Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL. V 001 OF 1990

BETWEEN	DALTON SEYMOUR VACCIANA	PLAINTIFF
A N D	OXFORD PRUDENTIAL HOLDINGS	DEFENDANT

Patrick Bailey for the Plaintiff

Norman Davis for the Defendant

Heard on the 19th, 20th and 21st days of October 1993 and the 21st day of March 1997.

Judgment

COURTENAY ORR J.

Throughout 1994, I struggled against exhaustion. A brief period of leave did not help much; and so my work suffered considerably. Then in March 1995, shortly before I was due to go on an extended period of leave I suddenly fell seriously ill. After two periods of hospitalization, I began the slow road to recovery.

I resumed duties on a limited basis in mid September 1995, but even this proved to be premature and so I again went on leave in November 1995 until March 1996. I am not yet completely recovered; hence the delay in delivering this judgment.

I hope that the parties and all affected by these proceedings have not suffered too much inconvenience because of the delay.

This is an action for specific performance of a written agreement dated 4th April 1989, and entered into by the defendant (as owner and vendor) and the plaintiff, as purchaser, for the sale of land situated at 14 Crieffe Road, in the parish of St. Andrew.

There is much common ground between the parties as the bulk of the evidence is contained in the agreed bundle of documents, in particular letters between the attorneys of the parties.

The outcome of this case therefore is determined largely by the effect given by the court to these papers.

Throughout the events which gave rise to this case the plaintiff was represented by Mr. Patrick Bailey Attorney-at-Law, and the defendant by Mr. Dereck Jones, Attorney-at-Law. The firm of attorneys having carriage of sale were Messrs. Myers Fletcher & Gordon Manton & Hart of which Mr. Jones was at all material times a partner.

The following facts were not in dispute:

The plaintiff was a tenant (in possession) of the defendant under a lease the effective date of which was 1st January, 1988, and which provided that the plaintiff should be a monthly tenant after the expiration of a year. The rent was $750.00 per month.

The parties entered into the sales agreement which provided for a purchase price of $315,000.00 payable by a deposit of $55,000.00 on signing, $100,000.00 within three months of evaluation and balance on completion which was fixed as on or before 30th June, 1989. A special condition of the agreement was that the Plaintiff obtain and deliver a written commitment from Victoria Mutual Building Society or such other lending institution as may be approved by the defendant for a loan of $160,000.00 on the security of the said property by 31st May 1989, failing which either party could rescind. At the outset time was not of the essence of the contract.

By letter dated 14th March, 1989 Mr. Bailey forwarded a cheque for the amount of the deposit of $55,000.00 to Mr. Jones. The latter in acknowledging receipt in a letter dated 4th April, 1989, wrote:

> "We think it only fair to let you know that our instructions are that no extensions of time are going to be granted and therefore it is important that your client does whatever is necessary to ensure that the terms of this contract are complied with".

With that letter was transmitted a copy of the agreement duly executed by the defendant vendor.

Mr. Jones by letter dated 10th April, 1989, sent a photocopy of the title to Mr. Bailey. Mr. Jones wrote Mr. Bailey again on 25th April, 1989 enquiring what progress had been made in obtaining a commitment for the financing of the loan. He pointed out that "Our concern is that there be no delay in relation to the completion of this matter.....".

Mr. Bailey in turn wrote the plaintiff the following day enclosing a copy of that letter and expressed himself thus:

> "Enclosed is a copy of a letter from Messrs. Myers Fletcher & Gordon Manton & Hart which taken with their earlier letter of 4th April, 1989 displays an unremitting agenda of urgency herein. Please let us have the letter of commitment within the time stipulated in the agreement".

Mr. Jones wrote again on 15th May asking about the financial commitment. On 29th May 1989, Mr. Bailey wrote Mr. Jones stating that the plaintiff's efforts to obtain financing had been hampered by the untimely death of Mr. Warren, a director and shareholder of the defendant company, who had been assisting in obtaining financing. Mr. Bailey asked for an extension of 30 days within which to supply the letter of commitment.

By a letter dated 12th June 1989, Mr. Jones wrote to Mr. Bailey saying that he had received instructions from the defendant granting the extension of 30 days as requested and added that "This is on the strict understanding that all money due in respect of this sale, including unpaid rental will have to

be paid no later than the 31st July. Further, if the letter of commitment is not delivered by the 30th June, our instructions are to rescind the contract".

In a letter dated 3rd July 1989, Mr. Bailey wrote to Mr. Jones intimating that formal approval of a mortgage loan from Victoria Mutual Building Society was anticipated and that he expected to be in a position to forward a letter of commitment shortly. Mr. Bailey also stated that it had been necessary to obtain the last tax receipt for the premises and that the plaintiff had informed him that it was furnished to him on 30th June, 1989.

By Registered Mail dated 12th July 1989, Mr. Jones sent to Mr. Bailey a notice to complete making time the essence of the contract and requiring completion within 28 days.

In a letter dated 1st August 1989, Mr. Bailey enclosed a copy of a letter from Victoria Mutual Building Society approving a loan of $157,000.00 from the plaintiff. Mr. Bailey also asked for a statement of Account to close.

On 4th August 1989, Mr. Jones wrote to Mr. Bailey enclosing a statement to close which showed a balance of $114,057.07 due, after the expected proceeds of the mortgage ($157,000.00) was credited to the account due from the plaintiff.

Mr. Jones also wrote:

> ".....$100,000.00 should have been paid by the 4th of July and this has to be paid immediately failing which the Notice of the 6th July remains in force. The balance should either be paid now or secured by an undertaking from a financial institution".

The next communication in this matter was a registered letter from Mr. Jones addressed to the plaintiff and dated 15th August, 1989 in which Mr. Jones purported to cancel the agreement and to forfeit the plaintiff's deposit.

In a letter dated 18th August, 1989, the National Commercial Bank wrote to Mr. Jones thereby giving an undertaking to pay $100,000.00. The letter stated that the undertaking would expire on 30th August, 1989, but was subject to extension with prior notice [It must be noted that under the agreement for sale $100,000.00 was payable by the plaintiff within three months of evaluation]. The letter also requested the duplicate certificate of title in exchange for the undertaking and asked that a tax certificate signifying that tax had been paid up to date should be sent with the title.

By letter dated 21st August, 1989, Mr. Jones replied to the National Commercial Bank. He wrote as follows:

> "We have already given an undertaking to the Victoria Mutual Building Society that we will send them the title to enable them to register a mortgage in the sum of One Hundred and Fifty-Seven Thousand Dollars ($157,000.00). Accordingly we are not able to give you any undertaking to send you the title on registration of the Transfer".
>
> "In addition, it is unlikely that the registration of the Transfer would be complete before the end of September."

In a letter of the same date to Mr. Bailey, Mr. Jones enclosed a copy of the letter from the National Commercial Bank dated 18th August 1989, and his reply of the 21st August 1989. The letter to Mr. Bailey was marked "WITHOUT PREJUDICE" and was couched in the following terms:

> "The vendor is not going to be prepared to continue any dialogue with your client unless:
>
> 1. All outstanding rent is paid up.
>
> 2. Satisfactory arrangements are made for the payment of the balance of the purchase money.
>
> 3. Satisfactory arrangements are made to compensate them for the loss they are suffering.....
>
> You need to speak with your client and get back in touch with me as quickly as possible."

In another letter dated 6th September 1989 and marked "WITHOUT PREJUDICE" Mr. Jones wrote to Mr. Bailey thus:

> "Your client is being given one final opportunity provided:
>
> a. Rental due to date plus interest at twenty-five percent (25%) for the period for which each payment has been outstanding is paid
>
> and
>
> b. The balance of the purchase price plus interest at twenty-five percent (25%) from when it became due to when it is paid, must either be paid or secured by an undertaking satisfactory to me.

is all in place by the 14th September, then we can complete the sale.

> If the settlement is not reached then all steps are going to be taken immediately to recover possession."

Mr. Bailey replied by letter dated 19th September 1989. In part it reads as follows:

> "Enclosed is cheque in the sum of $19,307.07 made up as follows:
>
> 1. Balance as per your statement $14,057.07
>
> 2. Rental arrears March to September 1989 @ $750.00 per month 5,250.00
>
> $19,307.07
>
> The interest claim apart from being excessive is susceptible to miscalculation so perhaps this aspect could be deferred."

That letter evoked a response from Mr. Jones in a letter dated 20th September 1989. It reads in part:

> "The balance shown as per my statement is One Hundred & Fourteen Thousand, Fifty-Seven Dollars and Seven Cents ($114,057.07). I have no idea where the other hundred thousand dollars is coming from and I can see no difficulty in computing the interest. I have referred you letter to my client for instructions....."

Mr. Bailey in a letter headed "URGENT AND IMMEDIATE" dated the following day

then wrote to the plaintiff enclosing a copy of the letter of the 20th September 1989 from Mr. Jones, and urging the plaintiff to attend the National Commercial Bank so that their letter of undertaking could be extended "otherwise the sale will be jeopardised."

Six days later , by letter dated 27th September 1989, Mr. Bailey forwarded an undertaking from the National Commercial Bank dated 26th September 1989. The undertaking was for a sum of $100,000.00 and would expire on 30th November 1989.

Mr. Bailey next wrote Mr. Jones by letter dated 16th November 1989. He sought agreement on interest of 12½% instead of the 25% asked by Mr. Jones, and in the second and third paragraphs had this to say:

> "Please recall that time was not of the essence of the contract. The delays herein though regrettable were by no means inordinate and our client has made himself ready, willing and able to complete this transaction as evidenced by his payments of the shortfall after deducting the sums expected from Victoria Mutual Building Society and the National Commercial Bank Ja. Ltd.
>
> To date we have not received the Transfer although from as far back as 27th September, 1989 we sent you the letter from N.C.B. Ja. Ltd. undertaking to pay the amount of $100,000.00."

Mr. Bailey wrote the attorneys for Victoria Mutual Building Society by letter dated 28th December 1989 requesting the mortgage documents for execution; and in another letter of the same date he also wrote to the National Commercial Bank asking for an extension of their undertaking (to pay $100,000.00) to 30th April 1990.

The next letter was from Mr. Jones to Mr. Bailey and dated 29th December 1989. The main points in this letter were expressed thus:

> ".....I am writing to confirm the telephone conversation between us on the 28th December, in which I advised you that my client had reluctantly agreed to give your client one final opportunity to complete.....

> You are correct that time was not originally of the essence of the contract. However, it was made so by virtue of a notice dated 6th July 1989. The fact is although your client has taken steps to put himself in a position to complete he had not, and still has not fulfilled his contractual obligations.....
>
> We have agreed that you will immediately write to National Commercial Bank asking them to extend their undertaking to the 30th April and that you will also immediately write Mr. Ethan Sinclair of this firm who is acting on behalf of Victoria Mutual providing him with the necessary information and funds to enable the processing of the mortgage to be completed. I confirm that I have already given him the title."

Mr. Jones also sent the transfer under cover of that letter with a request that it be executed and returned with a "cheque to cover interest on all outstanding amounts from the original due dates to the 31st January, together with your undertaking to pay any further interest up to date on which the funds are received from Victoria Mutual Building Society and National Commercial Bank."

Mr. Jones again wrote Mr. Bailey, by letter dated 15th January 1990 asking for a quick response to his last letter - the letter of 29th December 1989.

Mr. Bailey wrote Mr. Jones by letter dated 16th January 1989 enclosing the undated instrument of transfer signed by the plaintiff. He also asked for confirmation that the interest rate to be charged was 12½%. Mr. Jones replied by letter dated 17th January 1990, confirming that the interest rate was 12½% and added: "It is important that you let me have your cheque to cover this as quickly as possible."

