IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. W-189/81

BETWEEN	VINCENT WILLIAMS	PLAINTIFF
A N D	MANCHESTER BEVERAGES LIMITED	DEFENDANT

R. N. A. Henriques Q.C. instructed by Livingston, Alexander and Levy for Plaintiff.

B. Macaulay Q.C. and Mrs. M. Macaulay instructed by O. G. Harding and Company for Defendant.

July 4, 5, 1983, November 21, 22, 23, 24, 25, 1983, December 2, 1983 and July 13, 1984.

JUDGMENT

ALEXANDER, J: (Ag.)

This is a Specially Endorsed Writ brought by the plaintiff against the defendant, and it is perhaps more convenient to repeat here the Statement of Claim:

1. The defendant is a limited liability company duly incorporated under the Laws of Jamaica;

2. By an Agreement in writing made on the 26th June, 1979, between the plaintiff and the defendant, the defendant agreed to sell and the plaintiff agreed to purchase Lots No. 24 & 25 being lands part of Mount Nelson in the parish of Manchester and registered at Volume 1089 Folio 503 and Volume 1101 Folio 437 of the Register Book of Titles, for the sum of $80,000.00;

3. It was an express term of the said Agreement that the plaintiff should pay a sum of $30,000.00 on the signing of the said Agreement and the balance of the purchase price within twelve (12) months from the date of the signing of the Agreement;

4. It was a further term of the said Agreement that the plaintiff would be let into possession as of 1st July, 1979;

5. In pursuance of the said Agreement the plaintiff paid the sum of $30,000.00 on the signing of the said Agreement and further sums amounting to $14,983.00 (amended to read $14,183.00 by Order of the Court) to the defendant company towards the balance of the purchase price and interest agreed on;

6. That by letter dated the 13th of January 1981, the plaintiff's attorney informed the defendant that the plaintiff was ready to pay the balance of the purchase money together with interest thereon to complete the transaction but the defendant, in breach of the said Agreement, purported on the 17th January, 1981, to serve a Notice of Repossession on the plaintiff and to unlawfully determine the contract and forfeit moneys paid thereunder by the plaintiff;

7. That the defendant has failed, refused and/or neglected to take any steps to complete the said Agreement despite repeated requests by the plaintiff's attorney so to do;

8. The plaintiff is and has at all material times been ready, willing and able to complete the said Agreement.

And the plaintiff claims:

(i) Specific Performance of the Agreement in writing made between the plaintiff and the defendant and dated 26th June, 1979;

(ii) An Order that the defendant do transfer to the plaintiff the said parcels of land upon the plaintiff paying to the defendant the balance of the purchase price and such other sums incidental to the transfer of the said property;

(iii) Damages in addition to or in lieu of Specific Performance;

(iv) An Injunction to restrain the defendant by its servants and/or agents from selling, transferring or in any other way disposing of or encumbering the said parcels of land or any part thereof until the trial of this action;

(v) Further and other relief; and

(vi) costs.

An amended Defence and Counter-claim read as follows:

1. The defendant admits paragraphs 1, 2, 3 and 4 of the Statement of Claim;

2. The defendant says that the Agreement stipulated inter alia the date of completion to be within twelve (12) months from the date of the signing of the said Agreement, that is on or before 26th day of June, 1980;

3. The defendant says that the plaintiff failed to complete the said Agreement on the aforesaid date and consequently by mutual agreement the defendant granted to the plaintiff an extension of three (3) months expiring on the 30th of September, 1980, within which to pay the balance of the purchase price;

4. The defendant says that the plaintiff in breach of the said Agreement again failed to pay the balance of the purchase price on the 30th September, 1980;

5. The defendant says that by letter dated 20th November, 1980, the plaintiff was requested to advise as to how soon the sale would be completed but the plaintiff failed or neglected to respond;

6. The defendant says that as a consequence the attorney-at-law having the carriage of sale was instructed by letter dated the 4th of December, 1980, to terminate the said Agreement by virtue of the plaintiff's failure to complete on the dates aforesaid;

7. The defendant says that by letter dated the 14th day of December, 1980, the plaintiff was advised that the Agreement was at an end as there was no further basis on which the Agreement could continue;

8. Save and except as aforesaid paragraph 5 of the Statement of Claim is denied and that the sum of $30,000.00 only was paid to the defendant and no further sum;

9. The defendant says that a Notice of Repossession dated the 17th January, 1981, was served on the plaintiff which stipulated inter alia that the plaintiff will be liable for any loss, damage or waste which may have accrued during the plaintiff's possession and that the defendant would take steps for the forfeiture of any deposit paid under the Agreement and or for damages for breach of contract. Save and except as aforesaid paragraph 6 of the Statement of Claim is denied;

