the plaintiff in light of the disparity in the places where the names of the parties and other particulars of the contract had been inserted. It is significant to observe that the document relied on by John Graham was revealed by the plaintiff for the first time at the trial.

In all the circumstances I am inclined to the view and I so find, that the agreement which was forwarded to the plaintiff on June 19, 1989 was signed by the vendor. My conclusion derived assistance from the following:

(1) The deposit of $75,000 had been paid.

(2) An undertaking to pay the balance was given by the plaintiff from the 31st August, 1989.

(3) The first defendant for the entire period between 14th June, 1989 to 30th January, 1990 regarded itself as having been bound by the contract and conducted itself as such in that it satisfied all its obligations under the contract.

Finally, I reject the submission of the plaintiff's Attorney that assuming there was an oral contract and assuming the document had been signed by the vendor the contract was not thereby rendered enforceable. The contract would be merely enforceable by the purchaser against the vendor, and not by the vendor against the purchaser. This interpretation of the law is erroneous. As the law clearly demonstrates the memorandum must have been signed by the party against whom the action is brought. It is therefore a requirement which the party instituting the action is required to satisfy and not one which the party who has been sued must satisfy in order to affirm the existence of the contract.

III. Was there a legal termination of the Contract?

The period for completion of the contract was expressly provided for in Clause 4 of the agreement. In addition Clause 14 (b) made time

of the essence in respect of all payments by the purchaser. A statement of account indicating the exact sum required to settle the balance purchase price was sent to the plaintiff's attorney on December 8, 1989. The agreement required the plaintiff to pay this sum by December 15, 1989. This sum was not paid on that date.

By way of Notice making Time of the Essence the first defendant gave the plaintiff an additional 14 days within which to complete the contract. This Notice may be regarded as further indulgence being given to the plaintiff.

On January 30, 1990 the agreement was rescinded by the first defendant. The plaintiff had still not paid the balance purchase price and had not returned the signed Instrument of Transfer which had been sent to it for signing. The failure to return the signed transfer rendered the letter of undertaking dated January 29, 1990 provided by Citizens Bank, totally worthless since the Bank's undertaking was to pay the sum of $375,000 upon receipt of Duplicate Certificate of Title for ..... duly registered in the name of Park Traders Limited ....." There could be no such registration effected on the Certificate of Title until and unless the Transfer had been returned. It was admitted by the plaintiff that the transfer was still in their possession and was never at any time sent to the first defendant's Attorneys. Against that background it cannot be said that the plaintiff was at all material times ready willing and able to complete the agreement. On the contrary the first defendant was in a position to comply with its obligations under the contract. The only obstacle in the way of the plaintiff of effecting the actual transfer of title do the plaintiff at the date the contract was terminated would have been the failure on the part of the plaintiff to return the signed transfer.

Much assistance is derived from these authorities cited by the defendants' Attorneys.

Barnsley's Conveyancing Law and Practice 3rd Edition, page 374 where it is noted in relation to contracts in which time is expressly stated to be of the essence:

> "Here the rule is strict. Failure to complete on the due date constituted a fundamental breach of contract both at law and in equity. The party at fault

> cannot enforce the contract specifically, whereas the other party is free to pursue his remedies for the breach. Thus he may elect to rescind the contract on the very next day, if he chooses."

Now in Union Eagle Limited v. Golden Achievement Limited (1997) 3 ALL E.R. 215 P.C., the appellant purchaser entered into a written contract from the respondent vendor and paid a deposit. The contract provided that time was of the essence in every respect of the contract. The purchaser was ten minutes late in tendering cheques for the purchase money and relevant documents for completion. It was held by the Privy Council that in the absence of conduct amounting to a waiver or estoppel, the Courts would not intervene to provide an equitable remedy such as specific performance in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, since the purpose of the right to rescind was to free the property for resale and to enable the vendor to know with certainty that he was entitled to resell, which, in a rising market, could be both a valuable and a volatile right.

In the instant case there was no evidence of conduct amounting to a waiver or estoppel on the part of the first defendant. It therefore followed that as the time for performance of the contract had passed, performance of the contract by the purchaser/plaintiff was no longer possible. I conclude therefore that the purchaser could not show a readiness and willingness to complete either on the day fixed or within a reasonable time after. I reject the plaintiff's contention that the 14 day period indicated in the Notice had one day left for expiration since the notice clearly stated that the time given was within 14 days. I find on the contrary a protracted default on the purchaser's part despite the urgency of the vendor as in my view justified the vendor in treating the purchaser as refusing to complete notwithstanding his protestations of good intentions for the future.