Mr. Jones then wrote Mr. Bailey on 1st March 1990, and demanded that the plaintiff complete by paying all sums due by 16th March, 1990 "as to which time is of the essence."

Mr. Bailey responded by letter dated 16th March 1990 and enclosed a cheque for $22,000.00 which was stated as to cover interest.

In a letter dated 20th March 1990, Mr. Jones wrote Mr. Bailey. He acknowledged receipt of the cheque for $22,000.00 but continued:

> "As your client has again failed to comply with the contractual obligations, our client has instructed us to bring the contract to an end, notice of which we hereby give you. The deposit paid has been forfeited.
>
> Your cheque for $22,000.00 as also that dated 19th September 1989 for $19,307.07 are both returned herewith."

The plaintiff then lodged a caveat dated 29th March, 1990 in respect of the land in question. In the statutory declaration dated 28th March 1990 in support of his caveat the plaintiff stated at paragraph 6:

> "That to date the Vendor's Attorneys-at-Law have not forwarded the Transfer for my signature and by letter dated March 20, 1990, have sought to cancel the sale and purported to forfeit the deposit paid by me."

This statement regarding the transfer is false. Mr. Jones had sent the transfer with his letter dated 29th December 1989 to Mr. Bailey. Moreover his attorney Mr. Bailey had sent the instrument of transfer signed by the plaintiff to Mr. Jones by letter dated 16th January, 1990.

THE ISSUE BETWEEN THE PARTIES

The parties differed in the following respects:

(1) The defendant maintains that the notice issued on 6th July, 1989 was effective to make time of the essence.

The Plaintiff denies this.

(2) During his closing address Mr. Bailey obtained the following amendment to his statement of claim:

> "Further by letter dated August 4, 1989, the contract between the parties was varied to allow for payment of $100,000.00 by way of a letter of undertaking from a financial institution."

The defendant denies that there was any variation.

(3) The plaintiff asserts that "having regard to the terms of the agreement and the correspondence modifying the same the defendant could not properly terminate the agreement and forfeit the deposit as it purported to do."

The defendant maintains that it could and did lawfully do so.

(4) In the statement of claim the plaintiff gave the following particulars on which he would rely:

"(i) Time was not the essence of the agreement.

(ii) The plaintiff was not guilty of any inordinate or unreasonable delay.

(iii) The completion date for the agreement was by the defendant's attorneys letter dated March 1, 1990 extended to March 16, 1990.

(iv) The plaintiff discharged his obligations under the agreement by tendering the payment of the $22,000.00 on the final date for completion.

(v) The defendant at no time demonstrated that he was willing able and in a position to complete in the strictest sense of the word.

(vi) The forfeiture of the Plaintiff's deposit was penal, oppressive, inequitable and unjust in all the circumstances.

(vi) Payment of interest on the balance of the purchase price was adequate compensation to the defendant for any delay in completion."

The defendant denies this position.

In his prayer, the plaintiff claims:-

"1. Specific performance of the agreement for sale.

2. Damages for breach of the said agreement.

3. Alternatively the plaintiff claims damages for rescission of the said agreement and for the refund of the Plaintiff's deposit of $55,000.00.

4. Damages for his loss of bargain."

THE ORAL EVIDENCE GIVEN

The plaintiff alone gave evidence on his behalf. The defendant called no witnesses.

The plaintiff's evidence was that he took possession of the premises as a tenant and later agreed to purchase it. Mr. Kenneth Warren a director of the defendant company had promised to assist him to secure a mortgage. Mr. Warren was killed in 1989 and this proved a great set back so that he had to start all over.

He also said that he planned to borrow $260,000.00. "$100,000.00 would come from my resource," and the balance of $160,000.00 would be from a mortgage.

He said that he himself delivered the cheque for $22,000.00 for outstanding interest to the defendant's attorneys on 16th March 1990. He is in a position to obtain funds to complete the purchase and he still wishes to complete and acquire the property. He received the notice making time of the essence. He tendered payment on two occasions. "Based on the dialogue we had been having I concluded the contract we had still in progress."

He agreed that when he signed the statutory declaration in support of the contract, he had, contrary to what was said in the declaration, already signed the transfer. He maintained that he would not lie and sought to explain this discrepancy by saying, "there may have been a misunderstanding."

He admitted that he had not paid rent since March 1990. He said he did not understand that at all material times the defendant was in a hurry to conclude, but he would imagine that the defendant would want to conclude as quickly as possible.

As regard the sum of $100,000.00 he indicated that it was "not necessarily in the bank." It was a loan from National Commercial Bank.

Finally he said that based on the sales agreement, the request for rent to be brought up to date, by September 1989, the fact that the letter of undertaking from Victoria Mutual Building Society was given by September 1989, as well as the letter of commitment from National Commercial Bank, he thought that the purchase agreement was at a conclusion.

THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF

Mr. Bailey submitted as follows:

(1) There is no dispute that time was not of the essence in the agreement for sale.

(ii) The agreement was lacking in precision in that in the portion dealing with how the purchase price was payable, after speaking of the deposit it reads:

> ".....a further payment of $100,000.00 within three months of evaluation."

(iii) Special condition 4 which speaks to the purchaser obtaining a letter of commitment from a lending institution for a loan of $100,000.00 reads in part as follows:

> ".....In the event of the Purchaser not obtaining and delivering to the Vendor's Attorneys-at-Law a written commitment for such loan by 31st day of May 1989 either party shall be entitled to rescind this agreement by notice in writing within fourteen (14) days failing which this agreement shall remain absolute and binding on the parties hereto."

This means that if the letter of commitment was not produced on the stipulated date, either party would have to take the active step of serving notice of rescission; failing which the agreement remains binding and absolute. Nowhere in the evidence was this ever done so the parties treated the agreement as in force.

(iv) In assessing the reasonableness of the conduct of the plaintiff and the reasonableness of the delay, the court should look at what was being done to produce a letter of commitment.

Although the parties, especially the vendor, made it clear they would have preferred expeditious completion, time was never of the essence so as to go to the "root or foundation of the agreement."

(v) Halsbury's Laws of England, 4th Edition, Vol. 42 paragraph 126 reads:

> "126 Date of completion. A date is fixed by the conditions of sale for the completion of the purchase, but, in the absence of express stipulation to that effect, or unless an intention that it should be so can be implied from the circumstances that date is not of the essence of the contract. However, although time is not originally of the essence of the contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time, provided at the time of the notice there has been some default or unreasonable delay by the other." (emphasis supplied).

On July 3, 1989 he wrote Mr. Jones indicating that the plaintiff had said that he had received the last tax receipt for the premises as recently as 30th June, 1989. Yet within days, by letter dated 12th July 1989, Mr. Jones sends a notice requiring the plaintiff to complete "within 28 days from the date hereof, as to which the vendor hereby makes TIME OF THE ESSENCE of the said agreement." All circumstances suggested that the plaintiff was not guilty of unreasonable delay and that the time given was insufficient.

The date of the letter enclosing the notice (12th July 1989) shows that the date of the notice 6th July 1989, is not a true date. Moreover the effect of special condition 5 of the agreement is that at best the notice is not deemed to have reached the plaintiff until three days after 12th July 1989. This condition reads in part thus:

> "Any notice or demand to be served or made on either party hereto shall be deemed to be sufficiently served or made as the case may be if sent by pre-paid registered post addressed to him at this address above stated and shall be deemed to have been received three (3) days after the date of posting in any post office in Jamaica....."

Even if one counted 28 days from 6th July 1989, the notice would expire on 3rd or 4th August. But the statement to close was sent by Mr. Jones only by letter dated 4th August 1989.

Further, that the time given to complete was unreasonable is evidenced by the letter of Mr. Jones to National Commercial Bank dated 21st August 1989, in which he says he cannot send the title as he has promised to give it to Victoria Mutual Building Society and adds:

> ".....it is unlikely that registration of the Transfer would be complete before the end of September."

(vi) The evidence indicates that the contract was not terminated by Mr. Jones letter of March 20, 1990.

(vii) Mr. Jones' letter dated 4th August 1989, and enclosing the statement of Account to close, varied the contract to allow for payment of $100,000.00 by way of a letter of undertaking from a financial institution. The relevant portion of the letter is couched in these terms:

> "... $100,000.00 should have been paid by the 4th July and this has to be paid immediately failing which the notice of the 6th July remains in force. <u>The balance should either be paid now or secured by an undertaking from a financial institution."</u> (emphasis supplied)

(viii) As a result of continuing negotiations evidenced by letters and telephone calls, the notice making time of the essence had been waived up to 16th March 1990.

<u>THE SUBMISSIONS FOR THE DEFENDANT</u>

Mr. Davis put forward the following line of argument:

1. As regards the facts, the chronology of events may be divided into 4 stages.

(a) <u>STAGE ONE:</u> From the agreement to the cancellation on 15th August 1989. The plaintiff failed to comply with special condition 4 of the agreement regarding the payment of $100,000.00 and the securing of a

mortgage for the balance of the purchase price. and so the defendant was entitled to serve a notice to complete and make time of the essence. Accordingly the agreement was properly terminated on 15th August 1989 when the plaintiff failed to complete.

(b) STAGE TWO: From 15th August 1989 to 19th September 1989.

During this period the defendant's attorney exchanged correspondence with the plaintiff's attorney with a view to giving the plaintiff a further opportunity to complete. To this end time of completion was extended but upon certain conditions which the plaintiff failed to meet.

(c) STAGE THREE: From 19th September 1989 to 17th January 1990

Further correspondence took place and the defendant reduced the rate of interest demanded on all outstanding amounts. and indicated this by letter dated 17th January 1990.

(d) STAGE FOUR: From 17th January 1990 to 20th March 1990

On receiving no reply to the letter of 17th January 1990. the defendant's attorney by letter of 1st March 1990. sent the plaintiff's attorney a notice to complete by 16th March 1990. and made time of the essence in relation to this. On 16th March 1990. the plaintiff had failed to tender the sum of $100,000.00 or an undertaking for the sum and so by letter dated 20th March 1990. the defendant's attorney properly cancelled the agreement.

2. The particulars relied on by the plaintiff do not bear examination:

(a) There is no requirement that the defendant prove that "it was willing. able and in a position to complete in the strictest sense of the word."

That duty was the plaintiff's.

(b) Although time was not originally of the essence. it was made so by the defendant's notices.

(c) The plaintiff was guilty of inordinate and unreasonable delay.

(d) The plaintiff failed to discharge his obligation under the agreement when he tendered $22.000.00 as this did not cover the interest due which the defendant was entitled to demand.

(e) The defendant properly terminated the agreement by letter dated 20th March 1990.

(f) So far from varying the agreement, it was validly terminated in August 1989, subsequent negotiations were without prejudice and where there was no obligation on the defendant to revive the agreement.

Nor did these negotiations amount to a waiver of the right to rescind. Rather, they were concerned with giving the plaintiff an opportunity to complete upon certain conditions.

Even if there were a waiver of the essentiality of time there was never any waiver of the first termination.

THE COURT'S ANALYSIS AND RULING

I think it is helpful to consider the issues under the following headings:

1. THE STATUS OF THE PURPORTED RESCISSION IN AUGUST 1989

The answer to the following questions should elucidate this issue.

(a) Was the contract lacking in precision?

Mr. Bailey for the plaintiff submitted that the contract was lacking in precision as the words providing for the payment of the $100,000.00 are vague in that they prescribe ..."a further payment of $100,000.00 within three months of evaluation".

I adopt the following statement of law in Lewison on the Interpretation of Contracts paragraph 6.03 p. 127.

> "In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus".