10. The defendant denies paragraph 8 of the Statement of Claim;

11. By reason of the matters aforesaid the defendant denies that the plaintiff is entitled to the relief claimed and any further relief;

12. By way of Counter-claim the defendant repeats paragraphs 3 to 9 and Counter-claim -

(a) Damages for breach of contract of the Agreement dated 26th day of June, 1979;

(b) Recovery of possession of Lots No. 24 & 25 part of Mount Nelson in the parish of Manchester and registered at Volume 1089 Folio 503 Volume 1101 Folio 437 of the Register Book of Titles on the grounds that -

(a) as tenant under the Agreement for sale he has breached the said Agreement;

(b) and or in the alternative, has failed to pay rent lawfully due to the plaintiff;

(c) refund of mesne profits at $400.00 per month with interest to the date of recovery of possession;

(d) costs;

(e) further and other relief.

The Reply and Defence to the amended Defence and Counter-claim read thus:

1. The plaintiff joins issue with the defendant on its defence herein save and except in so far as the same consists of admissions;

2. That the plaintiff denies that he was in breach of the said agreement when he failed to pay the balance of purchase price on or before the 30th September, 1980, as alleged in para. 4 of the Defence or at all;

3. The plaintiff says that it was mutually agreed between the defendant through its servant and/or agent, Mr. Alvin Chin, and the plaintiff that the time within which the plaintiff should complete the transaction should be extended on the basis of a payment of $200.00 (Canadian) monthly pending the sale by the plaintiff of other property owned by him and in pursuance of the said variation of the agreement the plaintiff paid to the defendant through its servant and/or

3. agent, Mr. Alvin Chin, the sum of $10,000 (Ten Thousand Dollars - Canadian) on the 19th June, 1980, and further sums totalling $1,600 (One Thousand Six Hundred Dollars - Canadian) between the 7th August, 1980, and the 30th December, 1980;

4. The plaintiff says that the defendant unlawfully purported to repudiate the agreement by letter dated 4th December, 1980, addressed to the plaintiff's attorney-at-law;

5. The plaintiff further says that the defendant by Notice of Repossession on the 17th January, 1981, unlawfully purported to repudiate and terminate the agreement dated the 7th of June, 1981, on the basis that the agreement had expired by effluxion of time and claiming possession of the premises;

6. The plaintiff denies that he received any letter from the defendant dated 14th December, 1980, as alleged in paragraph 7 of the Defence or at all;

7. The plaintiff says that the defendant is not entitled to terminate and/or rescind the agreement as the time for completion was never of the essence of the agreement and that no notice was ever served making time of the essence of the agreement and consequently the defendant was not entitled to rescind and terminate the agreement on either the 14th December, 1980, or the 7th January, 1981;

8. The plaintiff says that the contract is still a valid and subsisting one and that the defendant was in breach thereof when the defendant failed, neglected and/or refused to complete the said agreement when the plaintiff's attorney-at-law offered to pay the balance of the purchase money in respect of the said agreement as alleged in the Statement of Claim;

9. Further and/or alternatively the defendant is estopped from denying that the said agreement between the plaintiff and the defendant is still a valid and subsisting one as the defendant accepted substantial payments on the purchase price from the plaintiff between the 29th June, 1980, and the 30th December, 1980, and by virtue of the conduct of the defendant it waived the date of completion from the 25th June, 1980, to the 30th September, 1980, and further the defendant through its servant and/or agent knew at all material times that the plaintiff took possession of the premises with tenants therein and renewed the agreements with the tenants therein on the basis that the plaintiff was completing the Agreement for Sale;

10. By way of defence to the counter-claim, the plaintiff repeats paragraphs 3 to 9 hereof and further says that by reason of the matters aforesaid the defendant was not entitled as a matter of law or equity to rescind the said agreement as time was not of the essence of the agreement and that the said agreement is still a valid and binding one and enforceable by the plaintiff against the defendant;

11. The plaintiff denies that the defendant is entitled to damages for breach of the Agreement dated the 26th day of June, 1979, as alleged in paragraph 12(a) of the Counter-claim or at all;

12. The plaintiff denies that the defendant is entitled to possession of the premises as alleged in the Counter-claim and says that the plaintiff is entitled to possession thereof by virtue of the Agreement for sale between the plaintiff and the defendant;

12(a) The plaintiff denies that he was a tenant under an Agreement for sale alleged in paragraph (b) (a) of the Amended Defence and Counter-claim or at all, or that he is in breach of any such Agreement as alleged or at all;

