IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO E 510 OF 2000

IN EQUITY

BETWEEN	BARBARA **WAKEFIELD**	1st PLAINTIFF
AND	WINSTON WAKEFIELD	2nd PLAINTIFF
AND	OLIVE DOSTEY	DEFENDANT

John Graham, Esq., and Georgette Scott instructed by John Graham & Co for the Plaintiffs

Crafton Miller, Esq., and Suzette Wolfe, instructed by Crafton S. Miller & Co for the Defendant

Heard on the April 24 and 27 and May 3, 2001 and April 9, 2002

Anderson, J.

This matter arises by way of an Originating Summons filed by the Plaintiffs herein on the 12th December 2000. The summons seeks the following relief namely:-

1) The Registrar of Titles be directed to remove the caveat numbered 1128529 lodged by the defendant as the plaintiff (sic) has no legal or equitable interest in the property situated at Townhouse No 5, 1 Waterworks Road in the Parish of St. Andrew registered at Volume 1172 Folio 56 of the Register Book of Titles.
2) That an Order be made directing the Registrar of Titles to remove Caveat No 1128529 lodges against the said certificate of title registered at Volume 1172 Folio 56 of the Register Book of Titles lodged by the Defendant Olive Dostey.
3) That the caveat be removed in that the defendant Olive Dostey has been guilty of material non-disclosure.
4) That the costs of this application be the plaintiff's to be agreed or taxed.

5) Such further or other relief as may be just;
6) That there be liberty to apply.

I shall recount as briefly as I can the circumstances leading up to this application by the plaintiffs herein. The genesis of the action is a contract entered into on the 11th February 2000, between the plaintiffs, Winston Gordon Wakefield and Barbara Anita Wakefield of a New York address in the United States of America, electrical engineer and housewife respectively, on the one hand, as vendors, and the defendant, Olive Dostey of a Kingston 8 address in the Parish of St. Andrew, as purchaser, on the other. The contract was duly executed with the parties thereto having their respective signatures duly witnessed.

The contract provided for a purchase of property known as Townhouse No 5, 1 Waterworks Road in the Parish of St. Andrew, and registered at Volume 1172 Folio 56 of the Register Book of Titles, at a price of Seven Million Five Hundred Thousand Jamaica dollars (J$7,500,000.00). There was to be a deposit of seven hundred and fifty thousand dollars ($750,000.00), and a further payment of three hundred and seventy five thousand dollars ($375,000.00), with the balance to be paid on completion. "Completion" was scheduled to take place "within ninety (90) days of the date hereof and on payment of all monies payable by the purchaser hereunder in exchange for the duplicate certificate of Title duly endorsed in favor of the purchaser and her mortgagee's interest thereon". Possession was to be handed over "vacant on completion"

As with contracts of this nature, the agreement had a number of special conditions. In this case there were nine in all. Some of these conditions are of particular relevance in relation to the issues raised in this matter. In particular, I set out below verbatim, special conditions 4, 5, 6, 7, 8 and 9. I shall in term refer to these special conditions below as their relevance appears.

> "4. The sale is subject to the Purchaser obtaining a mortgage loan of not less than $5,000,000.00 on the security of the premises from the Victoria Mutual Building Society or any other reputable financial institution and

delivering to the attorneys-at-law having carriage of sale a written commitment from that financial institution for such loan no later than Sixty (60) days from the date hereof. In the event of the purchaser failing to do so either party shall be entitled to rescind this agreement within fourteen (14) days thereof failing which this agreement shall remain absolute and binding on the parties hereto. In the event of this agreement being rescinded, all monies paid hereunder shall be refunded without interest and free from deductions save and accept that the purchaser hereby agrees to pay the attorneys-at-law having carriage of sale fee in the sum of ten thousand dollars ($10,000.00) for professional services rendered in respect of work incidental hereto and the purchaser hereby irrevocably authorizes the said attorneys-at-law having carriage of sale to deduct the amount of such fee from the deposit paid on the termination of the agreement.

5. Any notice or demand to be served or made on either part hereto shall be deemed to be sufficiently served or made as the case may be if sent by pre-paid registered post addressed to them at their address above stated and copied to their attorneys-at-law and shall be deemed to have been received fourteen (14) days after the date of posting in any post office in Jamaica. This method is not exclusive and shall be in addition to any other available procedure.