In this connection the following dictum of Lord Romilly MR in Re Strand Music Hall Company Limited (1865) 5 Beav. 153 is apposite:

> "The proper mode of construing any written instrument is, to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed". (emphasis mine)

Again at paragraph 6.02 page 124 the learned author states the basic premise that a document must be construed as a whole, in the following:

> "In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole document".

Thus Lord Ellenborough in Barton vs Fitzgerald [1812] 15 East 20 said:

> "It is a true rule of construction that the sense in any particular part of an instrument must be collected ex antecedentibus et consequentibus: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done".

Further, in Hume vs Rundell [1824] 25 & 174 Leach V-C, said:

> "In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together".

The full clause from which the words impugned is taken reads thus:

> "HOW PAYABLE: A deposit of $55,000.00 on the signing hereof, a further payment of $100,000.00 within three months of evaluation and the balance on completion".

The very next clause provides as follows:

> COMPLETION: On or before the 30th day of June, 1989 on payment of all moneys payable by the purchaser hereunder in exchange for the duplicate Certificate of Title for the property, duly registered in the name of the Purchaser". (emphasis supplied)

It is clear that the parties contemplated and agreed that all moneys should be paid on or before the 30th of June 1989.

(b) Was the plaintiff in default when the defendant served notice making time of the essence? In other words was the defendant entitled to serve a notice making time of the essence when it did so in July 1989?

Whilst the defendant conceded that time was originally not of the essence, Mr. Bailey is wrong in submitting that it was never made so. In Halsbury's Law of England 4th Edition Vol. 4, paragraph 128 (supra) it is stated:.....that if a party wishes to make time of the essence where it was not originally so, he may serve a notice to that effect "provided at the time there has been some default or unreasonable delay by the other".

In Smith v Hamilton [1951] 1 Ch. 174 it was held that if one party does not meet the timetable set out in an agreement for the sale of land, the innocent party may not immediately serve a notice making time of the essence, but must first wait for a reasonable time to elapse.

Later in Behzadi v Shaftesbury Hotels Limited [1991] 2 ALL ER 477, the English Court of Appeal overruled Smith v Hamilton and established that if the contract contains a specific date for performance there is a breach of contract if performance has not taken place by that date; the previous belief that in some circumstances the date might be no more than a target was thoroughly discredited. In so deciding the court followed the Australian case of Louinder v Leis 149 CLR 509.

It has been the law that if time is not of the essence, the remedy for failure to perform will normally be damages, but that the innocent party can give a notice making time of the essence and so acquire a contingent right to terminate the contract for further delay. In Behzadi (supra) it was held that such notice may be given as soon as there was failure to perform on time, and the innocent party need not wait.

I find that the plaintiff, therefore, was in default when the defendant served notice making time of the essence in July 1989 as at that time the plaintiff had not tendered the sum of $100,000.00 or a valid undertaking from a financial institution for that sum to complete the contract nor the further sum of $14,057.07 as shown on the statement of account. Therefore the notice did make time of the essence.

(c) Did the defendant in its notice to complete dated 6th July 1989, give the plaintiff a reasonable time within which to do so?

It is a basic requirement of a notice to complete, that the time specified in the notice to complete must be reasonable. The reasonableness of a time fixed is to be considered in the context of the actual circumstances of a transaction, not in terms of the typical, average or normal. Thus in Hick vs Raymond and Reid [1893] AC 22, a case dealing with the reasonableness of time in which to discharge a ship's cargo, Lord Herschell said in the House of Lords at page 29:

> "There is no such thing as a reasonable time in the abstract".

The time at which the reasonableness of the time allowed in a notice is to be assessed is the time of the giving of the notice, and the reasonableness of the time specified is determined after a consideration of all the circumstances of the case. Crawford v Toogood (1879) 13 Ch. D 153 at 158.

It must be borne in mind that a notice to complete may serve the purposes of a party who wishes to rescind by removing the equitable hindrance to rescission at common-law by taking away the defaulter's right to seek specific performance.

Thus for example where a purchaser fails to meet a time stipulated for completion, (albeit time was not originally of the essence), the purchaser will be in breach of a condition, but rescission is prevented if Equity would decree specific performance at the instance of the party in breach, (the

purchaser). Equity would not do so, therefore the only hindrance to the innocent party's (the vendor) common law right of rescission will be removed, if the guilty party (the purchaser) fails to comply with a notice stipulating a further time which is reasonable in all the circumstances for completion.

The courts have regarded various factors as relevant in deciding whether a particular notice allowed a reasonable time for completion, and because the court must consider all the circumstances of each case, it follows that in any particular case more than one factor may be significant, and that the factors are not mutually exclusive.

It may be useful to characterise the factors to be considered as relevant to a determination of whether there was a reasonable time for completion in the terms expressed by McLelland J. in Spencer v Hanson Pastral Co. Pty Ltd. (Supreme Court of New South Wales December 4, 1979 unreported - cited by Lindgren Op. cit para 452). He described them as "(a) matters which were or ought reasonably to have been, in the mutual contemplation of the parties at the time of the contract and (b) causes of delay arising after contract to the extent to which they could not reasonably have been avoided or overcome by the party bound."

The following are some of such factors enunciated by courts in the Commonwealth:

1. The delay by the recipient in taking the necessary steps to put himself into a position to complete the transaction. Barrett v Beckwith (1974) 1BPR 9318 per Holland J. (New South Wales, Australia) (cited by Peter Butt ALJ W59 P.267, Article: Modern Law of Notices to Complete).

2. The attitude of the giver of the notice to the recipient's delay, a longer time being required where the giver has shown no impatience with the delay than where he has shown impatience Ajit v Sammy [1967] 1 AC 255 at 258.C

3. Whether the course of the transaction, including the correspondence and discussions between the parties, has demonstrated that neither party (and, in particular, the party giving the notice) was in any hurry to complete; conversely whether either party and, in particular, the party giving the notice) has reasonably displayed a desire for an urgent completion. (Stickney vs Keeble [1915] AC 386 at 419 Charles Richards vs Oppenheim [1950] 1 KB 616 at 624 Green vs Sevin (1879) 13 Ch D 589 at 601.

4. Whether a prior notice to complete has been issued but waived. Stickney vs Keeble [1915] AC 386 at 419.

5. Whether, prior to the issue of the notice the recipient (being the purchaser) has advised the giver of the notice that his financial arrangements have fallen through or become uncertain. Re Barr's Contract [1956] Ch 551 at 558 Ajit v Sammy [1967] 1 AC 255.

6. The nature of the property and the title thereto, and any conveyancing difficulties to which they may give rise. Crawford v Toogood (1879) 13 Ch D 153. Macbride v Weekes (1856) 22 Beav 533 at 543; 52 ER 1214 at 1217-1218.

7. What remains to be done by the recipient of the notice Stickney v Keeble (supra) Ajit v Sammy [1967] AC 386 at 419. Thus where only minor or mechanical steps remain to be taken by the recipient at the date of the issue of the notice a reasonable time will be a shorter time than where more substantial or onerous tasks remain outstanding - Wells v Maxwell (1863) 33 LJ Ch 44 Crawford v Toogood (supra) at 159. But the recipient will not generally be allowed to rely on his own previous delay in complying with the terms of the contract as the basis for a submission that the notice does not give him sufficient time to fulfil outstanding contractual obligations. Stickney v Keeble (supra) at pp 398 and 404 Ajit v Sammy (supra) at 258.

8. Whether prior to the issue of the notice, the recipient indicated his impending readiness to complete Lobar Corporation Pty Limited vs Dibu Pty Limited (1976) 1 BPR 9177 - cited in article by Peter Butt (supra) p 268.

Whether the time allowed is reasonable is computed from the date of receipt of the notice and not the date of its issue (subject to any contrary provision in the contract for sale.) Michael Realty Pty Limited vs Carr [1977] 1 NSWLR 553 at 572 (cited in Article by Peter Butt (supra) p. 268.)

In the final analysis, whether the period stipulated is sufficient must be tested by the basic purpose and function of a notice to complete, namely, to remove the equitable bar upon the legal right to terminate the contract for breach of the time provision relating to completion - Stickney v Keeble (supra) at 416. Louiden v Leis (1982) 56 ALJR 433 at 443 per Brennan J. It follows therefore that to be valid a notice to complete should not specify a date upon the expiration of which Equity would still order specific performance. Per Reynolds JA in Michael Realty Pty Ltd. v Carr [1977] 1 NSWLR 533 at 560 - 561, (cited by Lindgren op. cit para. 496.)

The factors noted above, illustrate an important truth. For example in Macbryde v Weeks (supra), the court held that a notice of one month was reasonable, and in so doing relied on the character of the property and the antecedent delay of the vendor. Similarly, in Charles Richards v Opperheim (supra) the court found the period of four weeks to be reasonable and based its reasoning on the facts that time was originally of the essence and that the giver had been continuously pressing for performance. These cases therefore support the proposition that in determining reasonableness of the time fixed for completion, the court is not confined to concentrating its attention on the steps yet to be taken.

This has a bearing on the evidence given by the plaintiff and adverted to in Mr. Bailey's letter to Mr. Jones dated May 29, 1989. The plaintiff said

that Mr. Kenneth Warren a director of the defendant company was going to assist him in securing a mortgage, and indeed had promised to secure a mortgage for him, but had been killed in 1989.

The case of Smith v Batsford (1897) 76 LTR 179 supports the proposition that post contract dealings between the recipient of notice and a third party (eg. a subsale by the purchaser) which may explain the recipient's delay are not to be taken into account and it is immaterial that the other contracting party is aware that they are taking place.

I am of the opinion that where a party has not sought to cover any envisaged delay on his part by a term in the contract, then little concession should be made in his favour by reason of what he has informally told the other party. Of such a situation E. Lindgren op. cit. para. 499.5 writes:

> "It is submitted that he should be entitled to no more than the minimum additional time that might, under the most favourable circumstances be necessary to overcome his problem (lack of title, finance, etc.).
> As Holland J observed in Van Roalte v Graham
> .....if risks as to getting in title or getting finance were to be freely taken into account, a reasonable time for completion could not be objectively assessed and unconditional contracts would be conditional upon resolution of personal problems."

I respectfully adopt these remarks.

In Michael Realty Pty Ltd. v Carr (supra) Holland J. concluded that the House of Lords' decision in Stickney v Keeble (Supra) was authority for the proposition "that the vendor's past unreasonable delay is to be taken into account in considering the reasonableness of the time given by a notice to complete and that he is not necessarily entitled to be given such further time as he may need to complete." (at 823F) I accept this proposition and in the context of this case I would substitute "purchaser" for "vendor". The Privy Council also took this view of what Stickney's case decided - see Ajit v Sammy (supra) at 258.

As regards the choice of allowing the defaulter double time, and allowing him an impossibly short time, Holland J. chose the latter and expressed the reasoning behind such a stance thus in the Michael Realty case (supra) at 823 - 824A, (a case where the vendor was in default)

> ".....the time he may need may postpone the date for completion to a date which Equity would not, because of the remoteness of that date force the purchaser to specific performance of the contract. This makes relevant the purchaser's position as well as the vendor's. The position of both parties by reference to the date to which completion must be postponed by the vendor's default or delay must, I think, be taken into account in relation to the remedy of specific performance because that remedy is bound up in the doctrines of Equity as to time in a contract for the sale of land."
> (cited by Lindgren para. 494 op. cit.)

Lindgren para. 496 writing of the Michael Realty case says:

> "Mahoney JA referred to the different reasons for, and functions to be served by giving a notice to complete..... Neither at law nor in Equity was a notice to complete given as a precursor to rescission designed to secure performance. 'The time is, therefore, to be calculated by reference, inter alia, to the interests of the party giving the notice and the inequity of maintaining him effectively bound by the contract thereafter.' His Honour concluded that it is not inconsistent with the purpose of a notice of this type that it may on occasions allow less time than is required for completion." (emphasis supplied.)