12(b) The plaintiff denies that under the Agreement for sale he was a tenant or that the said Agreement provided that he should pay rent as alleged in paragraph 12 (b) (b) of the Amended Defence and Counter-claim and that he failed to do so as alleged or at all;

12(c) The plaintiff denies that the defendant is entitled to mesne profits at $400.00 per month with interest to the date of recovery or possession as alleged in paragraph 12 (b) (c) of the Amended Defence and Counter-claim or at all;

12(d) The plaintiff says that the entered into possession of the said parcels of land known as Lots 24 & 25 part of Mount Nelson in the parish of Manchester and registered at Volume 1089 Folio 503 and Volume 1101 Folio 437 of the Register Book of Titles on or about the 1st day of July, 1979, as a purchaser pending completion of the Agreement for sale between the plaintiff and the defendant;

13. Further and/or alternatively the plaintiff says that of a purchase price of $80,000.00 the plaintiff has to date paid the defendant Ja.$30,000.00 and ($14,783.00 (Canadian Currency)) to the defendant's servant or agent, Mr. Alvin Chin, and that even if denied the plaintiff is entitled to relief in equity from recission of the agreement or forfeiture of the sums paid to the defendant.

Details of the sums paid in Canadian Dollars referred to above are as follows:-

26th October, 1979	-	$ 1,000.00
12th November, 1979	-	100.00
7th December, 1979	-	1,000.00
7th January, 1980	-	683.00
3rd April, 1980	-	100.00
3rd May, 1980	-	100.00
19th June, 1980	-	10,000.00
7th August, 1980	-	400.00
28th September, 1980	-	400.00
3rd December, 1980	-	600.00
30th December, 1980	-	200.00
		$14,783.00 (Canadian Dollars)

14. By reason of the matters aforesaid, the plaintiff says that the defendant is not entitled to the relief Counter-claimed for or to any other relief.

On an application to the Court, the figure $14,783.00 was amended to read $14,183.00 in paragraph 13.

On an application in open court by the Defence the following amendments to the Counter-claim were granted:-

(1) The abandonment and therefore removal of Prayer (B) (a) and (b);

(2) Prayer (c) to be substituted for Prayer (b);

(3) Prayer (d) substituted for Prayer (c);

(4) Prayer (e) substituted for Prayer (d).

The plaintiff gave evidence and called no witnesses, and then closed his case. The defendants at that stage rested their case.

There was an agreed list of documents, numbering 1 - 26.

Where a stipulated time is fixed in a contract for the sale and purchase of land, time may or may not be of the essence of the contract.

In Stickney vs. Keeble and Another - 1914-15 All E.R. (Reprint) at page 73, Lord Parker at page 80 had this to say:

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

> " term of the contract. It should be observed too that it was only for the purpose of granting specific performance that equity in this class interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract or had by his own conduct lost the right to specific performance, had no equity to restrain proceeding at law based on the non-observance of the stipulation as to time....."

It follows from this that equity will not interfere in the following circumstances:-

1. Where time has been made the essence of the contract;
2. Where by the very nature of the property, time is of the essence;
3. The surrounding circumstances.

1. Where time has been made the essence:

Was time ever made the essence?

On examination of the Agreement - page 1 of the list of Agreed Documents - nowhere is it stated that time was of the essence of the contract. Under the head "Terms of Payment", it reads:

> " Thirty thousand dollars on the execution of this Agreement which amount is acknowledged as received and the balance shall be payable within twelve (12) months from the date hereof at which time the vendor will execute and register the transfer in favour of the purchaser and Phyllis his wife as joint tenants.

The Agreement was made on June 26, 1979.

Other terms and conditions are clearly stated, but nowhere is it stated that time is of the essence. Not having been so stated, are there circumstances in which it can be inferred and if so what is the effect of such and inference.

In Tilley v. Thomas 1868 - 17 Law Times Reports, the vendor although he tendered possession failed to show a good title by the day named.

Held (reversing the decision of Stuart, V.C.) that the stipulation as to time was of the essence of the contract, and the bill for specific performance of the agreement dismissed.

Lord Cairns, L.J. had this to say:-

> " Looking to the admitted facts there stated, I can have no hesitation in saying, that in my opinion it was essential, that the defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view of his own immediate residence, a possession, that is to say, with a title, and that to enforce against the purchaser performance of the contract after a breach of it by the vendor in this respect would be inequitable".

In Jamshed Khodaram Irani vs. Burjorji Dhunjibhai - 1915, 32 Times Law Reports at page 157 it was there stated:

> " Equity would further infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract. Tilley v. Thomas (Supra) where specific performance was refused, illustrated that class of transaction. But in such a case the intention must appear from what had passed before the contract, and its construction could not be affected in the contemplation of equity by what took place after it had once been entered in to....."