6. It is understood and agreed that if the Stamp Commissioner shall assess the transfer tax and stamp duty payable on this Agreement for Sale on a value which is greater than the agreed sale price of JA$7,500,000.00, the vendors shall have the option to rescind this Agreement for Sale by notice in writing to the Purchaser within seven (7) days of being notified of this assessment in which event all monies paid by the Purchaser, save and except monies paid under special condition 3 shall be refunded without interest and free from deductions, PROVIDED THAT if the Purchaser

within seven (7) days of being so informed by the vendors shall pay to the vendor such sum by which Transfer Tax and Stamp Duty exceeds the amount payable on a consideration of JA$7,500,000.00 this agreement shall remain binding on the parties hereto.

7. In the event that the Purchaser shall fail to pay the balance of the purchase price within the time stipulated, which failure is not due to any default of the vendors, and the vendors shall agree to extend the time limited for completion and interest on the unpaid balance of purchase money shall accrue at the rate of 20% per annum for the period of any extension.

8. In the event that the purchaser shall fail to pay the balance of the purchase price within the time stipulated for completion the vendors shall be entitled to forfeit the deposit.

9. It is hereby agreed that the purchaser shall pay to the vendor the sum of US$25,000.00 as part of the balance of the purchase price. For the purposes of this Agreement the rate of exchange between the United States Dollar and the Jamaican Dollar shall beUS$1.00 to JA$40.00.

It is common ground that the purchaser did in fact make the payment of the relevant deposit and further sum and then proceeded to seek mortgage financing in order to fulfill special condition 4 which required that the purchaser secure, within a sixty (60) day time frame, the relevant commitment to finance the mortgage. The special condition, as noted above, continued as follows:

> In the event of the purchaser failing to do so either party shall be entitled to rescind this agreement within fourteen (14) days thereof failing which this agreement shall remain absolute and binding on the parties hereto. In the event of this agreement being rescinded, all monies paid hereunder shall be refunded without interest and free from deductions save and accept that the purchaser hereby agrees to pay the attorneys-at-law having carriage of sale fee in the sum of ten thousand dollars ($10,000.00) for

> professional services rendered in respect of work incidental hereto and the purchaser hereby irrevocably authorizes the said attorneys-at-law having carriage of sale to deduct the amount of such fee from the deposit paid on the termination of the agreement.

The effect of this part of special condition 4 is purportedly summed up in the affidavit of the purchaser/defendant Olive Dostey at paragraph 5 of her affidavit dated and filed in the Supreme Court the 5th February 2001. That affidavit states in relevant paragraph that:-

> "This condition provides for the procedure to be adopted upon rescission of the contract by the vendor/plaintiffs wherein if the purchaser fails to obtain the mortgage loan it states that all monies paid hereunder shall be refunded without interest and free from deductions save and accept the sum of ten thousand dollars for professional services to be paid to the vendor/plaintiff's attorneys-at-law".

While this does give some indication of the effect of paragraph 4, it is suggested that it is not a complete reading of that relevant special condition. It seems that a close reading of the condition gives a right to rescind to either party, and then, only within a set fourteen day period after the expiration of the sixty (60) days. Further, in the absence of rescission within that set fourteen (14) days, the contract remains in full force and effect in relation to all its other terms.

In the outturn, the purchaser had great difficulty in securing the commitment for mortgage financing to purchase the property. This difficulty was communicated to the attorneys-at-law for the vendors/plaintiffs. Accordingly, the attorneys-at-law representing the purchaser, on the 15th June wrote to the plaintiff's attorneys requesting an extension of time within which to supply the letter of commitment in accordance in special condition 4 of the agreement for sale. This was apparently agreed to, although there is nothing on the Bundle with which I have been supplied to state whether such a concession was on terms or not. Subsequent correspondence is however, only explainable on the basis that the extension was agreed to by the vendors' attorneys.

In any event, as a consequence of the difficulty in obtaining mortgage financing herself the defendant/purchaser then sought the assistance of a couple, Mr. Patrick Shim and Mrs. Dawn Shim to become nominee purchasers under the terms of the agreement for sale, in order to complete the transaction. The attorneys-at-law for the vendors were advised of these efforts. It appears from a letter from the attorneys acting on behalf of the Shim's, that the attorneys-at-law for the vendor accepted this arrangement which was being entered into in order facilitate the purchase by Miss Dostey. It should also be noted that the letter from the attorneys for the Shim's did indicate that the Shim's were prepared to act in substitution for Miss Dostey, 'provided necessary arrangements are put in place expeditiously'. The Shims' role in the sorry chain of events was, therefore, conditional.