The vendor was justified in rescinding the contract.

IV. Was the Plaintiff by its conduct estopped from denying that an oral contract supported by the memorandum in writing came in effect in June, 1989?

It is the contention of the first defendant that the plaintiff is estopped from denying that a valid oral contract for the sale of the apartment did exist from June 14, 1989.

The following conduct of the plaintiff is relied on:

(1) It paid a deposit on the apartment on the 14th June 1989.

(2) It's bank, acting on its instructions, gave an undertaking to pay the balance of the purchase price from the 31st of August, 1989.

(3) It received at least nine letters from the first defendant, during the period June, 1989 and January, 1991, some of which clearly indicated that the first defendant was acting on the promise that a valid contract for the sale of the apartment existed and it never denied even once that such a contract existed.

(4) The first defendant acted on the reliance it placed on the conduct of the plaintiff and altered its own position in many ways.

I accept the submission of Mrs. Benka Coker Q.C. that the plaintiff is in breach of the principle of equitable estoppel. Assistance is derived from the following statement in the text Specific Performance by Jones and Goodhart at page 17.

> "He who made an unequivocal assurance to another could not act inconsistently with it if the promisee had altered his position and it would be inequitable for the promisor to enforce his right".

I hold on the evidence before me that the plaintiff is estopped from denying that an oral contract existed from June 1989 which was supported by a memorandum in writing.

V. Should Specific Performance be granted to the Plaintiff?

I turn now to the question of whether this Court ought to grant Specific Performance to the plaintiff based upon the Court's equitable jurisdiction.

The plaintiff has been unable to provide this Court with a satisfactory explanation for the seven month delay in having the

agreement signed by itself despite repeated requests sent to it by Jennifer Messado. It is significant to note that despite the many letters sent by Jennifer Messado to John Graham from June 19, 1989 to December 8, 1989 the first and only response which she ever received from John Graham was his letter dated January 18, 1990 when the agreement for sale which was sent to him seven months earlier was eventually returned executed by the plaintiff.

In Howe v. Smith (1881-5) ALL E.R. 201 the issue before the Court of Appeal related to the failure on the part of a purchaser to comply with the terms of an agreement for sale. The relevant facts are set out by Fry C.J. at page 210:

> "The contract was entered into on March 24, April 24 being fixed for completion ..... April 24 arrived, but the draft conveyance had not been sent, and the vendor pressed for completion, but in vain. It appears that on June 20, the vendor agreed to give a month's notice for completion on the purchaser agreeing to pay certain costs (to which the purchaser assented). Having regard to all that had occurred before, I consider that the expiration of this month was the latest time at which the purchaser could require the vendor to accept his purchase money and complete. The month expired and no payment was made, though this action was begun shortly afterwards, I do not find that any tender of payment has ever been made..... In a word, the purchaser has in my opinion, been guilty of such delay, whether measured by the rules of equity or of equity, as deprives him of his right to specific performance and of his right to maintain an action for damages and under the circumstances I hold that the purchaser has no right to recover his deposit."

In Stickney v. Keeble and Another (1915) A.C. 386 Lord Parker in addressing the relevance of the conduct of parties to a contract when determining the question of whether or not specific performance ought to be granted, said at pages 418 - 419:

> "Again although the vendor's conduct may not, under the circumstances, be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay, and the purchaser has served him with notice limiting a time at the expiration of which he will treat the contract at an end, equity will not, after the expiration of such time provided it is a reasonable time, enforce specific performance or restrain an action at law ..... The fact that the purchaser has continually been pressing for completion, or has before given

> similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts: ..... Indeed the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred as unreasonable time."

The authorities clearly demonstrate that delay on the part of a party to a contract is a relevant factor for the Court to consider when determining whether or not to grant specific performance. In my view the plaintiff is guilty of gross inexcusable and unreasonable delay in the performance of its obligations under the contract. The first defendant for a period of seven months continued to press the plaintiff to comply with the terms of the agreement but without success. The plaintiff is therefore not entitled to any equitable relief from this Court.