It seems therefore that although it has not been stated, time may still be of the essence if it can be so inferred and the effect would be as if time being of the essence was so stipulated by the parties.

It now becomes necessary to examine the relevant bits of evidence given before me, to see if such an inference could reasonably be drawn.

Vincent Williams, the plaintiff then residing in Canada, learnt of the offer of sale of "....all those parcels of land part of Mount Nelson in the parish of Manchester being the Lots numbered 24 & 25 and being all the lands comprised in Certificate of Title registered at Volume 1089 Folio 503 and Volume 1101 Folio 437".

The defendant, a company, were the vendors, and one Alvin Chin, a Director of this company, was at the time, also residing in Canada.

A dwelling house was situated on the property which was occupied by a tenant. The price was $80,000.00. An Agreement was signed by the plaintiff and defendants for the plaintiff to purchase and the defendants to sell the property.

In examination in chief, the plaintiff had this to say:

> " In 1979 I purchased a dwelling house in Jamaica. I come to Jamaica fairly often. I intended to reside in the house. I learnt of the availability of a house in Mandeville. I am from St. Elizabeth. I spoke to someone - Alvin Chin. We went to see a lawyer, Mr. McFarlane in Mandeville. Mr. McFarlane prepared an Agreement - signed in his office by Alvin Chin and Albert Lowe. I also signed....."

In cross-examination, the following transpired:

> " Not true Lowe, Chin and I met together before the Agreement was signed. Not true Lowe said to me he was expecting the whole $80,000. Not true I then asked for six (6) months. Not true Lowe told me best they could do was to give me twelve (12) months. Admit I said I had a house to sell in McFarlane's office. Admit I said I would pay the money before the twelve (12) months. I admit I asked for twelve (12) months to pay the money. Not true there was reluctance at first to give me twelve (12) months, but later they agreed. There was no argument between us over the time. I told them twelve (12) months and they agreed....."

I see nothing here in which it can reasonably be inferred that prior to the signing of the Agreement, time was of the essence. Indeed the opposite seems to be a true reflection of the minds of the parties.

On the part of the plaintiff he bought the house with the intention of living therein, but never stated when, and was quite happy to accept the premises as tenanted.

The defendants, even if I believed in their entirety the suggestions put to the plaintiff, moved from a position where the entire amount of the purchase money was expected, to one where they were willing to wait for a period of twelve (12) months for more than half of it.

I am therefore unable to find either on the basis of an express stipulation or one on which it can be reasonably inferred, that time was of the essence of the Agreement.

If time is not of the essence, at the time the Agreement was signed, can it be made so at a subsequent time.

In Halsbury's Laws of England - Volume 42 - 4th Edition page 98 at paragraph 126 - Date for Completion - it is stated:

> " A date is usually 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 that at the time of the notice there has been some default or unreasonable delay by that other....."

In Stickney v. Keeble (Supra) it was stated inter alia:

" Time may become of the essence of the contract where a vendor has been guilty of unnecessary delay and the purchaser serves him with a notice limiting a reasonable time at the expiration of which he will treat the contract as at an end....."

In Ajit and Sammy, A.C. page 255 at page 258 the judgment of their Lordships read inter alia:

" The position at law is stated in the decision of the House of Lords in Stickney vs. Keeble. The first paragraph of the headnote which summarises the effect of the judgment is as follows:

' Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchasermay serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end and in determining the reasonableness of the time so limited the court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto' ".

One has to reverse the words 'vendor' and 'purchaser' to adapt that statement to this case.....

Equally in this case the words 'purchaser' and 'vendor' ought also to be reversed to adapt that statement to this case. The plaintiff did not pay the balance of the purchase price on the date stipulated. The evidence in relation to that was somewhat like this:

" Under the Agreement I was to pay balance of purchase price in twelve (12) months. Hoped to sell a house in Canada to pay the balance of purchase price. It did not go through as contemplated. Gave McFarlane certain instructions. He was trying to raise a mortgage from Jamaica National Building Society. After twelve (12) months, Chin and I had a discussion on the matter. It was the same Chin who signed the Agreement. We both went to see Mr. McFarlane. Some arrangement was made. $10,000 (Canadian) to be paid to Chin and he would give me a mortgage for the rest that was left.

...../

> I paid him the $10,000. He then changed his mind by saying he would not give the mortgage to me anymore, he would leave it open until I sold the house and pay him. The interest was $200 per month (Canadian)....."