By letter dated October 8, 2000 the attorneys for the vendor wrote to defendant's lawyers, Crafton F. Miller & Company, indicating that time they were making time of the essence in the transaction contemplated by the agreement for sale. That October 8th 2000 letter, according to a copy of a letter attached to Mrs. Dostey's affidavit, was received in the office of her attorney on Friday October 20th, 2000. On October 24, Mr. Miller wrote to John Graham and Company setting out his view that the purchaser having failed to conclude the nomination agreement, (which she had attempted in light of her inability to secure the commitment), they now considered the whole matter "had been aborted". That letter goes on to state: "You were kept abreast of all recent developments both by the Shim's attorneys-at-law, Messrs Myers Fletcher and Gordon, and ourselves of all the developments in the pursuit of the nomination agreement and of its un-accomplishment." In that letter, Crafton Miller & Company therefore requested the return of their client's deposit and further payment, plus interest as had been requested in his previous letter of October 19, 2000.

The plaintiffs then purported to treat the agreement for sale as being at an end and further purported to forfeit the deposit which had been paid by the purchaser/defendant claiming to effect this forfeiture under special condition 8 of the agreement for sale. Their right to do this was disputed by the defendant, who succeeded in lodging a caveat against the

property. The plaintiffs/applicants now seek to implement an agreement for the sale of the said property to subsequent purchasers, an agreement for sale in respect of which, has been attached to the affidavit of Christopher Malcolm, an attorney-at-law of the firm of John Graham & Co., and this subsequent agreement is given as one reason for the need to have the caveat lifted. It is against this background that the plaintiffs/applicants now seek to have the caveat placed against the property by the defendant removed, so that they can complete this latter sale.

The issues which must be resolved before determining whether they are entitled to have that caveat removed, turn upon an extensive construction of the terms of the agreement for sale and may be summarized in the following questions:-

1. What is the effect of special condition 4 of the agreement for sale?
2. What is the effect, if any, of the purported agreement on the part of the attorneys-at-law for the vendor/plaintiff that the putative purchaser could proceed to give effect to the agreement through nominees?
3. Does the failure to complete the nominee agreement have any effect on the relative positions of the parties? and
4. Does special condition 8 permit the forfeiture of the deposit as claimed by vendors?

Some subsidiary questions also arise. These include

1. Whether the defendant had a caveatable interest in the property sufficient to maintain a caveat against the title; and
2. whether, if there was such a caveatable interest, it ought now to be lifted in all the circumstances of the case, at the behest of the plaintiff applicant.

These are the issues that we now explore.

I shall deal firstly with the construction of the terms in the agreement.

Both the applicants and the Respondents/Defendants, made extensive oral submissions and in addition forwarded written submissions. I have to say, with respect, that both sets of submissions seem to focus more on the "existence" of the caveat and its sustainability. It seems to me that the proper point of departure is a true construction of the relevant

clauses of the Agreement for Sale. In this regard, the defendant's submissions at least make reference to the clauses, but proceed to the conclusions as to the meaning of those clauses, without the necessary analysis or authorities. In both cases, therefore, it would appear that the necessary first step, that of construing the terms of the agreement, has been largely ignored.

It is quite clear that, pursuant to special condition 4, (quoted, *in extensu*, above) it was a condition to the effectiveness of the agreement that the purchaser provide the appropriate financial commitment letter written sixty (60) days of the signing of the agreement. This condition subsequent, a common one in an agreement of this nature is, and I so hold, a condition for the benefit of the vendor. I also hold that where there is a condition for the benefit and protection of one party, such party may waive the fulfillment of such condition. See ***Curdella Rose v Lloyd Forsythe [1988] 25 J.L.R. 437 (Jamaica C.A.)***

This is implicitly acknowledged by the defendant because, when the defendant was unable to comply with the condition, she sought the vendor's approval, first to extend the time for complying, and thereafter sought unsuccessfully to interpose nominee purchasers. In this regard, I advert to paragraph 12 of defendant's written submission.

> "The Agreement for Sale was subject to and contingent upon the defendant obtaining a mortgage loan. At all times, the Plaintiffs were made aware of the defendant's difficulties in obtaining the said loan, and they not only agreed to allow her further time within which to comply, but were willing to complete the transaction with nominee purchasers in her stead. This amounts to a waiver on the Plaintiff's part of any right to complain that the defendant did not complete the transaction within the specified time."