I now turn to the facts of the case as they impinge upon the issue of the reasonableness of the time in the notice. Mr. Bailey submitted thus

> (i) When looked at in the context of the assertion in his letter dated July 3, 1989, that the plaintiff had said he only received the last tax receipt for the premises the subject matter of the contract on 30th June, 1989, he would not have had an opportunity to formalise the mortgage before then.
>
> (ii) By virtue of special conditions regarding when service is deemed to be effected if done by post, the plaintiff would not have received the notice until 3 days after 12th July, 1989.
>
> (iii) The statement to close was not sent until 4th August, 1989. This would give the purchaser a mere 11 days in which to obtain the balance on a mortgage.

(iv) The defendant through its attorney had varied the contract in the letter of Mr. Jones to Mr. Bailey dated 4th August, 1989, when he wrote: "The balance should either be paid now or secured by an undertaking from a financial institution".

To my mind, there is ample proof that the time given to complete was reasonable having regard to all the circumstances of the case.

Firstly, the defendant's attorney in his letter repeatedly showed that the defendant was impatient to conclude the matter. In his letter of 4th April 1989, he sent a copy of the agreement to Mr. Bailey and declared that no extension of time would be granted and that it was important that the plaintiff complied with the terms of the contract. By 25th April 1989, he was inquiring what progress was being made in the plaintiff's obtaining a written commitment for financing and expressed concern that there be no delay in completion.

In response to that letter Mr. Bailey himself wrote the plaintiff and in his letter confessed that the letter together with the earlier one of 10th April, 1989, "displays an unremitting agenda of urgency".

By 15th May 1989, Mr. Jones wrote Mr. Bailey asking that he inform him "if you have received the necessary financial commitment". This was to be delivered by 30th June 1989. It was only after receiving Mr. Bailey's letter of May 29, 1989, asserting that the death of Mr. Warren had hampered the plaintiff in his quest for a mortgage loan, that Mr. Jones gave an extension of 30 days as requested "on the strict understanding that all the money due in respect of this sale, including unpaid rental, will have to be paid no later than the 31st July," and he added, "Further, if the letter of commitment is not delivered by the 30th June, our instructions are to rescind the contract".

(b) It must be noted that Mr. Bailey asked for the extension of time "within which to deliver the letter of commitment". Nothing was said of the sum of $100,000.00 which had not yet been paid. The date of completion had previously been fixed as 30th June, 1989.

Secondly, Mr. Bailey did not indicate the need for a much longer period

for completion when he asked for the extension of the time within which to supply the letter of commitment. He got the extension he asked for.

(c) In his letter of 3rd July, 1989, Mr. Bailey indicated that he expected to have formal approval of a loan and to forward the letter of commitment shortly. He did mention that he had only received the tax receipt on 30th June 1989, but rather than expressing doubt as to the plaintiff's ability to fulfil his obligations, he promised the letter of commitment shortly. The plaintiff had not met the condition in time and was therefore in default and the defendant served the notice to complete. At this stage all that remained for the plaintiff to do was to pay the outstanding balances and submit the letter of commitment. In the contract it had been originally provided that completion should take place 30 days after receipt of the letter of commitment. The defendant had extended the date of payment of the balance by 30 days to 31st July, 1989.

Thirdly, there is nothing to suggest that the transaction would be other than a straightforward transfer under the Registration of Titles Act.

Fourthly, the plaintiff gave evidence, but he did not use the opportunity to indicate a time which he would have regarded as reasonable.

Fifthly, Mr. Bailey submitted that the contract was varied to allow for the balance to be paid or secured by an undertaking from a financial institution. I agree. But this was to the plaintiff's advantage. It offered him an easier option. Moreover he cannot complain that he only received the statement to close a mere eleven days before the time expired. He did not ask for the statement until Mr. Bailey's letter of 1st August, 1989, although it is clear from the letter of Victoria Mutual Building Society that the mortgage for $157,000.00 had been approved from 19th July, 1989 at the latest. A diligent mortgagor would have discovered this fact as soon as it was done and sought the statement of account to close at a much earlier date. He clearly

did not appear to bestir himself although he had been served with a notice to complete, and it also seems that his failure to complete was due to his own impecuniosity.

(d) Was the defendant ready, willing and able to complete?

The plaintiff raised this issue expressly in paragraph 15 of his statement of claim. It is pleaded under the heading "Particulars On Which The Plaintiff Will Rely" and the relevant portion reads thus:

> ".....(v) The Defendant at no time demonstrated that it was willing, able and in a position to complete in the strictest sense of the word".

It is an important requirement for a notice to complete to be valid that the giver of the notice must at the time of giving the notice, be ready, willing and able to complete. The words "ready, willing and able to complete" have been used in the English Standard Conditions of Sale which are incorporated into contracts made in that country (See the Law Society's General conditions of Sale 1980 Edn., the National Conditions of Sale 20th Edn., and the Conveyancing Lawyers' Conditions of Sale). But these words have not been the subject of close analysis in any reported English decision.

In considering the issue of readiness one must always bear in mind that this question is complicated by the fact that for conveyancing transactions to proceed to completion there must be some amount of co-operation between the parties so that a party may not be in a state of readiness through no fault of his own.

The Courts in England and other parts of the Commonwealth have laid down important principles governing this requirement. In England the Courts have shown a willingness to imply a condition of readiness on the part of the giver even in the absence of the incorporation of such a clause through the Standard Conditions of Sale. In Finkielkrant vs Manahan [1949] 2 ALL ER. 234 the headnote reads:

> "On December 10, 1947, a contract was concluded for the sale of certain property. On March 31, 1948, the vendor sent the purchaser a notice to complete within 14 days. On April 14, the date fixed by the notice as the final date for completion, the purchaser was ready and able to complete, but the vendor was unable to do so. On the same day the purchaser sent to the vendor a three days' notice to complete, but the vendor was unable to comply with it, though she was in a position to complete on April 30.
>
> In an action by the purchaser claiming a declaration that he was entitled to rescind the contract and a counter-action by the vendor claiming an order for specific performance:
>
> HELD: (1) by her notice of March 31, the vendor made completion by April 30, an essential term of the contract so that the rule of equity that the time fixed for completion was not of the essence of the contract no longer applied, as the purchaser was bound by the notice, the vendor, having given the notice, was also bound thereby; and as she was unable to complete on the date fixed she was not entitled to an order for specific performance of the contract".

In the course of his judgement Dankwerts J., as he then was, said at p.237 :

> "To some extent.....it (Re Sandwell Park Colliery Co [1929] 1 Ch 277, is a rather special case, but I think it is clear from the judgment of Maughan J., that, if time is essential, a vendor who is claiming that he is entitled to obtain specific performance must show that he himself was in a position to complete on the date fixed. On the date of completion in the present case the vendor, who is now seeking an order for specific performance, was not in a position to complete. For that reason, in my opinion the vendor in her cross-action is not entitled to a decree of specific performance and her action must be dismissed".

I am of the opinion that a proper starting point of any inquiry as to readiness of a vendor, will be to ask "What is the precise nature of the vendor's obligation under the terms of the particular contract in order to effect completion"?

I will now examine the position of a giver of a notice to complete as it has been developed in England. In Re Barr's Contract (Supra) at 556, Dankwerts J., said that apart from any express contractual provision, a vendor

giving a notice to complete must be "able, ready and willing to proceed to completion" (emphasis mine).

In Horton v Kurzke [1971] 2 ALL E.R. 577 a notice purportedly given under clause 22 of the National Standard Conditions of Sale was held invalid on the ground that a third party had claimed that he had a grazing tenancy over the property and Goff J., ruled that the vendor was not "able, ready and willing" since the Court would not force the purchaser to buy a lawsuit.

The later case of Cole v Rose [1978] 3 ALL ER. 1121 shows a refinement of the principles governing "readiness". There the property for sale was subject to three charges but details of only two were included in the abstract of title. The solicitor for the purchaser asked for and obtained an undertaking that those two charges would be discharged on completion, but later discovered by search the existence of the third charge and wrote the vendors' solicitor asking for details. Due to lack of funds the purchaser was unable to complete on the date fixed in the contract, namely, January 19. On January 29, on purported exercise of the right given by general condition 19 of the Law Society's General Conditions of Sale, the vendors issued a notice to complete in which it was stated that they were "willing and ready to complete the sale", and allowed 28 days for completion. At the same time the vendors' solicitor sent a letter with the notice stating that he would write further when he obtained particulars of the third charge.

The purchaser did not complete within the 28 days stipulated and the vendors purported to rescind and to forfeit the deposit. The vendor's solicitor was aware of the existence of the third charge but wanted to be sure that the entries revealed by the purchaser's search related to that charge of which he was aware before he gave an undertaking to discharge the third charge on completion. Mervyn Davies, Q.C., sitting as a Deputy Judge on the High Court, held that the notice to complete was ineffective as the vendor's solicitor was not ready to complete on January 29. He dealt with the

arguments of counsel for the vendor in this way at 1128g - 1129b.

> "He said that a vendor has not literally to be ready when serving the notice because many steps had to be taken after the service of the notice to put a vendor into complete readiness. Thus a completion statement may have to be prepared and agreed, or arrangements made for the discharge of mortgages, or the time and place of completion agreed. I agree with this approach. Nevertheless, the unreadiness of the vendors' solicitor was, as I see it, of a different character. What he had to do on 29 January, was to satisfy himself on a matter of substance that he could go forward to complete. He was not merely in a position of having to set up the necessary administrative arrangements respecting completion. Counsel for the vendors also suggested that in considering whether a vendor is, when serving a notice, 'ready to complete' one does not look at his particular knowledge at that time, that is one does not consider the question subjectively so far as the vendors' actual knowledge is concerned, but rather one considers the position objectively with a view to saying whether the vendor, whatever he himself knew, was in fact ready to complete. By that test, the vendors' solicitor was no doubt ready although he himself was not quite assured of the fact on 29 January. I do not think that any such test should be applied. It is a matter of reading condition 19(2). That provides that the party giving the notice must at that time be ready to complete. The answer given by the vendors' solicitor in cross-examination referred to above shows that he was not ready. This conclusion is emphasized if one considers what the position would have been if one of the class C(1) entries that the vendors' solicitor wished to investigate had turned out to relate to some charge of which he was unaware and as to which he could give no undertaking. In that event the vendors' solicitor would have been obliged to inform the purchaser's solicitor that the vendors would not complete either at all or at any rate, not on their solicitor's undertaking."

This case is authority for the proposition that readiness involves two requirements of the giver of a notice to complete:

(1) The person serving the notice must, within his own knowledge be ready to complete, and

(2) On an objective test he must in fact be ready; but

in this regard the learned judge drew a distinction between failure to be ready because of outstanding matters of substance as in that case and failure to be ready because of outstanding necessary administrative arrangements

respecting completion which need not have been made. Examples of such matters are the preparation of a completion statement, and arranging the time for the discharge of mortgages (1bid at 1128 g).

The requirement of the English form of contract that the giver of a notice to complete must be ready "to complete" at the time of giving has been mitigated by decisions of the courts. In Prosper Homes Ltd. v Hambros Bank Executor and Trustee Company Ltd., 39 P and CR 395, the date fixed for completion in the contract was January 2, 1979. On January 12, the vendors' solicitors gave a notice to complete expiring on February 13.
The property included a shop which was demised by a lease under which the tenant had covenanted not to use the shop otherwise than as and for the trade of selling electrical goods and appliances and not to assign, underlet or part with possession. The evidence revealed that he had parted with possession and that the new occupant carried on at the shop the business of the repair of television and hifi equipment and ancillary repairs. The purchasers argued that from contract to completion a vendor is in the position of a trustee for the purchasers and that in this case the vendor was in breach of that fiduciary obligation. But Browne Wilkinson J as he then was, had this to say at 400.

