[2011] CCJ 10 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 7 of 2010
BB Civil Appeal No 30 of 2006

BETWEEN

DELYS O'LEEN COLBY DEC'D
BY D.V.B. COLBY, EXECUTOR **APPELLANT**

AND

FELIX ENTERPRISES LTD
FELIX BROOME INCORPORATED **RESPONDENTS**

Before The Honourables **Mr Justice Rolston Nelson**
Mr Justice Saunders
Madame Justice Bernard
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Alair Shepherd, QC and Mr Philip McWatt for the Appellant
Mr Roger Forde, QC and Ms Nargis Hardyal for the Respondents

JUDGMENT
of
The Court
delivered by
the Honourable Mr Justice Hayton
on the 8th day of July, 2011

An Overview

[1] This vendor-purchaser dispute involving a contract for the sale of land ought to have been a relatively straightforward one. Matters, however, became complicated due to delays of the parties and the courts and due to the absence of detailed standard conditions of sale containing clear comprehensive provisions governing the process through to completion or termination of contracts for the sale of land. Conveyancing in Barbados would be much simpler and quicker - and recourse to the courts very much less - if a small working party of experienced conveyancing attorneys could prepare a set of standard conditions to be incorporated into land contracts except to the extent expressly modified with special conditions to cover the exigencies of a particular sale.

[2] Ultimately, we hold that the vendor had waived time being of the essence for completion of the contract so that she could not forfeit the deposit and recover the property that she had leased to the purchaser at $3,000 per month until completion of the purchase. Instead, the purchaser is entitled to have the contract specifically performed. Thus the vendor's appeal will be dismissed, except that we will order the purchaser to pay the vendor from 1st December 2004 rent at $3,000 per month until completion of the purchase. As the vendor failed in the hard-fought main appeal but succeeded in a more straightforward aspect, we will order the vendor to pay three quarters of the purchaser's costs relating to the appeal to this Court, such costs to be taxed if not agreed.

[3] Unfortunately, it would be remiss of us if we did not again comment adversely upon the excessive delays in the delivery of reserved judgments. The trial judge took over two years four months – and even then it took over eight months for his order to be finalised – while the Court of Appeal took two years, all in the context of litigants having a constitutional right under Article 18(8) of the Constitution that their "case shall be given a fair hearing within a reasonable time." The outcome of the hearing is clearly a key part of the hearing process. In *Reid v Reid*[1] Saunders J in delivering this Court's judgment stated, "as a general rule no judgment should be outstanding for

[1] [2008] CCJ 8 (AJ) at [22]

more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."

[4] While appreciating that circumstances as to finances, facilities, manpower and other resources will vary from country to country and a reasonable time varies according to circumstances, it is worthwhile noting the recent approach of the English Court of Appeal in *Bond v Dunster Properties Ltd*[2] where the trial judge did not deliver his judgment for twenty two months. Arden LJ stated[3],

> "This extraordinary delay clearly called for an apology and, if any existed, an explanation of the mitigating circumstances... The matter goes further than just the effect on the parties. An unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a whole, and reinforces the negative images which the public can have of the way judges and lawyers perform their roles. If there were regular delays of this order, the rule of law would be undermined."

The Background

[5] On 16 May 1995 by a written agreement ('the Contract') Mrs Delys Colby (hereafter 'the Appellant', who died on 20 May 2005 but was duly replaced in these proceedings by her executor, Mr David Colby) contracted to sell land and a house known as Maristow to Felix Enterprises Limited ("the Purchaser"), already a monthly tenant of the Appellant. There was a problem with the title so the Contract required the Appellant to take legal proceedings to perfect the title.

[6] Of particular significance are the following clauses of the Contract.

> "2(e). The Purchaser will continue to pay to the Vendor the rent of Three thousand dollars ($3,000.00) per month on the 10th day of May 1995 and continuing on the 10th day of each and every month until completion in accordance with clause 10 hereof and all sums so paid shall be credited toward the purchase price until evidence of title has been produced to the Purchaser's Attorney-at-law as set out in clause 10 hereof.