What is clear is an extension of the time fixed for completion and the conditions thereunder. There is nothing here suggesting time being the essence, being made of the essence, or that there is even a contemplation that the contract is no longer subsisting.

There is evidence that by cheque dated 19th June, 1980, the plaintiff paid $10,000 (Canadian) to Alvin Chin. By cheque dated 7th August, 1980, the plaintiff paid $400 (Canadian) to Alvin Chin. By cheque dated 28th September, 1980, the plaintiff paid $400 (Canadian) to Alvin Chin.

I pause here as at this stage a letter dated November 20, 1980, (page 7 of the list of Agreed Documents) seems to have some relevance. It is addressed to "Vincent" and signed by "Alvin". It was conceded that "Vincent" was the plaintiff and "Alvin", Mr. Alvin Chin one of the Directors of the defendant company, and one of the signatories to the Agreement. This letter states:

> " When we last met, we agreed on an extension of three months (July, August and September) for a fee which you have paid along with the amounts advanced to you. You have not informed me as to what have happened nor what may be expected so as to determine if a further extension may be considered.
>
> Your check dated 11th November, 1980, arrived only today which would be in respect of October, if an extension beyond the September deadline had been agreed to. Such fees are payable in advance. The check is enclosed.
>
> In your best interest you should let me hear from you immediately, advising how soon the deal may be closed, and the factors on which consideration may be given to grant a further extension. The last scale of fee will apply but must be up to date for any proposal to be considered.
>
> It is needless to repeat how anxious I am to finalize this transaction, hence I look forward to hearing from you by return mail or phone".

The plaintiff denies receiving this letter. However, a number of things are revealed by it:-

(i) An extension of time of three months, July to September for a fee;

(ii) Amounts advanced to the plaintiff;

(iii) A further extension that may be considered; and

(iv) the urgency, importance and the need to finalise the transaction as soon as conveniently possible.

In relation to the advances, the plaintiff denies that he and Chin had any other dealings. He said:

> " No moneys advanced to me by Chin. I made advances to him. I did not owe Chin any moneys personally...."

However, the evidence discloses that the plaintiff was paying monthly sums to Mr. Chin from October 26, 1979. Based on the terms of the original Agreement, having made the initial payment of $30,000.00, no payments were due until June 1980. It is therefore somewhat puzzling to me to see the reason for these payments which are as follows:

26th October, 1979	-	$1,000.00
12th November, 1979	-	100.00
7th December, 1979	-	1,000.00
7th January, 1980	-	683.00
3rd April, 1980	-	100.00
3rd May, 1980	-	100.00
3rd June, 1980	-	100.00

The plaintiff described these payments as payments towards the purchase price and interest. The payments seem more consistent with some separate transaction with Chin, which seems to be what the letter was referring to when it made reference to amounts advanced to the plaintiff. The payments after that seem consistent with the arrangement the plaintiff spoke of, that is $10,000 and interest of $200.00 per month.

The letter speaks of the possibility of a further extension of time. A cheque was sent back to the plaintiff only because it was dated 11th November, 1980, and would be in respect of October, if an extension were agreed to, and since the payments are to be in advance, by then November's payment would also have become due.

Mr. Chin is not here seeking to terminate the contract, but on the contrary treating it as still very much alive, but at the same time reminding the plaintiff that he is anxious to have the matter finalised. This can in no way be interpreted as a notice making time the essence of the contract. Clearly then up to November [illegible], 1980, the contract was still subsisting. Apparently not having heard from the plaintiff by December 4, 1980, the defendants sent off a letter dated December 4, 1980, to Mr. McFarlane which reads as follows: (page 8 of the List of Agreed Documents)

" Dear Sir,

Reference is made to an Agreement of sale per **subject which provided for a closing on June 30, 1980.**

The Williams were subsequently expected to close by no later than September 30, 1980, failing which they should have made representations to seek a further extension.

In the absence of their making such representation and in view of the courtesies and patience already accorded at this point in time we consider and declare that the Williams have forfeited and possession of the property must be reverted to us.

We are giving the matter of damages consideration in order to determine how much if any refund may be made.

Please take whatever steps that are necessary while we look forward to receiving your acknowledgement of this letter.

Your prompt attention is anticipated....."

The defendants have now terminated the contract. In their minds the plaintiff has forfeited and possession of the property must be reverted to them. Under a term of the Agreement, possession was given to the plaintiff on July 1, 1979. To show not only his consistency, but his seriousness, "Alvin" sends off a letter dated 14th December, 1980, to "Vincent" in much the same terms. (Page 9 of the Agreed List Documents). It says in part:

".....no further time may be considered for an extension as up to when we spoke you gave no firm basis on which some reasoning could be formed. In any transaction such as this time is of the essence and accordingly you have forfeited. That is to say you have not kept your end of the agreement thereby you have given up your rights thereunder....."