> "The fact that the vendor may have failed in some respect to carry out his duty between contract and completion in looking after the property does not mean that he is unable or unwilling" to complete. He is able, ready and willing to complete as I think Mr. Lightman accepted. If any damage has occurred in the interim the vendor would have to make it good in damages. It does not prevent a completion of the contract."

Brickles v Snell [1916] 2AC 599 a decision of the Privy Council was a case which dealt with the situation where there was an outstanding mortgage on land the subject of an agreement for sale. The headnote sufficiently explains the issues and reads as follows:

> "The purchaser under an agreement for sale of land in Ontario which made time of the essence was in default

> at the date fixed for completion, and the vendor thereupon cancelled the agreement. At that date there was a small mortgage upon the land. The mortgagee had consented and was willing to accept repayment upon completion taking place, the purchaser had been informed that the mortgage would be paid off upon completion and raised no objection.....
>
> HELD: that the vendor was able and willing to convey at the date fixed for completion and that the purchaser being in default was not entitled to specific performance".

I now turn to cases from Courts outside England. In Rands Development Pty. Ltd., v Davis (1975) 6 ALR 631, the High Court of Australia noted that in the absence of special provision in the contract a vendor is not obliged to discharge a mortgage before completion, and that it suffices if the mortgagee is represented on completion and hands over the discharge then in return for payment. (Cited by Lindgren op. cit. para. 462).

Both Dankwerts J. in Re Barr's Contract (supra) at 556, and Street C.J. in Halkidis v Bugeia [1974] 1 NSWR 423 at 427 (cited by Lindgren op cit para 465) declared that the test of the position of a giver of a notice to complete as at the time of his giving the notice was a requirement that he be ready to "proceed to" completion (as distinct from a requirement that he be ready instantly and throughout the period of the notice "to complete". In Halkidis v Bugeia (supra) there was no provision in the contract of sale requiring the vendor to be able, ready and willing to complete before issuing a notice to complete. By the terms of the contract the vendor was obliged to give vacant possession on completion; the vendor gave a seven-days' notice to complete; but a tenant was in occupation of the property and the vendor had not given him a notice to quit although he was entitled to one week's notice under the lease. But the tenant had expressed willingness to vacate on a couple of days' notice or, if proper alternative accommodation was available, on the evening of the following day of being requested.

Smith C.J. in Equity held that when giving notice the vendors were not in a position to comply with certainty with their obligation to give vacant

possession on completion: (at 427 D). He continued:

> "It is well established that one of the prerequisites of the entitlement of a party to give a notice to complete is that he must himself be able, ready and willing to proceed to completion at the time when he gives the notice. Re Barr's Contract. .....A party is only entitled to require performance of the other if he himself is currently able to fulfill his own obligations. .....[A] vendor in order to be able to rescind in reliance upon non-compliance with a notice specifying a period for completion, must be able to establish in court that he was himself not only ready and willing, but also able to complete in accordance with the requirements under the contract throughout that period, that is, to say at the time he gives the notice through until the time at which it expires".

(Quoted by Peter Butt op cit P. 264)

The dramatic effect which the requirements indicated in the last paragraph can have is illustrated by the case of Maxsujur Pty. Ltd. v Asinus (1979) 1 BPR [97022] [1980] 2NSWLR 96 (cited by Lindgren op cit para 465 and by Peter Butt op cit p. 264). At the date of service upon the purchasers of the notice to complete, the property was subject to a charge for land tax for the year 1979, under the Land Tax Management Act 1956 (NSW). The notice to complete was given by the vendor on 22nd May 1979, and was for 21 days and expired on 12 June 1979.

Under the relevant Act, tax is charged upon the land from the commencement of the year, thus the land was subject to the charge at the date of the issue of the notice to complete. But under the same Act, land tax is not payable until after the issue of an assessment, and an assessment was not issued to the vendor until 8th June that is after the service of the notice to complete. The vendor paid the land tax on 13th June, the date after the expiry of the notice. McLelland J in holding that the notice to complete was invalid said:

> ".....it was the vendor's obligation, prior to completion, to remove the existing charge, and to provide sufficient evidence to the purchasers that it has been removed. .....The evidence does not satisfy me that the vendor was, prior to 8th June 1979 [that

> is the date of issue of the assessment], able to perform this obligation. In these circumstances, the vendor was not, in my opinion, entitled on 22nd May 1979, effectively to make the time for completion stipulated in its notice, of the essence of the contract.....
>
> It seems to me to be inconsistent with the equitable principles which have given rise to the procedure of giving a notice making time of the essence that a party who is himself not then able to proceed to completion can effectively require the other party to complete within a stipulated time or lose the benefit of the contract, bearing in mind the concurrent and interdependent character of the respective obligations of the parties to complete".

A gloss on the decision in Maxsujur's case (supra) is provided by the case of Caleo Bros. Pty. Ltd. v Lyons Bros. (Aust) Pty. Ltd. (1980) 1 BPR [97050]; cc H NSW Conv. R 55-004. (Cited by Lindgren op cit para 469). In that case the purchaser had not submitted a memorandum of transfer to the vendor and the vendor had not himself prepared and executed one prior to giving the notice to complete. McLelland J., referred to Halkidis v Bugeia and Maxsujur Pty. Ltd. v Asimus and said:

> "Readiness to proceed to completion does not connote readiness instantly to hand over everything required on completion..... At all material times on or after 20th June 1980, the plaintiff was ready to comply with any reasonable request by the defendant for completion; cf Electronic Industries Ltd. v David Jones Ltd. (1954) 91 CLR 288 at 297.
>
> No request by the defendant for completion would have been reasonable unless it had allowed time for the simple mechanical process of the Plaintiff's execution of a memorandum of transfer tendered by the defendant or the preparation of a memorandum of transfer by the plaintiff itself and its execution. Readiness to proceed to completion must be determined with due regard to common sense and the practicalities of ordinary conveyancing transactions". (emphasis supplied).

Another case shows that the vendor is not required by the Court that when giving a notice to complete he should be literally and in every respect ready to complete at the time of giving the notice. In Hobden v Seamer unreported, Ruth J. in the Supreme Court of New South Wales on 24th October

1980, held that a notice to complete was not invalid where at the date of its issue the vendor had taken no steps to request the mortgagee to discharge the mortgage. He also said:

> "The plaintiffs have established that at the appointed time for settlement they would have been in a position to proffer a discharge of the mortgage to the Commonwealth Trading Bank. I have a doubt as to whether in the circumstances of this case the burden rested on the plaintiffs of establishing this fact, but the matter was not agreed and I expressed no view upon it:. (transcript pp 14-15).
>
> (cited by Lindgren op. cit. para 472).

The next important Australian case on this matter is McNally v Waitzer [1981] 1 NSWLR 497 (cited by Lindgren op. cit. paras. 473-5) and Peter Butt op. cit. pp. 265-6). That case concerned a vendor's notice to complete and a charge to land tax. The vendor issued a notice to complete on 29th April 1980, calling for completion on or before 21st May. The vendor had received on April 16, a land tax assessment for 1980. The tax was paid on 19th May, that is prior to the date fixed for completion. The differences from Maxsujur's case (supra) are interesting. Whereas in Maxsujur's case the notice of assessment of land tax issued after the date of the notice to complete, in McNally's case (supra)it was issued 16 days earlier, was received by the vendors one day after its issue, and was paid by them during the currency of the notice to complete and two days before it expired. The vendors did not advise the purchaser that payment had been made and the charge for land tax discharged, and the purchasers had not become aware of this from enquiries made at the Land Tax Office either. McLelland J. held that the notice was invalid, relying in part on these facts.

The Court of Appeal overruled Maxsujur's case and held that the non-payment of land tax did not invalidate the notice to complete, because the vendor's obligation was to remove the charge for land tax at or before completion. But the notice was held invalid on the ground that the vendor had not given particulars of title to the purchaser in the manner required by the

relevant condition of the contract and this was held to preclude him from calling upon the purchaser to complete (at least as long as the breach remained unremedied).

In that case, as in Halkidis v Bugeia (supra) there was no provision in the contract of sale that the vendor should be able, ready and willing before issuing a notice to complete.

Huntley J.A. disagreed with the dictum of Street C. J. in Halkidis v Bugeia (supra) that the giver of a notice to complete must be ready "to proceed to completion at the time when he gives the notice". He pointed out that the vendor's obligation in relation to the charge for land tax, just as in relation to an ordinary mortgage, is to discharge it, at the latest, on completion. He emphasized that the requirement of readiness "is to be understood in the context of the demands made by Equity of a party seeking specific performance." He continued:

> "The correct rule, in my opinion, is simply that a vendor who is in default in respect of things to then have been done cannot give a notice to complete, but he can give a notice to complete prior to performing all those things which he had to perform in order to complete the contract".
>
> (1bid 304 B-E cited in Lindgren op cit para. 473).

He posed the question, "Can the vendor give a notice to complete if he is for any reason in default?" and answered it by citing with approval a portion of the joint judgment of Barwick C. J. and Jacobs J in Neeta (Epping) Pty. Ltd. v Phillips (1974) 131 CLR 286 at 299:

> "In cases where the contract contains a stipulation as to time but that stipulation is not an essential term then before a notice can be given fixing a time for performance, not only must one party be in breach or guilty of unreasonable delay, but also the party giving the notice must himself be free of default by way of breach or antecedent relevant delay. Only then may a notice be given fixing a day a reasonable time ahead for performance and making that time of the essence of the contract".

Because the statement of title of the vendors was inadequate Huntley J A held that they "were and continued in breach of their obligation from the time they gave particulars of title and could, therefore, never give a notice to complete making time of the essence" [1981] 1 NSWLR 300G-301A (cited by Lindgren op. cit para 474).

Reynolds J A pointed out that what Dankwerts J. had said in Re Barr's Contract was that the vendor must be able, ready and willing to proceed to completion, and that this was different from requiring that at the time of the giving of the notice the vendor be then able to complete.

He went on:

> "The vendor.....is to be judged to be presently able to fulfil his contractual obligations if he can do so at the due date. It could hardly be asserted that a purchaser giving a notice to complete would have to show that on the date he gave it he had immediately available funds to complete any more than it could be asserted that a vendor who has contracted to sell an unencumbered freehold could not give a notice to complete unless he first discharged the mortgage....."
>
> (Cited by Peter Butt Op. Cit p.365)

Reynolds J A considered that "the giving of a notice to complete is analogous to instituting an action for specific performance and the 'clean hands' principle is equally applicable but the requirement of the law is no greater in a case of a notice to complete" (Cited Lindgren op cit para. 474). He then concluded that the giver of a notice must show "that he is willing and able to provide the full consideration which is to pass from him at the due time".

It is quite clear that the case of McNally v Waitzer rejected as the appropriate test of the position of a giver of a notice to complete at the time of giving it, a literal "readiness to complete". Reynolds J A seems to have endorsed a test of readiness to proceed, whereas Huntley J A, following Barwick CJ and Jacobs J in Neeta (Epping) Pty. Limited (Supra) propounds a test which requires the giver to be "free of default by way of breach or

antecedent relevant delay". Both tests have much to commend them but with respect I do not think each can stand alone as a definitive formulation. That of Reynolds JA by itself could mean that the court could ignore the giver's past conduct unless it affected his present or future capacity; and the test propounded by Huntley J. A. without more could allow a party who was not ready to proceed to completion to give a notice, provided only he was innocent of default in the past, and his position would not come under scrutiny again until the notice had expired. Further, taken literally this latter test could be interpreted to mean that any past default would disqualify a party from giving a notice.