I agree that there is a waiver, but it is, in my view, *a waiver of the sixty days limit only*, that is, the time for securing the letter of commitment, as a basis for avoiding the contract. Moreover, even if there has been a waiver in the sense that I have suggested, it is clear from the Australian case **Rian Financial Services Pty Limited,** referred to

below, that a proper notice to complete within a specified time and making time of the essence of the contract would have revived the breach by the purchaser. The right to insist upon the performance of the other terms of the agreement, would not appear to be affected. And the plaintiff is not complaining that the transaction was not completed within the time specified for completion in the agreement. Indeed, "Completion" was scheduled to take place "within ninety (90) days of the date", (i.e. the date of the contract), subject of course to the "payment of all monies payable by the Purchaser hereunder, in exchange for the Duplicate Certificate of Title duly endorsed in favour of the Purchaser and her mortgagee's interest thereon". The plaintiffs' complaint is to the effect that the defendant was given a notice making time of the essence of the contract, as it was the right of the plaintiffs' to issue, and that the defendant failed to complete within the time set out in that notice. In fact, it is possible to argue that the effect of the defendant's seeking the plaintiffs' approval to complete using a nominee, was an implicit waiver of the defendant's right to fall back upon the inability to secure the commitment. It was, after all, this assurance that had prompted the plaintiffs to agree to further extend the time for completion. The result of this view of condition 4 would be that the purchaser would have to notify the vendor of its inability to secure the commitment letter (whether on her own or through a nominee) before the expiration of fourteen (14) days after the end of the sixty (60) days (or such longer period agreed to by the vendors), and to formally give notice to rescind the agreement. This rescission must be an affirmative act, as doing nothing would leave the vendor at the mercy of a purchaser who could plead that the contract was still extant in the absence of such notice.

If this view of special condition 4 is not correct, then I would hold that the right to rescind the agreement within the fourteen (14) days after the time for provision of the financial commitment letter, is an affirmative right given to both parties, but is essentially for the protection of the purchaser. It seems that two (2) points in time must be fixed in order to trigger the protection afforded the purchaser by special condition 4.

(A) The sixty (60) days or such defined longer period as is agreed by the vendor for providing the commitment letter; and

(B) A period of fourteen days after the end of such period when actual notice of intention to rescind would have to be given.

It is trite law that in a contract for the sale of real property, time is not of the essence unless made so by the contract or by one party giving notice to the other that he intends to make time of the essence. (**Kelsie Graham v Lurline Eugenie Pitkin [1992] 29 J.L.R. 41,** a judgment of the Privy Council) It is clear therefore that the failure to obtain the required commitment letter from a financial institution within the sixty (60) days contemplated by the agreement (time not being originally of the essence) is not, without more, fatal to the contract. Further, and in any event, the vendor agreed to extend the time for the purchaser to provide the letter, and even agreed to substitution of nominees where the purchaser had indicated that there was a problem of financing. Notwithstanding these concessions, the defendant failed to give the appropriate notice. Mr. Graham for the plaintiff, pointed out that the plaintiff's notice making time of the essence was served in three (3) ways, and even then there was no attempt to serve a notice of rescission.

What then is to be seen as the effect of the power to rescind the agreement dealt with in special condition 4?

As part of the bundle prepared for this hearing, there is included an affidavit of an associate in the law firm of the defendant's attorneys-at-law, attaching a copy of a Summons and a Third Party Notice. These, both the ex parte summons, and the affidavit of Patricia Roberts-Brown, are appended as exhibits to the "Further affidavit of Olive Dostey". Mrs. Roberts-Brown at paragraph 13 of her affidavit, having dealt with the unsuccessful attempt to put in place a nominee agreement involving a Mr. & Mrs. Shim, stated:

> "That it was a consequence of the said Mr. & Mrs. Shim reneging on their oral agreement that the sale was not completed".

The 'sale' here referred to, is, of course, that in the agreement between the plaintiffs and the defendant. Further, the letter from Crafton S. Miller & Co. to the plaintiffs' attorneys dated the 19th October 2000, states that:-

> "We have been instructed by Mrs. Dostey to inform you that the proposal to nominate Mr. & Mrs. Shim as Purchaser following upon her failure to obtain the mortgage to complete, has fallen through. She has therefore instructed us to request the immediate return of the deposit and further payment of One Million, One Hundred and Twenty and Twenty-five Thousand Dollars ($1,125,000.00) with the accrued interest thereon."