Of significance, as far as this letter is concerned, is the term:

> " .....In any transaction such as this time is of the essence and accordingly you have forfeited....."

Implicit in this is the belief that by merely stipulating a date for closing in any transaction of that nature, that, without more, makes time of the essence. This is not the law, as I understand it, and seems clearly to be in contrast to the very carefully stated and settled principles outlined in Stickney vs. Keeble (Supra). Instead of terminating the contract at this stage, the proper thing for the defendants to have done, was to serve a notice on the plaintiff, making time the essence. This was never done.

It is, perhaps, convenient here to look at Raineri vs. Miles and Another [1980] 2 All E.R. 145:

> " By a contract incorporating the Law Society's Conditions of Sale (1973 Revision) the third parties agreed to sell a house to the defendants. The contract provided that the purchase should be completed on or before 12th July, 1977, when vacant possession was to be given to the defendants. At the same time the defendants agreed to sell the house in which they were then living to the plaintiff, that contract also providing for completion with vacant possession on 12th July. In neither case was the time for completion expressed to be of the essence of the contract. On 11th July, the defendants were told that the third parties could not complete their contract with them on the following day. The defendants immediately informed the plaintiff's solicitors, but the plaintiff himself had already vacated his previous house and was on the road with his furniture intending to take possession of his new house. In consequence of the third parties failure to complete their contract with the defendants on 12th July, the defendants were prevented from giving the plaintiff vacant possession and could not complete their contract with him on that day in accordance with its terms. On 13th July, the defendants, being then ready, able and willing to complete their contract with the third parties, gave them notice, pursuant to condition 19(a) of the conditions of sale, to complete the contract by 11th August. The contract between the defendants and the third parties was duly completed on that day. The defendant's contract with the plaintiff was also completed on that day and the plaintiff was let into possession. Between 12th July and 11th August, the plaintiff incurred expense in providing himself and family with living accommodation for which he recovered damages from the defendants. The defendants served the third parties with a third party notice claiming indemnity against the plaintiff's claim on the ground of the third parties failure to give vacant possession on or before 12th July. The judge dismissed the third party proceedings. On an

" appeal by the defendants the third parties contended that, where time was not of the essence, the contract only required completion on the date fixed for completion or within reasonable time thereafter and that, since they had completed in a reasonable time, they had not committed a breach of the contract and so were not liable in damages for the delay. They further contended that the effect of the notice to complete was to substitute for the 12th July a new date for completion and that they had fulfilled the contract as so varied. The Court of Appeal [1929] 3 All E.R. ...63) rejected these contentions and allowed the defendant's appeal. The third parties appealed to the House of Lords.

Held (Viscount Dilhorne dissenting) - the appeal would be dismissed for the following reasons -

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

2) The service of a notice to complete under condition 19, which could only be served after the date fixed for completion had passed, by which time the innocent party had an accrued right to damage, added to the remedies available to the party serving the notice against the defaulting party in the event of the party served failing to comply with it without excluding the existing remedies.

Accordingly the defendants had not been deprived of any cause of action in damages against the third parties which had accrued before they served the notice to complete.

3) The fact that the failure of the third parties to complete was due to their inability to raise the necessary finance afforded no defence to the defendants' entitlement to be compensated".

It seems therefore that by virtue of the stipulated time or times having passed, the defendants would be entitled to damages from the plaintiff if such damages could be shown.

What is the situation here?

Damages is being given "consideration in order to determine how much if any refund may be made....." (Letter dated December 4, 1980 page 8 of the List of Agreed Documents). It is being considered only in the context of the contract being terminated and not in terms of a breach as to the stipulated time only.

The defendants' position is made even clearer by the letter dated 14th December, 1980, (page 9 of the List of Agreed Documents)

" ..... I intend to call you on the phone later but want to ensure that you understand quite clearly what is the situation. The house at present is not for sale, hence you need not think of any negotiation to come up with alternate or substitute terms and conditions....."

In the meantime what is happening?

On November 12, 1980, Jamaica National, writes to Mr. McFarlane endeavouring to get him to do what is necessary to enable them to complete their aspect of the transaction (page 5 of the List of Agreed Documents). On that same date a letter along similar lines is sent by them to the plaintiff at, presumably, his Canadian address.

It must be conceded that the wording of these letters show a "dragging of feet" by the plaintiff and his legal representative, but this must be looked at against the background of the extension of time already granted to the plaintiff and the plaintiff fulfilling his side of the new arrangement by remitting the agreed payments to Mr. Chin, as agreed.