I propose to adopt a combination of both tests, thus requiring the giver to show that he will be ready in due time to provide such performance as will entitle him to specific performance, and he must not be guilty of such breach as would preclude his being granted that remedy.

Adamson and Martin Investments Limited v Barton (1981) 7 (9) NZ Recent Law 314, (Cited by Lindgren op cit p. 83 Note 34) provides an example of how the Courts in New Zealand have approached this issue. In that case at the time when a vendor's notice to complete was given, tenants were in possession.

There were at best tenants at will who could be removed in practice on 24 hours notice from the vendor. Indeed this happened. Speight J held the notice valid saying that where a vendor has it within his power to remedy any defaults "so that by settlement date he can present the property in the condition contracted for.....then he is not in default and the notice is validly given".

In the Canadian case of Beckett v Karlins et al 50 DLR (3d) 21, Grant J rejected an objection by the purchaser that the defendants were not ready to close because a land mortgage which had been paid off years before had not been discharged and that a small sum was owing on a conditional purchase of a water heater which could have been paid from the price.

In giving judgment Grant J. referred to the case of Watts v Strezos and said this at 27.

> "In Watts v Strezos [1955] O.R. 615 [1955] 4 DLR 126 the vendor had not submitted to the purchaser a draft deed or statement of adjustments. On behalf of the plaintiff purchaser it was submitted that this relieved him from making tender of the purchase money. The O.R. headnote of LeBel J's judgment indicated:
>
> > 'The mere fact that a vendor of land has not prepared and submitted a draft deed for approval within the time limited in the agreement will not necessarily preclude him from relying on the purchaser's default as avoiding the contract; it will have that effect only if it prevents the purchaser from completing the purchase according to the terms of the agreement;'". (emphasis mine)

Apropos the question of a giver's antecedent breach, in Canada, this was overlooked in RJ Mayo Limited v Wolsey et al 50 DLR (20) 482. In that case a time for completion was made essential by the contract, neither party was ready to settle so that neither could rescind for the other's breach, and the vendor subsequently gave what was regarded as a notice to complete. Moorhouse J sitting in the Ontario High Court, held that the purchaser, because of his own delay, could not set up that of the vendor to defeat the latter's notice!

In the instant case the defendant chose to call no witnesses so the Court has to resolve the issue of the defendant's readiness from the written exhibits.

In Monigatti v Minchen [1936] NZLR 49, at 53 Ostler J said:

> ".....where the stipulations are dependent, in order to succeed in an action for breach of contract on the part of the purchaser, the vendor must show that he was ready and willing to complete. The usual way of showing this is by proof of the tender of a transfer, but it is not the only way".

In the case of Hooker v Wyle [1973] 3 ALL ER 207, Templeman J, as he then was, accepted that the vendors had been "ready, able and willing to complete" at the time of giving the notice to complete even though in correspondence between the parties, the solicitors for the vendor had been asked but had not answered the question whether vacant possession was

available. Templeman J thought that is should be inferred from the terms of the notice itself that the vendor was and would remain throughout the period of the notice ready to transfer the property with vacant possession.

This is how the learned judge dealt with the issue of readiness at 713 E - 714C.

> "Counsel for the purchasers' next point is this. It is a prerequisite of the giving of the notice under condition 19 that on that date when the notice is given the party giving it must be ready, able and willing to complete. He says there is evidence that the vendor was not ready, able and willing to complete. He says that there is evidence which shows that the notice of 25th May was, as he puts it, a manoeuvre, that by 2nd April, 1973, the vendor having attempted to give notice to hurry up matters, was dictating terms on which if the deposit were paid, the contract would go on, that the vendor never answered the question as to the date when vacant possession was available and that the letter of 2nd May in which the vendor purported to treat the contract as null and void because the deposit had not been paid shows that the vendor was not ready, able and willing to complete. Thereafter the onus lay on the vendor to show that by 25th May he has changed his mind and was then ready, able and willing to complete. All the letter of 25th May shows is that the vendor was trying to escape from the contract.
>
> .....In my judgement the letter dated 25th May, must be taken at its face value. Notwithstanding what the vendor attempted to do before 25th May, the purchasers never accepted and do not today accept any repudiation which might have been read into the vendor's notice, so there was an extant contract on 25th May. The letter of that date gave notice to complete under condition 19. <u>It seems to me that the vendor was thereby saying: I am willing, able and ready to let you have this property if you complete within 28 days in accordance with condition 19. Of course if you do not, then condition 19 will prescribe what is to happen thereafter.</u> The vendor by the letter of 25th May put himself in the position that if the purchasers at any time within 28 days were willing to complete, then the vendor would have been obliged to accept the purchase and transfer the property.
>
> The vendor thought it was most unlikely that the purchasers would complete, but paragraph 1 of the letter dated 25th May, showed that if the purchasers produced the money within the requisite period then the vendor would complete. To my mind that shows that on that date the vendor was ready, able and willing to complete. It is said that the vendor had not answered the letter about vacant possession, but there was no

> need for an answer. If the purchasers turned up with the money, the vendor was bound to give vacant possession. There was no need to reiterate something which the contract already provided, namely, that vacant possession should be given on completion. Although an attempt was made in the letter of 25th May to keep open an alternative plea, namely, fundamental breach if the deposit was not paid, the vendor to my mind in paragraph 1 was saying: 'Give me the money within 28 days and you can have the property. By condition 19, 28 days is all you are going to get.' So that in my judgment there is no substance in the allegation that condition 19 was not satisfied because the vendor was at that date not ready, able and willing to complete."

I am satisfied and find that the vendor was ready, able and willing to complete the contract in the instant case when the notice to complete dated 6th July 1989, was given. I have come to this conclusion guided by the approach of the various Courts in the cases referred to earlier such as Prosper Homes Ltd. v Hambros Bank Executor and Trustee Company Ltd., Rands Development Pty. Ltd. v Davis, Caleo Bros. v Lyons Bros., McNally v Waitzer Adamson and Martin Investment Ltd. v Barton, Watts v Strezos and Hooker v Wyle.

The evidence in this case to my mind supports this conclusion. The copy of the title to the land shows that the mortgage on the land had been discharged, the plaintiff was already in possession and as Templeman J held in Hooker v Wyle, I find that in the letter and notice to complete the vendor was saying: "Fulfil your financial obligations under the contract in 28 days and the property will be yours." The vendor in paragraph 1 of the notice clearly stated that he was ready, willing and able to complete. No evidence was adduced by the plaintiff which contradicts this in any way. I therefore find that the vendor was ready, able and willing to complete at the time the notice dated 6th July 1989, was given.

(e) Did the defendant properly and effectively cancel the agreement by the letter of Mr. Jones to the plaintiff dated August 15, 1989?

As noted earlier, when the defendant served the notice to complete

making time of the essence and dated 6th July 1989, it was entitled to do so because the plaintiff was in default as at 30th June 1989, the date for completion fixed in the contract. He was in default as he had not obtained a currently operative letter of commitment from a financial institution for $160,000.00 as specified in special condition 4; and he had not paid the sum of $100,000.00 due under the agreement or secured an undertaking for that sum.

The notice to complete provided an extended date by which the plaintiff should complete but here again the plaintiff failed to complete. The statement to close dated 4th August 1989 showed a balance of $114,057.07 most of which was the $100,000.00 due under the agreement at page 1, the rest being minor incidentals. But the plaintiff failed to pay this sum or tender an undertaking to cover it. Therefore the defendant properly discharged the agreement on 15th August 1989.

Mr. Bailey criticised the purported discharge of the contract. He argued that by allowing the plaintiff the option of seeking a mortgage for the balance the vendor was obliged to afford him a reasonable time within which to do so and that the time allowed a mere 11 days was unreasonable. I do not agree, the defendant was in my view being extremely indulgent and as the plaintiff was in default and showed a lack of businesslike urgency, the vendor was entitled to grant him only a short time. For instance in Ajit vs Sammy (Supra) the Privy Council in an appeal from British Guiana, approved of a notice allowing a mere six days for completion where the purchaser was guilty of serious delay. I readily concede that a mere recital of times given in other cases is unhelpful; those periods can only be understood in the light of all the circumstances of the cases in which they occurred, including, for example, the background against which the parties contracted, all the terms of the contract itself, the communications which had taken place between the parties, and whether as in the instant case the giver (vendor) had been calling for prompt settlement, or on the other hand whether the giver had been

acquiescent in the recipient's delay.

In concluding this aspect of the case I cannot help but express regret that neither side thought it prudent to lead evidence to show what would be the normal time for completing a purchase where a mortgage was involved in the sale of registered land in Jamaica. It is the duty of counsel to assist the court on every issue raised in the case. In O'Connor v Slattery [1981] 2NSWLR 447 (cited by Lindgren Op cit. para 451) expert evidence was led to prove what was the normal time for completing a straightforward purchase of land under the Torrens Title system for cash! In the instant case there was no evidence that the plaintiff could not complete within 28 days, although he had every opportunity to do so when he gave evidence.

One further important point must be made at this juncture. Where as in the instant case, the innocent party elects to treat the contract as discharged and communicates his decision to the party in default, his election is final and cannot be retracted: (Scarf v Jardine (1882) 7 App. Cas 345 at 360-361 per Lord Blackburn).

2. THE EFFECT OF THE COMMUNICATIONS BETWEEN THE PARTIES SUBSEQUENT TO THE DISCHARGE OF THE CONTRACT.

Shortly after his termination letter of 15th August 1989, Mr. Jones received a letter of undertaking dated 18th August 1989 from National Commercial Bank, Cross Roads, Kingston 5. It indicated that the bank undertook to pay to Mr. Jones' firm Myers Fletcher & Gordon the sum of $100,000.00 on behalf of the plaintiff and in exchange for the duplicate certificate of title for the land concerned. The letter of undertaking also requested that a certificate that tax had been paid up to date should be sent along with the duplicate certificate of title. The undertaking was expressed to expire on 30th August 1989.

Mr. Jones replied by letter dated 21st August 1989 that he was already committed to giving the duplicate certificate of title to Victoria Mutual

Building Society to enable that company to register a mortgage. Mr. Jones also wrote Mr. Bailey by letter of the same date. In it he referred to previous correspondence and a telephone conversation which was said to have taken place the week before between himself and Mr. Bailey.

In that letter he sent Mr. Bailey copies of the letter of undertaking from National Commercial Bank and of his own reply to the letter from that bank. Mr. Jones laid down the following conditions to be fulfilled by the plaintiff in the absence of which the defendant would not be prepared to continue any dialogue:

> "1. All outstanding rent to be paid up.
>
> 2. Satisfactory arrangements are made for the payment of the balance of the purchase price money.
>
> 3. Satisfactory arrangements are made to compensate them (the defendant) for the loss they are presently suffering."
>
> and he added: "You need to speak with your client and get back in touch with me as quickly as possible".

Up to this point no new contract had been formed. The parties were still having dialogue. Thus on 6th September 1989 Mr. Jones wrote Mr. Bailey and laid down further and more specific instructions. The letter was headed "WITHOUT PREJUDICE" and in it he expressed himself thus:

> "Further to my letter of the 21st August I now have instructions.
>
> Your client is being given one final opportunity, provided:-
>
> (a) Rental due to date plus interest at twenty-five percent (25%) for the periods for which each payment has been outstanding is paid.
>
> and
>
> (b) The balance of the purchase price plus interest at twenty-five percent (25%) from when it became due to when it is paid or secured by an undertaking satisfactory to me, is all in place by the 14th September, then we can complete the sale.

> If the settlement is not reached then all steps are going to have to be taken immediately to recover possession."