From the foregoing, it would seem clear that it was the failure of the negotiations with the Shims, which was the proximate cause for the Purchaser failing to complete the purchase. It goes without saying that the prospect of a nominee agreement being the cause of the failure of the original agreement for sale of the property, does not arise on the terms of that agreement for sale.

What then is the implication of the fourteen (14) days (after the sixty (60) days given for the purchaser to provide the commitment letter) for either party to rescind? I hold that since the condition requiring the purchaser to deliver the commitment letter within the certain time, is for the benefit of the vendor, the vendor way waive it. Waiver of that condition does not affect the fourteen (14) day period during which, *and only during which*, the right to rescind, remains extant. *A fortiori*, where the vendor has served a notice making time of the essence of the contract. If I am wrong in this holding, I would hold in the alternative that by seeking and securing the vendor's consent to extend the time, as well as permission to complete through nominees, the purchaser has thus waived the right to rescind under special condition 4. In any event there is no evidence that the purchaser served any notice to rescind within the time allowed or at all, upon the vendor. It is not the defendant's case, on the evidence, that " a notice of rescission was served within the time permitted by the contract". It will be recalled that the agreement provided that "in the absence of any notice to rescind, the "agreement for sale shall remain absolute and binding on the parties hereto". There is therefore no valid rescission of the agreement.

As noted above, special condition 5 also required that: "Any notice or demand to be served or made on either part hereto shall be deemed to be sufficiently served or made, as the case may be, if sent by pre-paid registered post addressed to them at their address above stated and copied to their attorneys-at-law and shall be deemed to have been received fourteen (14) days after the date of posting in any post office in Jamaica. This method is not exclusive and shall be in addition to any other available procedure". I would suggest that a notice of intention to rescind would be one such notice contemplated by the agreement. Indeed, as also noted above, the plaintiff's attorneys say that notice making time of the essence was served in three ways, including by fax.

If the construction which I have placed on special condition 4 is correct, then the failure to definitively notify the vendor of the inability to get the commitment and the intention to rescind within the time limited by the agreement, must be fatal to any claims that the contract has been rescinded. In other words, if the purchaser is at liberty to claim rescission without establishing the two trigger points that I have suggested above and serving a notice of rescission consistent therewith, but merely by saying that "you were aware of my difficulty in finding the financing", it would make a nonsense of the defined periods in special condition 4, as well as, the affirmation of the other clauses in the agreement as suggested by that special condition 4.

In support of the conclusions reached in the foregoing, I would refer extensively to the case of **RIAN FINANCIAL SERVICES PTY. LIMITED v ALFRED INVESTMENTS PROJECTS PTY. LIMITED S.C.913 OF 1985**, a decision of the Supreme Court of the Australian Capital Territory, heard by Miles, C.J. It is, of course, well known that the Torrens Systems of title registration is used in various jurisdictions throughout Australasia. In that case, the plaintiff/purchaser sought an order for specific performance of a contract for sale of land to the plaintiff. The parties had entered into a written agreement on June 12, 1984 which provided in condition 19 that in the event that there was a rescission of the agreement, *as distinct from termination*, (my emphasis) the rescission should be treated as a rescission *ab initio*, and neither party would be liable to the other for any damages, costs or

expenses, with certain limited exceptions. The contract also had some special conditions. Special condition 10 of the contract provided as follows:

> Completion of this contract shall take place on 31st October 1984. If completion shall not have taken place on that date either party may serve on the other a written notice requiring completion to take place within 14 days after the date of such notice and any such notice may provide that time shall be thereupon deemed to be the essence of the contract.

Another special condition, that being condition number 12, stated that the consent of the relevant City Council should have been obtained, and that application for that consent was to be made by June 29, 1984. Further, pursuant to clause 12(e), if the consent had not been obtained by October 31, 1984, "the Agreement shall be at an end, and the provisions of clause 19 hereof shall apply". Clause 19 was the clause which dealt with the effect of rescission.