Indeed in the latter dated November 20, 1980, (page 7 of the List of Agreed Documents) and December 14, 1980, (page 9 of the List of Agreed Documents), mention is made in both of cheques being returned to the plaintiff.

This shows on the one hand, the plaintiff although not closing on the agreed dates, still faithfully conforming with the terms of the "new arrangement", the defendants on the other hand, treating the whole transaction, as at an end.

By letter dated January 12, 1981, by Jamaica National to Mr. McFarlane (page 10 of the List of Agreed Documents) the Society is still anxious to complete their aspect of the transaction, especially as by then Mr. Williams had made and submitted to them a formal application. The letter reads inter alia:

> " We have done a valuation of the security subsequent to receiving a formal application completed by Mr. Williams...."

It is clearly shown here that the plaintiff is still prepared to complete the Agreement, although late in terms of the stipulated times.

By letter dated 13th January 1981, from Mr. McFarlane to Jamaica National (page 11 of the List of Agreed Documents), Mr. McFarlane is endeavouring to get the matter finalised.

This is made abundantly clear to the defendants by a letter of the same date sent by Mr. McFarlane to the defendants which says inter alia: (page 12 of the List of Agreed Documents).

> " .....Mr. Williams instructs me that he will be retiring the balance of the purchase moneys together with interest to the date of payment and I am enclosing herewith for signature the transfer.
>
> Would you please be good enough as to return the document to me after execution....."

Not interested in,nor impressed by,these developments, the defendants proceed to get new legal representatives- O. G. Harding and Company, and through them send off to the plaintiff a Notice of Repossession dated 17th January 1981, (page 13 of the List of Agreed Documents) which reads as follows:

> " Take notice that contract for sale dated the 26th day of June, 1979, between you and Manchester Beverages Limited of No. 37 Mandeville Plaza, Mandeville in the parish of Manchester for the purchase of Lots # 24 & 25 part of Mount Nelson in the parish of Manchester being the lands registered at Volume 1089 & 1101 Folios 503 & 437 respectively has expired by the effluxions (sic) time being the 25th day of June, 1980, and TAKE FURTHER NOTICE that the registered proprietors have this

" day re-entered the said lands and resume possession and will hold you liable for any loss, damages or waste which may have occurred during your possession and will take such steps as they may be advised for the forfeiture of any deposits paid under the Agreement and or for damages for breach of Contract and for the recovery of any loss incurred by reason of your delay defaults and failure to complete ....."

Having been given possession on July 1, 1979, the plaintiff contracted with Alcan Jamaica Company for a two year lease of the property to them with an option to renew for one year, commencing October 15, 1979, at a rental of $400.00 per month. (page 2 of the List of Agreed Documents).

Apparently this rental was being submitted to Jamaica National to the credit of the plaintiff. By letter dated February 2, 1981, from Jamaica National to Alcan Jamaica Company (page 15 of the List of Agreed Documents), it appears that the defendant had issued instructions to Alcan to cease doing so.

Here again the clear inference to be drawn is that the defendants are taking yet another step displaying that as far as they are concerned, the contract has come to an end.

By letters dated 19th January 1981, from O. G. Harding & Company to Mr. McFarlane (page 16 of the List of Agreed Documents) and February 3, 1981, from Mr. McFarlane to O. G. Harding and Company (page 17 of the List of Agreed Documents), that position could not have been clearer.

A letter dated February 11, 1981, from Jamaica National to the plaintiff (page 19 of the Lost of Agreed Documents) reads:

" Re: Proposed purchase of Security - Part of Mount Nelson - Mandeville

We have been advised by the vendors attorneys that the sale of the above Security has been aborted, and that the vendors have decided to re-possess same.

The Society is therefore unable to proceed with the processing of your application unless we are in a position to receive from your attorneys instructions to deal further with the matter.

In the circumstances, therefore, the Society will not accept any obligation in relation to a mortgage until the matter is amicably settled between yourselves....."

The defendants have now put an end to any possibility of a mortgage being granted to the plaintiff in relation to the purchase of the property.

Applying the principles laid down in the "Raineri Case" (Supra) to these circumstances, it is my view that the defendants would not be entitled to damages, for none has been shown and even if they in fact suffered damages such damages would have come about by their own doing as they sought to and in fact did all that could possibly be done by them to frustrate the effors of the plaintiff to fulfill his obligations under the Agreement, when he showed every intention of doing so, at every stage.