[2] [2011] EWCA Civ 455
[3] Ibid at [1]-[2]

6. The Land Tax for the current year shall be apportioned as at the date of completion of the sale and purchase.

10. The title to the said property shall be perfected by means of proceedings through the Supreme Court of Barbados and subject to the Vendor obtaining a good and marketable title by such proceedings the sale and purchase shall be completed within thirty (30) days of the Vendor producing evidence to that effect to the Attorneys-at-Law for the Purchaser when the balance of purchase price shall be paid.

16. If the Purchaser fails to complete the purchase in accordance with the terms of this agreement the deposit paid as aforesaid shall be forfeited to the Vendor who shall accept the same as liquidated damages for breach of this agreement and it shall not be necessary for the Vendor to give or to tender a conveyance to the Purchaser but this clause shall not be interpreted so as to make time of the essence of the contract and the Purchaser shall forthwith give up possession of the property to the Vendor. The Vendor shall within 180 days of the Purchaser giving up possession pay to the Purchaser the sum of Two hundred thousand dollars ($200,000.00) representing the improvements made to the property by the Purchaser".

[7] By letter of 27 June 1995 the parties to the contract amended it so that the rent referred to in clause 2(e) should be paid by the Purchaser's standing order to the Vendor's bank account and "[s]hould the rent not be paid on the date specified in clause 2(e) or within fourteen days thereof, as to which time shall be of the essence, then the rent for that month shall not be credited towards the purchase price".

[8] The proper effect of this last clause created the key difficulty between the parties when it came to determine the precise amount of the balance of the purchase price to be paid by the Purchaser to complete the contract. The Purchaser claimed that if in any month it paid the monthly rent of $3,000 within the fourteen days period the payment should be credited against the purchase price. The Appellant claimed that payments had first to be set off against arrears of rent for earlier months. Thus only the first seven payments of $3,000 could be credited against the purchase price because thereafter there were arrears so that payments were always credited against

arrears rather than the rent due for the month in which the payment happened to be made.

[9] Greenidge J and, on appeal, the Court of Appeal found in favour of the Appellant on this issue. The Purchaser has not challenged this in this Court.

[10] On 2 February 1998 the Appellant obtained a consent order from Carlisle Payne J which was duly entered on 5 June 1998, so evidencing the Appellant's title to Maristow and enabling the Appellant to invoke clause 10 of the contract at [6] above to make completion possible within thirty days.

[11] In fact, the Appellant's attorneys did not send a completion statement to the Purchaser until 8 October 1998. The statement credited against the purchase price of $535,000 the deposit of $53,500 and $21,000 relating to the seven payments of the $3,000 a month rent, while providing for an apportionment of Land Tax as stipulated in clause 6 of the contract at [6] above.

[12] On 23 November 1998 the Appellant's attorneys gave the Purchaser notice to complete the contract and pay the balance of purchase money "as set out in our Completion Statement dated the 8th day of October 1998" "within twenty-eight (28) days from the date hereof" in default of which the deposit would be forfeited to the Appellant, who would rescind the contract and seek such relief as she might be entitled to in law.

[13] The Purchaser's attorneys on 27 November 1998 served requisitions on the Appellant's title which the Appellant's attorneys duly answered by letter dated 1 December 1998.

[14] This letter also responded to the Purchaser's attorneys' letter of 18 November 1998 stamped as only having been received on 27 November 1998. This letter not only raised the Purchaser's contention as to the crediting of payments of $3,000 a month discussed at [8] and [9] above but stated that the Purchaser wished the property to be conveyed instead to its nominee, Felix Broome Incorporated. As to this, the Appellant's attorneys pointed out that the Court Order dated 5 June 1998 and referred

to in the Completion Statement had duly provided for the Registrar of the Supreme Court to execute a conveyance in favour of the Purchaser, Felix Enterprises Limited. They also pointed out that if the Purchaser now wanted the conveyance to be to Felix Broome Incorporated the Purchaser must persuade the Registrar to do this and have the necessary changes made to the Court Order and this "must be within the notice period" under the 23 November 1998 notice to complete within twenty-eight days.