Further in Casey v. Whawrawhara Haimona 1920 - 21 NZLR 455, the Court of Appeal of New Zealand had to decide whether the plaintiff was entitled to an order for specific performance in light of his delay in filing the action. The contract for sale in question was dated October 18, 1919. The appellant's repudiation of the contract took place in November 7, 1919 followed by a refusal by him on December 11 to accept the cash payable on completion when it was tendered to him by the Respondent. The Respondent lodged a caveat to protect his interest on April 1, 1920. The writ was not issued until July 17, 1920. Sim C.J. stated at page 462:

> "A party cannot call upon a Court of equity for specific performance" said Lord Alvanley, MR in Milward v. Thanet, "unless he has shown himself ready, desirous, prompt and eager". This statement of the law was quoted with approval by Cotton LJ in delivering the judgment of the Court of Appeal in Mills v. Haywood ..... It is a question in each case of what in the circumstances is a reasonable time, and not whether the delay has been one of twelve months or any definite number of months: Huxham v. Llewellyn. In Wilson v. Moir and Dryden v. Moir the contracts were for sale of land. In the first named case an explained delay for nine months was held to be a bar to specific performance. In the other case a similar delay for over four months was held to be fatal.

In the present case the agreement for sale was terminated on January, 30, 1990 but the suit was not filed until 27th July, 1990 - a period of approximately six months after termination. In my judgment this further delay in filing the suit provides an additional reason why this Court ought not to exercise its discretion in the Plaintiff's favour by granting the equitable relief of specific performance.

Accordingly I am not satisfied that the equitable remedy of Specific Performance or Damages should be granted in this case and I therefore dismiss the case of the plaintiff and grant the declarations sought by the first defendant as under:

(a) A Declaration that a valid and enforceable contract came into existence between the plaintiff and the first defendant on around the 19th June 1989 after the deposit of $75,000 was paid by the plaintiff to the first defendant's Attorney's-at-Law and after the first defendant had executed the memorandum in writing containing all the material terms of the said Agreement for Sale.

(b) A Declaration that the first defendant had a right in law to issue the Notice Making Time of the Essence of the Contract dated the 16th January, 1990 and that the said Notice was valid and effective in law.

(c) A Declaration that the First Defendant had a right in law to rescind the said contract on the 30th January, 1990.

(d) A Declaration that the said rescission on the 30th January, 1990 was valid and effective or alternatively rescission of the said agreement.

(e) A Declaration that in light of the facts and the provisions of paragraph 14(b) of the said Agreement, the first defendant had a right in law to rescind the said contract.

(f) A Declaration that the plaintiff's delay in completing the said sale was so gross and unreasonable as to warrant the first defendant's termination of the said contract.

(g) In all the circumstances it would not be just and equitable to grant the remedy of specific performance.

The Case of the Second Defendant

On February 26, 1990 the first defendant entered into an agreement with the second defendant to sell and the second defendant to purchase the relevant premises for the sum of $600,000. There have been no allegations in the plaintiff's pleadings nor has any evidence been adduced before this Court to establish any complicity on the part of the defendants in entering into this agreement. The testimony of Roger Hinds on the second defendant's behalf indicates that this sale was an arm's length transaction between unconnected parties.

The purchase price in respect of this second agreement, was paid in full by the second defendant on May, 14, 1990. The second defendant was given possession of the apartment on March, 19, 1990 and is still in occupation of the property. The second defendant has not breached any of the terms of the agreement and has not been guilty of any delay or failure to complete its obligations under the contract. The inability of the first defendant to complete is due solely to the existence of a caveat which was lodged at the office of the Registrar of Titles on the plaintiff's behalf on February 8, 1990.

I conclude that since the contract between the first defendant and the plaintiff was legally terminated by the first defendant on January 30, 1990, the first defendant was entitled in law to enter into the agreement with the Second Defendant.

There is a valuation report dated June 12, 1997 prepared by David Delisser and Associates in respect of the apartment. The current market value of the apartment is stated to be $3,108,000.

In the circumstances I grant the following:

(a) A Declaration that the contract for the sale of the said premises to the Plaintiff was rescinded by the First Defendant.

(b) A Declaration that the contract for the sale of the said premises to the Second Defendant is valid and enforceable.

(c) An order that the Plaintiff do cause the Caveat lodged by N. Resort Limited on the 8th day of

February, 1990 against the Title to the said premises to be withdrawn.

Summary

For the reasons given I would dismiss the Plaintiff's action. Accordingly, I give judgment for the First and Second Defendants against the Plaintiff and refer to the abovementioned Declarations and Order.

Costs

Both Defendants will recover their costs from the Plaintiff including the costs which the First Defendant may have to pay to the Second Defendant as a consequence of the lodging of a caveat by the Plaintiff against the title to the subject property and the First Defendant's consequent liability to register the transfer to the second defendant.

All these costs to be agreed or taxed.

It only remains for me to thank learned Counsel on both sides for the clear and orderly manner in which the arguments were conducted. Their invaluable assistance has considerably reduced the burden of my task.