Having terminated the contract the defendant was entitled to impose conditions on any attempt by the plaintiff to be given another chance to purchase the property. It is trite law that a purchaser's delay in completing prima facie entitles the vendor to charge interest on the balance of the purchase money.....see Sale v Allen [1987] 36 WIR 294, Horvela Investments v Royal Trust Co. of Canada [1986] Ac 207 at 236 per Lord Templeman.

The case of Petrie v Dwyer and another 91 CLR 99, a decision of the High Court of Australia is instructive. The last portion of the headnote reads as follows, and is sufficient to indicate the principle being enunciated:

> "After the purchaser under a contract of sale of land in which time was stated to be of the essence, had failed to pay the balance of the purchase money by the due date, negotiation took place between the parties for an extension of time for payment. The vendor's attitude in these negotiations was that they would insist on their strict rights unless the purchaser was prepared to pay a sum in addition to the contract price. The purchaser not being prepared to do this the vendor rescinded the contract.
> Held, that the stipulation that time was of the essence had not been waived by the conduct of vendors in negotiating with the purchaser and the contract was validly rescinded for non-completion by the due date."
> (emphasis mine)

If the innocent party may properly impose additional conditions where the other is in default, a fortiori a party who has rescinded a contract may impose additional conditions to those in the contract rescinded which conditions the defaulter must satisfy in order to qualify for a second chance to purchase the property.

On the matter of further interest demanded by Mr. Jones, I find that this was not finalised until Mr. Jones' letter dated 17th January 1990 in which he confirmed that the rate was 12½ per centum.

Mr. Bailey submitted in accordance with his reply to the defense, that as a result of continuing negotiations as evidenced by the correspondence and the telephone calls, notice making time of the essence had been waived up to 16th March 1990.

He cited the cases of Webb v Hughes (1870) LR Vol. X Equity 281 and Wendt v Bruce 45 CLR 245 in support of this proposition. The headnotes are as follows: Webb v Hughes

> "Upon a contract for the sale of a house and land required for immediate residence, the conditions were that the purchase should be completed at noon on the 26th February, on which day the purchaser, having paid his purchase-money, was to be entitled to possession; but if, from any cause whatever, the purchase should not then be completed, the purchaser was to pay interest on the purchase-money from that day until the completion; and if any objections or requisitions as to title should be made upon the delivery of the abstract which the vendor should be unable to or unwilling to remove, then the vendor was to be at liberty to cancel the contract. The vendor failed to complete his title by the day named; but negotiations were continued till the 7th of April, on which day notice was given by the purchaser of immediate abandonment of the contract. Upon bill filed by the vendor for specific performance:-
>
> Held, that as a possible postponement of completion of the contract was contemplated by the terms of the agreement, time was not of the essence of the contract, and that if it had been so the purchaser, by continuing the negotiations as to title after the day fixed for completion, had waived it, and could not rescind without reasonable notice. Decree for specific performance, with the usual inquiry as to title."

Wendt v Bruce (a decision of the High Court of Australia)

> "The plaintiff agreed to sell a farm to the defendant on 9th November 1926, the date for completion being 1st March 1928. Simultaneously with the agreement for sale the parties entered into a share-farming agreement for the year 1927 which gave the defendant right to fallow part of the land during 1927 for his use after taking possession on 1st March 1928. The defendant entered into possession under the share-farming agreement. The plaintiff failed to produce the clear title by 1st March 1928, and on 15th October 1928 the defendant gave a notice to the plaintiff requiring the agreement to be completed by 5th November and purporting to make that date of the essence of the contract. The Plaintiff was ready to settle on 12th December. The defendant, in effect, continued in possession until after

5th November, alleging an agreement with the plaintiff to do so for the purpose of harvesting the crop, but the learned trial Judge found that there was no such agreement and decreed specific performance of the agreement for sale, which decision was affirmed by the Full Court of the Supreme Court.
Held, by Gavan Duffy C.J.; Starke, Dixon and McTierman JJ. (Evatt J. dissenting), that the defendant by, continuing in possession of the land and harvesting the crop elected to affirm, and not to put an end to, the contract, and was, therefore, precluded from relying upon the plaintiff's failure to comply with the notice fixing 5th November as the final date for completion."

I will now contrast Webb v Bruce with Lock v Bell [1931] 1 Ch. 35. It is sufficient to quote the headnote which reads thus:

"By a contract dated October 19, 1928, the plaintiff agreed to sell to the defendant all her right, title, and interest in a licensed house known as 'The Thorns' of which she was the licensee. The contract provided that the purchase money should be paid, "on or about" November 10, 1928, and that the defendant should forfeit the deposit of 120L. which he had paid if he should fail to fulfil his part of the contract; also that either party refusing to comply with or neglecting to perform any part of the agreement should pay to the other, on demand the sum of 200L. On October 3, 1928, the defendant had given to the brewers who were the freeholders of 'The Thorns' references which they had accepted by October 10. He went to the magistrate's clerk and signed the ordinary notices on reference to a request for a temporary transfer on November 10, and for full transfer on December 8. At least a week before November 10 the defendant knew that he would be unable to complete the purchase of 'The Thorns' unless he could raise a loan. His brokers acting in the matter sent him a notice to attend on November 10. He did so, and first saw the brewers, telling them that he could not complete, and that the notice of the application for transfer would have to be withdrawn and another one given. He then arranged with the plaintiff that completion should take place on December 8. The defendant, however, did not attend to complete. On December 22 the defendant stated that he would complete on January 30. In an action by the plaintiff for a declaration that the contract had been rescinded and the deposit of 120L. forfeited, and for damages:-

Held, (i) that, in the circumstances, and particularly having regard to the subject-matter, time was of the essence of the contract.

(ii) that under the terms of the contract, the sum of the 200L. damages was in the nature of a penalty, and therefore not recoverable."

The distinction between Lock v Bell and Webb v Hughes, is that in Lock's case the extension of time was until a definite day, whereas in Webb's case the extension of time envisaged a general continuance of negotiations. The instant case is more like Lock's case.

I now turn to Wendt v Bruce. it is easily distinguishable from the instant case. As Gavan Duffy CJ. and Starke J. pointed out in their judgment at pages 253 and 254:

> "Wendt had the right, if he had taken no substantial benefit under the contract, to refuse to be further bound by it; .....
>
> Now, a man who has his option whether he will affirm a particular act of contract must elect either to affirm or to disaffirm it altogether; he cannot adopt that part which is for his own benefit and reject the rest; he cannot blow hot and cold. And the election once made is finally made..... The facts in the present case show that Wendt desired discharge from the obligations of the contract so far as they were disadvantageous, to him but that he retrieved possession of the land and harvested a crop to protect his own interests. It is clear we think, that the authority for these acts must be referred to the contract which he claimed to have repudiated."

I accept that the following passage - para 1469 of Stoneham - The Law of Vendor and Purchaser, 1964 is a concise and correct statement of the law.

> "Waiver of Time as an Essential Term
>
> 1469. Having regard to the principles discussed, relating to the loss of right to rescind and to waiver, the position, generally, is that, if time be made of the essence of the contract that fact may be waived by the conduct of the parties, and, if the time is once allowed to pass and the parties go on negotiating for the completion of the purchase, then time is no longer of the essence of the contract. But it can be made so again by an appropriate notice. Time will cease to be of the essence of the contract (that is to say, right to rescind the contract for non-fulfillment of the condition on the date fixed will lapse) in the same manner as the innocent party may lose his right to rescind for breach of condition (i.e. essential promise) of the contract. It will be reduced to a condition upon which no higher relief can be obtained in respect of that particular breach than if it were a warranty, until by notice given in accord with the principles discussed it is

> again made of the essence of the contract in equity. Even though time be not originally of the essence of the contract, the parties may by their correspondence fix a new time for completion, and make that time of the essence of the contract, entitling a party to rescind on breach thereof. A provision as to the time for the final execution of a contract for the sale of land may be varied by agreement or waiver by word of mouth."

The case of Charles Richards Ltd. v Oppenhaim (supra), bears examination. The headnote reads in part:

> "Where, as a condition of its performance, time is of the essence of a contract for the sale of goods and, on the lapse of the stipulated time, the buyer continues to press for delivery, thus waiving his right to cancel the contract, he has a right to give notice fixing a reasonable time for delivery, thus making time again of the essence of the contract, which, if not fulfilled by the new time stipulated, he will have the right to cancel. The reasonableness of the time fixed by the notice must be judged as at the date when it is given.
>
> Hartley v Hymans [1920] 3 K.B. 475, 494-5, and Crawford v Toogood [1879] 13 Ch. D. 153, followed.
>
> In similar circumstances, in the case of a contract for work and labour done, the person who has ordered the work can give a valid notice to the contractor making time again of the essence of the contract."

I hold that the defendant vendor in the instant case was merely being lenient but continued to indicate that it wished the contract to be performed as a matter of urgency and that the notice making time of the essence dated March 1990 was valid. I think the words of Denning LJ in Richards v Oppenhaim (supra) at 624 line 7 are apposite and I respectfully adopt them:

> "It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should by doing so, have prevented himself from ever thereafter insisting on reasonable quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection of the suppliers is given by the requirement that the notice should be reasonable."

The case of Charles Richards Ltd. v Oppenhaim (supra) is authority for the proposition that to amount to waiver there must be conduct which leads the

other party reasonably to believe the strict legal rights will not be insisted on. The whole essence of waiver is that there must be an intention to affect the legal relations of the parties. The act of the innocent party must be one which is inconsistent with the idea that he is still intending to rely on the conditions. Thus, where the vendor's attitude to negotiations between the parties is that he will insist on his strict legal rights unless the purchaser is prepared to pay a sum in addition to the contract price, there is no waiver. Petrie v Dwyer (supra).

I reject the submission of Mr. Bailey and find that there was no waiver by the defendant of the essentiality of time.

Mr. Davis for the defendant made two submissions on the issue of the correspondence subsequent to the discharge of the contract.

Firstly, the correspondence subsequent to the discharge of the contract revealed that the defendant's letters created "a condition precedent to the revival of the contract".

This condition was, he said, set out in Mr. Jones' letter of 29th December 1989, in which he demanded that the signed transfer should be returned by Mr. Bailey together with a cheque to cover interest for all outstanding amounts from the original due dates to 31st January together with an "undertaking to pay any further interest up to the date on which funds are received". He noted that the rate of interest was agreed at 12½ per centum in Mr. Jones' letter of 17th January 1990.

The plaintiff's failure to fulfil "the condition precedent to revival of the contract (namely the payment of interest and the submission of an undertaking as to further interest) on or about 17th January or the extended date of 16th March means that the contract was not revived and there was no necessity to terminate any contract".

Secondly, if the Court held that a valid contract had been created, then the plaintiff was in breach of his obligations and notice making time of the

essence having been issued by the defendant, the defendant was entitled to discharge the contract on 16th March 1990, as the various conditions had not been fulfilled.

These were: the failure to tender $100,000.00 or an undertaking in lieu thereof, the absence of an undertaking as to further interest the cheque for $22,000.00 purporting to cover the interest due was insufficient as the sum of $22,923.88 was in fact due.

The Courts have not always been consistent in the use of the word 'condition'. Indeed in his article "The Contractual Concept of.Condition" (1953) 69 L.Q.R. 485 S.J. Stolgar identifies some 12 meanings of the word condition. However, in the context of this case I agree that the stipulations laid down by Mr. Jones after the discharge of the original contract on 15th August 1989, amount to a condition precedent.

Denning L. J., as he then was, in Trans Trust S.P.R.L. v Danubian Trading Company Limited [1952] 2 QB 297 divided conditions precedent into two groups; firstly, where non-fulfillment of the condition prevents the existence of any binding contract, and secondly, where non-fulfillment of the condition has the same effect as a breach of contract which goes to the root of the contract. But there is a third intermediate possibility. A condition, may operate not to prevent a binding contract from coming into existence but to suspend until the condition is satisfied, some right or duty or consequence which would otherwise spring from the contract. (See Marten v Whale) [1917] 2 KB 480.