The relevant application for approval was not made by June 29, 1984. By letter dated 18 January 1985 the vendor, through its solicitors, purported to rescind the agreement, pursuant to clause 19 and clause 12(e) of the special conditions, on the ground that the required consent of the Queanbeyan City Council had not been received by 31 October 1984. The notice of rescission attached to the letter was dated 22 January 1985. In fact the approval of the Council had been given the day before, 21 January 1985. After a letter from the purchaser's attorney-at-law protesting the rescission, on February 6, 1985 the vendor's solicitors withdrew the notice of 22 January 1985, accepting the return of the cheque for $500 for the deposit, noting "that the above action is taken on the basis of your agreement to vary the terms of the contract to pay the vendor the full purchase price of the block forthwith" and seeking "immediate confirmation that you will be able to settle on or before 20 February 1985". On March 6, 1985, the vendor/defendant's attorneys wrote to the plaintiff's attorney stating that:- "unless a definite date for settlement is set down, such date being prior to March 15, 1985, we are to exercise our client's rights under the contract immediately". On March 20, 1985, the defendant's solicitor wrote a letter attaching a notice of rescission, and stating that pursuant to clause 12(e), the vendor was rescinding the contract and returning the deposit. The plaintiff denied that the defendant had any right to rescind, and protested that they were willing

and ready to settle. They succeeded in placing a caveat on the title to the property, the subject of the Agreement. The defendant's consequent response thereafter, was to treat the contract as having been abandoned, rather than one which could not be rescinded until there had been a failure to comply with a notice to complete. The judge held that:-

> "In my view, by 20 March 1985 the vendor was entitled to treat the contract as abandoned by the purchaser".

He continued:-

> "This is not a case in which the purchaser can successfully contend that the vendor was disentitled from serving a notice to complete because the vendor itself was in breach. Nor, on the other hand, is it a case where time had been made of the essence of the contract, so that the purchaser in default will, for failure to complete, be denied specific performance: see Legione and Another v. Hateley (1983) *152 CLR 406*. Nevertheless, it is important to recognize that the purpose of a notice to complete is not restricted to effecting completion of the sale: Ciavarella v. Balmer (1983) *153CLR 438*, and hence that failure to comply with a notice to complete is not the only way in which the conduct of a purchaser may indicate to a vendor that the purchaser does not intend to honour the purchaser's obligations under the contract. This point is made in Lindgren & Ors., Contract Law in Australia, 1986 where the authors state at para. 1954:
>
> > "Generally speaking, where time is not essential the promisor's breach of the time stipulation does not give rise to a right to terminate unless the promisee first serves a notice requiring performance within a reasonable time. There are, however, two exceptions to this rule."
>
> The two exceptions are, first, where the promisor is guilty of unreasonable delay in the performance of an express time stipulation either because the breach has had serious consequences for the promisee or because the delay amounts to a repudiation of obligation on the part of the promisor, and second, where the promisee terminates on the ground of anticipated unreasonable delay. The authors go on to comment:

> "A promisee's decision to terminate without notice for breach of a non-essential time stipulation certainly exposes him to considerable risks, since it must be difficult to prove that the promisor was so placed that he would not have complied with a reasonable notice. It is therefore a 'perilous' course to take."

A similar view is expressed by J.W. Carter, Breach of Contract 1984 p. 433 where the authors state as follows:

> "Where a promisee elects to continue performance after a breach of the promisor's main obligation under a contract his election does not imply a willingness to be eternally bound by a contract which will not performed. The promisee is still entitled to receive the promisor's performance, and if the promisor fails to comply with a notice allowing a reasonable time for performance, the promisee's right to terminate revives notwithstanding that, in a sense, the promisor has merely failed to remedy his prior breach. Moreover, as was explained earlier, if it is clear that the promisor cannot (or will not) perform, the promisee may be able to justify termination, without first serving notice, on the basis that performance of the contract has become substantially different from that intended by the parties."

I adopt the reasoning of the learned judge in this case and in particular his reference to the view expressed by J.W. Carter, in the text, "Breach of Contract". As it applies here, the plaintiff promisee having elected to continue performance after a breach of the defendant/promisor's obligation under a contract, *his election does not imply a willingness to be eternally bound by a contract which will not performed.* The promisee is still entitled to receive the promisor's performance, and if the promisor fails to comply with a notice allowing a reasonable time for performance, the promisee's right to terminate revives notwithstanding that, in a sense, the promisor has merely failed to remedy his prior breach.