2. The Nature Of The Property: In Tilley v. Thomas (supra), it was there stated that the nature of the property is, illustrated by the cases of reversions, mines or trades, none of which has any application here;

3. The Surrounding Circumstances: Again in Tilley v. Thomas, it was stated that "surrounding circumstances" must depend on the facts of each particular case.

The relevant facts have already been outlined and analysed. There seems to be therefore no need to re-examine them, except to say that from December, 1980, not having had a response from the plaintiff to a letter sent to him in November 1980, by Alvin Chin in which he sought to ascertain what were the intentions of the plaintiff in relation to (a) the need or not for a further extension of time and the terms and conditions if a further extension were granted and (b) the anxiety to finalise the transaction, the defendant stated that the contract was no longer in subsistence, behaved in a way consistent with that, and even after knowing that the plaintiff still intended to fulfill his contractual obligations, although the stipulated dates had passed, ensured that the source of funding was effectively blocked. The plaintiff, on the other hand, at all stages showed a clear intention to complete his contractual obligations.

When the original closing date was approaching and he realised he could not meet the deadline, he negotiated with Mr. Chin for an extension of time. He was successful in getting a further three months, under terms that he complied with. At the end of that period, a letter was sent to him by Alvin Chin requesting an ascertaining of the position as it stood then, together with his anxiety to bring the transaction of finality.

The plaintiff in his evidence stated he never got that letter. Whether he did or not, in my view, did not affect in any fundamental way the respective positions of the parties, as the plaintiff continued to honour his obligations under the Agreement and in particular the new arrangement. Pages 7 and 9 of the List of Agreed Documents clearly show that.

Although not meeting the two deadlines in terms of the dates for payments, the plaintiff has not indicated that in his mind the contract is still not subsisting and by the letter of 13th January 1981, (page 12 of the List of Agreed Documents) the plaintiff is stating his position as it then was:

> " .....Mr. Williams instructs me that he will be retiring the balance of purchase moneys together with interest to date of payment and I an enclosing herewith for signature, the transfer.
>
> Would you please be good enough as to return the document to me after execution....."

A court of equity will indeed relieve against, and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps towards completion if it can do justice between the parties.

On the plaintiff's claim therefore there will be:

i) Specific Performance of the Agreement in writing made between the plaintiff and the defendant and dated the 26th June, 1979;

ii) The defendant is ordered to transfer to the plaintiff the said parcels of land upon the plaintiff paying to the defendant the balance of the purchase price and such other sums incidental to the transfer of the said property;

The balance of the purchase price will be that sum left after deducting the sum of $10,000.00 (Canadian) paid by the plaintiff to Alvin Chin by cheque dated 19th June, 1980, at the rate of exchange applicable in June, 1980, and all sums due are to be paid to the defendants within 90 days of the date of judgment;

iii) By virtue of the principles stated in Raineri v. Miles and Another (supra) the defendants would have been entitled to damages on the failure of the plaintiff to complete on the stipulated date. The damages in those circumstances would be interest on the balance of the purchase price;

iii) As already stated, the defendants by their own acts deprived themselves of any entitlement to that. However, on the evidence, despite the actions of the defendants, the plaintiff to date has not tendered nor even obtained the balance of the purchase price.

It is my view that the fact that the defendants had effectively thwarted the efforts of the plaintiff to get the funding from Jamaica National, that was but one source. That therefore ought not to prevent the plaintiff from saying, he now has the money, or better yet tendering it.

In cross-examination, the plaintiff had this to say: ".....I cannot produce $30,000 tomorrow morning".

In re-examination, he said "I am in a position to produce it in due course. I am in a position to complete the transaction".

Clearly then, although I have found that the contract is still subsisting, and that the defendants therefore had no basis in law to treat it otherwise, as they did, the plaintiff at the same time is still not yet in a position to complete.

The vendor is therefore entitled to interest on the unpaid balance of the purchase price to date. The unpaid balance of the purchase price, on my findings, would amount to upwards of $35,000(Ja.). Fixing a reasonable rate of interest to that unpaid balance could, in my view, earn to the vendor, a sum equivalent to the rental collected monthly, that is to say, a sum of $400.00 (Ja.).

It therefore follows that the rental collected by vendor, could be equivalent to the sum the plaintiff would have been entitled to pay as interest on the unpaid balance of the purchase price. In these circumstances, there is, therefore, no award to the plaintiff for damages;

iv) An order for the Injunction sought is denied for reasons that are patently clear;

v) The Counter-claim is dismissed.

Costs to the plaintiff on the claim and counter-claim, to be agreed or taxed, and when so agreed or taxed, to be deducted from the balance of the purchase price due and owing to the defendant.