I am of the opinion that the first and third meanings are the relevant ones in this case having regard to all the circumstances.

As I pointed out earlier no new contract was as yet formed when Mr. Jones wrote to Mr. Bailey on 21st August, 1989, indicating that he would not be prepared to continue any dialogue unless all outstanding rent was paid and satisfactory arrangements were made for payment of the balance of the purchase

price.

Mr. Jones' next letter of 6th September 1989, spelt out two conditions which should be satisfied if the plaintiff was to be given one final opportunity. They were that rental due and the balance of the purchase price plus interest on both sums of 25 per centum should be paid by 14th September 1989.

Mr. Bailey's response was to send a cheque purporting to cover the "balance as per your statement" and rental arrears for March to September 1989. So he tacitly agreed to most aspects of the conditions but complained about the interest rate, and this was not agreed until Mr. Jones' letter to Mr. Bailey of 17th January 1990.

I am of the opinion that this condition precedent was not of the first type, that is a condition precedent to contract as in Abefayle Plantation Ltd v Cheng [1960] AC 115, but rather a condition precedent to performance as in Marten v Whale (supra), and it thus took effect as one of the terms of the new contract between the parties. This means that until these extra sums were paid or where permitted, secured by an undertaking there was no obligation on the defendant to transfer the property to the plaintiff.

An important clause in the new agreement is the further demand which Mr. Jones imposed in his letter of 29th December 1989, for a cheque to cover interest to 31st January on all outstanding amounts "together with your undertaking to pay any further interest up to the date on which the funds are received from Victoria Mutual Building Society and National Commercial Bank". Mr. Jones was entitled to this because of the plaintiff's continued delay.

WAS TIME MADE OF THE ESSENCE IN THE NEW CONTRACT?

Mr. Bailey asserts that time was never made of "the essence of the Agreement". But in saying so he treats the original contract as having never been terminated in 1989. I have already found that he is quite wrong on that score. But his argument extended to the entire dealings between the parties,

and so one must examine the second stage to see whether this is true.

Mr. Jones in his letter of 29th December 1989, writes thus to Mr. Bailey:

> "You are correct that time was not originally of the essence of the contract. However, it was made so by virtue of a notice dated 6th July 1989".

This too is quite wrong. By then the original contract had been terminated by Mr. Jones' own letter of 15th August 1989, and that termination could not be retracted!

In the first letter in which Mr. Jones gave details of the new requirements which he sought to impose in the formation of a new agreement - in a letter dated 6th September 1989, he stated that rental and the balance of the purchase price plus interest on those amounts should be paid by 14th September 1989. But Mr. Bailey did not respond until letter of 19 September 1989. Thereafter further conditions were imposed but no date fixed - just a demand by Mr. Jones for quick action in letters dated 15th and 17th January 1990.

Therefore by the time the full agreement was reached the old date of 14th September 1989 for completion had passed. But that does not assist a party who is in default for two reasons. Firstly, he cannot take advantage of a state that his own default has produced; New Zealand Shipping Co. Ltd. v Societe des Ateliers et Chantiers de France [1919] AC 1 (H.L.) Baker v Crickett [1958] NZLR 943 Suttar v Grendowda Pty Ltd 81 C L R 418.

Secondly, when no time for performance is specified in a contract of this nature the expiration of a reasonable period itself permits rescission without service of a prior notice calling for fulfillment or completion within a reasonable time! Perri v Coolangatta Investment Pty Ltd. (1992) 149 C L R 537.

Where there is no specified date for completion the condition must be fulfilled within a reasonable time which is judged by an objective test

applicable to both parties. Re Longlands Farm [1968] 3 ALL ER 552.

WAS THE TIME GIVEN A REASONABLE TIME WITHIN THE CONTEXT OF THIS CASE?

It has already been noted that by Mr. Jones' letter of 17th January 1990 the sole outstanding term of the new agreement - the rate of interest was agreed. The last letter before that which contained stipulations for the plaintiff to perform was Mr. Jones' letter of 29th December 1989. Moreover the interest rate of 12½ per centum is exactly what Mr. Bailey had requested from the 16th January 1990.

The notice to complete and making time of the essence fixed 16th March 1990, as the date of completion. I find that this was reasonable time within which the plaintiff could fulfil the conditions which were outstanding.

I have already referred to Mr. Bailey's dilatory response to Mr. Jones' first letter setting out new terms if the question of the sale should be revived. I regard the lapse of time between Mr. Jones' letter of 17th January 1990 agreeing to an interest rate of 12½ per centum, the last term of the new agreement, and his letter of 1st March 1990 making time of the essence and serving notice to complete as a reasonable time within which the plaintiff could have completed. I therefore hold that the plaintiff was in default, and the defendant was entitled to make time of the essence and serve notice to complete.

WAS THE PLAINTIFF GUILTY OF INORDINATE AND UNREASONABLE DELAY?

He asserts to the contrary. I find that he was. In spite of the termination of the original agreement on 15th August 1989, the plaintiff's conduct of his affairs remained dilatory, and unbusinesslike. For instance, on 21st August 1989, Mr. Jones wrote to Mr. Bailey after a telephone conversation between them and indicated that the defendant would be unwilling to continue any dialogue unless inter alia all outstanding rent was paid. Then followed Mr. Jones' letter of 6th September, demanding payment of outstanding rent and the balance of the purchase price, plus interest on both

sums, by the 14th September 1989. But the plaintiff did nothing until Mr. Bailey's letter dated 19th September 1989 (after the deadline) forwarding the payment for rental arrears and $14,057.07 towards the balance of the purchase price. True he does ask that the matter of interest be deferred but there is then no suggestion of a lesser rate. Further when Mr. Jones in response to Mr. Bailey's letter of 16th January 1990, confirms that the interest rate is agreed at 12½ per centum and urges him to send a cheque to cover the amount as quickly as possible, nothing further is heard until 16th March 1990, and that in spite of a notice to complete and making time of the essence dated 1st March 1990.

Further in his letters of 6th September 1989, 29th December 1989, 15th January 1990 and 17th January Mr. Jones showed he was anxious that the plaintiff should complete, yet the plaintiff continued to drag his feet.

Indeed he waited until the last date on which he could complete to attempt to do so, and then it was inadequate.

The plaintiff himself has failed to show that he was ready, willing and able to perform his obligations under the contract.

In this connection I respectfully adopt the undermentioned quotation from Stoneham (op, cit para. 1370:)

> "wherever there are concurrent obligations, the party who seeks to recover against the other must show that he has always been ready, willing and able to perform the obligations imposed upon him. The state of readiness and willingness must be proved, whether it is a part of the cause of action or only relates to damages and even though the breach is a refusal to carry out the contract." (emphasis supplied)

Although the plaintiff gave evidence on his own behalf at no time did he state or prove that he was ready, willing and able to complete the contract.

I am satisfied that the defendant in no way contributed to the plaintiff's delay. As regards the completion statement it is sufficient to quote the dictum of Sir Nicholas Browne-Wilkinson V.C. as he then was, in

Carne v de Bono [1988] 3 ALL ER 485 at 489:

> "So far as the authorities drawn to our attention are concerned there is no legal obligation on a solicitor to provide a completion statement."

Mr. Bailey complained that the defendant should have executed the transfer at an earlier date. I hold that the defendant had no such obligation until the plaintiff had completed, by paying all outstanding amounts or supplying an undertaking where the agreement as modified by the indulgence of the defendant so allowed. In SCCA 22/90 Dojap Investments Ltd. v Workers Trust and Merchant Bank Ltd. (unreported) Downer JA said of a similar proposition at page 67:

> "The reality was that the Bank was not under a contractual duty to execute the transfer as Mr. Clough in his letter of 19th October, requested of Miss Eaton, until he had paid the balance of the purchase price or supplied an unqualified undertaking from Jamaica Citizens Bank."

Moreover, it cannot be said that the defendant did not co-operate with the plaintiff. On the contrary the defendant did so when through its Attorney it offered to accept an undertaking in lieu of the payment of $100,000.00 and also by the extensions of time granted.

As regards the notice to complete and making time of the essence, Mr. Bailey readily conceded that no particular form of notice is necessary and that quite informal documents or correspondence will suffice (see Ajit v Sammy (supra) at 257.) O'Sullivan v Moodie [1977] 1 NZLR 643.

I therefore hold that the agreement existing in March 1990, was validly terminated by the defendant's letter of 20th March 1990.

SHOULD THE DEPOSIT BE FORFEITED?

Mr. Davis readily conceded that in light of the opinion of the Privy Council in Workers Trust and Merchant Bank Limited vs Dojap Investments Limited [1993] 2 ALL ER 370 the sum of $55,000.00 paid by the plaintiff is not a true deposit.

In that case the appellant bank acting as a mortgagee sold certain premises here in Jamaica, at auction to the respondent for $11,500,000.00 Clause 4 of the contract provided for payment of the deposit of 25% and a deposit of $2,875,000.00 was duly paid. The contract required the balance to be paid within 14 days of the date of the auction. The purchaser Dojap did not pay the balance on the 14th day, (though it tendered it on the 21st day). The appellant Bank claimed to be entitled to keep the whole deposit as clause 13 of the contract of sale provided for its forfeiture if the respondent Dojap failed to comply with its obligation to pay the balance of the purchase price on time.

At first instance the learned trial judge Zacca C.J. held that the sum of 25% of the purchase price was a true deposit and should be forfeited. The Court of Appeal held that a true deposit was the customary 10% and that therefore the forfeiture of the full amount was invalid. The Court ordered a refund of 15%. The Privy Council held that long usage had established that 10% was reasonable and any deposit in excess of 10% appeared to be a penalty unless special circumstances could be shown which justified taking a deposit at a higher level.

The Board also held that although if the appellant Bank had taken a deposit of 10% it would have been entitled to keep that sum, since the sum it had taken was not a deposit at all but a penalty the appellant could keep no part of it and must repay the deposit in full less any sum for damage actually proved to have been suffered as a result of Dojap's non-completion.

In the instant case Mr. Davis submitted that the "deposit" of $55,000.00 is approximately 17% of the purchase price - less than the then existing commercial interest rate: the period between the completion date and the last rescission is over 8 months, whereas in the Dojap case only a few days elapsed before rescission. He therefore argued that the defendant is entitled to

deduct from the deposit damages suffered and that this ought to be computed by applying the commercial interest rate to the purchase price as the loss suffered by the defendant is the interest he could have earned on this had the plaintiff performed the contract. Alternatively, he proposed that an appropriate interest rate to apply would be 12½% which was the rate agreed upon by the parties as a condition of completion.

Again I cannot help but marvel that the Court was not presented with evidence on the issue of damages or on an appropriate interest rate. I regard an order that damages be assessed, if any, as the most appropriate in the circumstances of an absence of evidence.

I hold that the sum of $55,000.00 is not a true deposit and should therefore be returned to the plaintiff.

The order of the Court is therefore as follows:

Judgement for the defendant with costs to be taxed if not agreed.

It is also ordered that there shall be an enquiry as to damage suffered (if any) by the defendant by reason of the plaintiff's failure to complete the contract.

The defendant is ordered to pay to the plaintiff the sum of $55,000.00 with interest at a rate per annum to be agreed by the parties failing which either party may apply to the court for its determination. Such rate of interest shall be calculated from 23rd March 1990, being the date of the rescission, having regard to the provisions of special condition 5 regarding service of notices in the written agreement, such amount to be calculated down to the date of actual payment. The payment of this sum is suspended until the enquiry as to any damage suffered by the defendant is completed.