If I may appropriate the learned judge's words in that case and apply them hereto, "The parties were each under an obligation at law under the terms of the contract, to complete by ninety (90) days from the date of the Agreement. The contract, however, did not provide that time was of the essence. The notice making time of the essence was duly served after the vendor had previously waived both its right to secure a financial commitment by the date set in the Agreement and to complete within ninety (90) days of the contract date. It did not however, give up its right to give the appropriate notice, making time of the essence. Failure to comply with the terms of the notice making time of the essence is therefore a breach. Moreover, no notice to rescind was ever served by the purchaser. Indeed, well after the period of time limited for service of the notice of rescission, the purchaser's attorney was still indicating that the purchaser wanted to complete, albeit with a nominee". (See Graham v Pitkin referred to above).

Mr. Graham submitted that the mere fact that the vendor had agreed to the purchaser using a nominee to complete the transaction, did not constitute a derogation from their rights under the contract such that obligations of the purchaser thereunder were discharged. Mr. Miller, on the other hand, submitted that the failure to provide the commitment letter required under special condition 4 meant that "the sub-stratum of the contract had disappeared" and that the rescission provision then applied, and the purchaser should recover her monies. I agree with Mr. Graham's submission.

It therefore goes without saying, and I so hold, that the plaintiffs were entitled to treat the Agreement as abandoned *and not rescinded*, and to proceed to call in aid the other provisions of the contract including those which gave a right to forfeit the deposit paid by the purchaser, up to a limit of 10%. (**Workers' Trust and Merchant Bank v Dojap Investments Limited 1993 2 A.E.R. 370**)

But I do not believe that the matter ends there. The issue which still has to be canvassed is whether the caveat should be lifted so as to permit the vendors to pursue other purchasers, or kept in place as the purchaser seeks to do by opposing this summons. Mr. Graham submitted that since a caveat "operated as a statutory injunction" (See "Torrens

Title" by Stein and Stone at page 127; see also the **Norma Haddad v Riverton City et al** referred to below), because of the purchaser's non-disclosure of material facts, the caveat should be discharged. He submitted further that the foundation upon which the caveat rests is, like a an application for an ex parte injunction, the full and frank disclosure of facts to the Registrar of Titles. He cited in support, the unreported case, **Half Moon Bay Limited v Earl Levy, Suit No C.L. 1996/H012**, as well as **Jamculture Limited v Black River Upper Morass Development Company Limited & Agriculture Development Corporation (1989) 26 J.L.R. p 244**, He suggested that the failure to advise the Registrar that there had been a breach of the Agreement by the purchaser and that a notice making time of the essence of the agreement had been served, represented material non-disclosure which should require the court to discharge the caveat. Mr. Miller in, response, says that these cases are irrelevant and suggests that the defendant has a proprietary interest that is, accordingly, caveatable. Mr. Graham makes two (2) further submissions. Firstly, that unless the purchaser/caveator could show that he was entitled to specific performance, he was ready, willing and able to complete, he ought not to be allowed to lodge a caveat. Secondly, he submits that since section 139 of the Registration of Titles Act allows the lodging of a caveat where the interest of the purchaser is a proprietary one, the caveat ought to be discharged. The interest if there is one, is an interest in money, and the purchaser has filed an action to recover money and ought to pursue her remedy there.

En passant, I should note that in their submissions for the defendant, her attorneys have cited as a fact that, in the event they are successful in that suit and the plaintiffs are allowed to have the caveat lifted and thereby transfer the property, they would have no means to enforce any judgment. I say, with respect, that that consideration is not paramount in this matter before me, and should more properly be dealt with in that suit.

Mr. Miller, for his part, submits that the caveat fully complies with section 139, and that it is the Registrar who must determine whether a basis has been made out for the lodging thereof. The section, in relevant parts, is in the following terms:

139. Caveat against dealings.
139. Any beneficiary or other person claiming *any estate or interest in land under the operation of this Act*, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, -----

No caveat shall be received -

(a) unless some address or place within the city of Kingston shall be appointed therein as the place at which notice and proceedings relating to such caveat may be served;
(b) unless some definite *estate or interest* (my emphases) be specified and claimed by the caveator;

He claims that the defendant here has "an interest" which needs to be protected and that the present circumstances are sufficient for the purposes of section 139. He cites in support, "Registration of Title throughout the Empire" by James Edward Hogg and in particular the section at page 186, in the following terms: "Having regard to the intimate connection between caveats and litigation, it is submitted that any claim which would entitle the claimant to initiate litigation in respect of land, should entitle him to enter a caveat, whether the claim be based on an equitable interest, or only on a contractual right". I agree with this submission and find support for it in the Western Australian case of **Jandric v Jandric & Anor, [1000] WASC 22 (18 May, 1999)** a decision of Commissioner Buss, Q.C. he said:-

"Plainly, a person who claims a legal estate or interest in land will be entitled to lodge a caveat against the land. But where a person does not have a legal estate or interest, he will be entitled to lodge a caveat only if he has *an interest in respect of which equity will give specific relief against the land itself*. This relief may be by way of an order that the interest claimed be satisfied out of the land itself; for example, by an order for the sale of the land and the payment out of the proceeds of an amount in respect of which the caveator has a charge. *If the person has an interest in respect of which Equity will give specific relief against the land itself,*

> *then the interest is caveatable, and it is appropriate to describe it as an equitable proprietary interest in land".* (All emphases mine)

It was submitted by Mr. Miller that, on the authority of **Norma Haddad v Riverton City and the Registrar of Titles, (Suit # E 230 of 1975)**, that this court should leave the caveat in place. While Mr. Graham advanced the New Zealand case of **Varney v Anderson [1988] 1 NZLR 488** as authority for the proposition that the purchaser should be pursuing a claim for specific performance, I do not necessarily accept this submission. I do, however, hold that in the words of Commissioner Buss, for the interest to be caveatable, it must be one "in respect of which Equity will give specific relief against the land itself". Mr. Miller, in a further submission cited a passage from **Re Moosecana Subdivision and G.T.P Vol 7 D.L.R. p 674, at page677.**

> "A caveat based upon a prima facie valid document will not be vacated on a summary application to a judge in chamber where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party. The application might be entertained if the facts are undisputed and the issue rested upon the interpretation or validity of the written document on which the caveat is founded: **McGreevy v Murray 1 D.L.R. 285.**

Again, I have little disagreement with the proposition in the submission. Notwithstanding the indications from the above of the limited acceptance of parts of the submissions of counsel for the defendant; I regret that the defendant's position in the instant case, is not supported by the foregoing. In this case, there is substantial, perhaps even universal, agreement upon the facts. Where the differences arise, is in an interpretation of those facts. I have already set out what I consider to be the legal effect of the document which has been brought before me, and so I do not believe that this case (Re Moosecana) avails the defendant. Nor do I find support for the defendant's position in **Rose v Watson [1864] Vol. 11 (H.L.) p1187** to which the defence also referred the court. In that case, the purchaser had paid over money for part of a property in respect of which certain material misrepresentations by the original vendors, now made it impossible to enforce an order for specific performance against him. He was held entitled to maintain a lien against the assignees of the property. Mr. Miller cited he following section of the court's judgement.

> "When instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow as a necessarily corollary that to the extent

> to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, he acquires a lien in the same way as if on payment of part of the purchase money, the vendor had executed a mortgage to him of the estate to that extent".

This quotation is buttressed by the submission at 11 of the defendant's written submission to the following effect:

> "The defendant acquired a lien against the land from the time she paid the deposit and further payment in the sum of $1,125,000.00. The subsequent cancellation in no way derogated from this right".

Firstly, the suggestion is that notwithstanding a breach, (*not a rescission*, as suggested by the word "cancellation" in the submission, the defendant's position would remain the same. I cannot agree with this submission. Moreover, in the Moosecana case, there would no doubt be a resulting trust in favour of the purchaser, and such could certainly be enforced against the property, as stated in the quotation and on the authority of Jandric above. Here, my finding that the defendant is in breach of the agreement, would be inconsistent with any finding that there continues to be a subsisting "interest" in the property, sufficient to sustain the caveat. There is, here, no possibility of a resulting trust.

In light of the foregoing findings, I hold that the plaintiff is entitled to the relief as claimed in the Originating Summons dated and filed on the 12th day of December 2000, paragraphs 1,2,4 and 6.

Ordered that:

1) The **REGISTRAR OF TITLES** be directed to remove the caveat numbered 1128529 lodged by the defendant as the defendant has no legal or equitable interest in the property situated at Townhouse No. 5, 1 Waterworks Road, in the parish of Saint Andrew registered at Volume 1172 Folio 56 of the Register Book of Titles.
2) The Registrar of Titles remove Caveat No. 1128529 lodged against the said Certificate of Title registered at Volume 1172 Folio 56 of the Register Book of Titles lodged by the defendant, **OLIVE DOSTEY.**
3) The costs of this application be the plaintiffs to be agreed or taxed.
4) There be liberty to apply.
5) The Order be stayed for fourteen (14) days
6) Leave to appeal granted, if necessary.