[15] By letter of 23 December 1998 (outside such "notice period"), stamped as received by the Appellant's attorneys on 29 December 1998, the Purchaser's attorneys disputed the treatment of rent in the Completion Statement but stated they had received the amendment to the Court order to provide for the conveyance to be in favour of the Purchaser, Felix Enterprises Limited, "or its nominee", so that the conveyance should now be in favour of Felix Broome Incorporated.

[16] On 5 January 1999 the Appellant's attorneys responded, insisting that their treatment of rent in their completion statement was the proper treatment and "that should we not receive the amount stated in our completion statement by Friday 8 January 1999 we shall commence proceedings to repossess the property in accordance with the terms of the Agreement" (as to which see clause 16 above at [6] providing for forfeiture of the deposit and giving up possession to the Appellant).

[17] This did not provoke any response, so on 29 January 1999 the Appellant's attorneys wrote to the Purchaser's attorneys insisting that the Appellant's approach to crediting rent was correct and requiring payment "of $436,532 by Monday 8 February 1999 or they would "commence proceedings in the High Court to enforce the agreement" (on which again see clause 16 above at [6]).

[18] On 8 February by a letter (stamped as received by the Appellant's attorneys on 9 February) the Purchaser's attorneys insisted on the correctness of their view as to crediting payments of rent and stated that the Purchaser "remains very willing and able to complete the sale". The Purchaser's attorneys concluded their letter with the suggestion that, as the parties remained unable to agree as to crediting rental payments, the matter should be "closed immediately", the Purchaser paying over the

purchase price as reduced by its rental payments, "and the assistance of the Court be sought to determine if any further payments ought to be made."

[19] Nothing further happened until 10 August 1999 when the Appellant's attorneys suddenly wrote to the Purchaser's attorneys, "As your client has failed to comply with the terms of our notice to complete and/or to complete the purchase of the property our client must now treat this contract as terminated. Under the terms of clause 16 of the contract our client forfeits the deposit paid by your client and demands that your client deliver immediate possession of the property."

[20] It was not, however, until 15 February 2000 that the Appellant's attorneys filed an originating summons claiming a declaration that the Appellant had rescinded the contract so as no longer to be obliged to transfer the property to the Purchaser. A further declaration was claimed that the Appellant had correctly forfeited the deposit, and an order that the Purchaser deliver possession of the property to the Appellant and pay to her mesne profits up to the date of possession. In his supporting affidavit, the Appellant's attorney specifically referred to the Notice to Complete of 23 November 1998 and the subsequent correspondence referred to above that provided new dates for completion.

[21] In opposition to the summons the Purchaser sought declarations that the Appellant was obliged to convey the property to it and that, in determining the balance of the purchase price, all the payments of rent should be deducted except two.

The Judgment of Greenidge J

[22] Greenidge J heard the originating summons on 9 and 10 October 2001. On 23 February 2004 he gave his decision orally in favour of specific performance but we were told leading counsel for both parties were then absent and their juniors were a little uncertain as to what were the terms of the judge's order disposing of the summons. Junior counsel were unsure for example as to whether interest on the purchase price was payable. It was not until 8 November 2004 that the terms of the order were settled. The order was eventually entered on 19 November 2004 as set out below at [25].

[23] Meanwhile, the Purchaser's attorney had filed an appeal on 3 March 2004 and the Appellant's attorney out of time had filed a counter appeal on 14 April 2004. On 8 June 2005 the latter sought by notice of motion to regularise this filing, but on 15 June 2005, however, the Purchaser's attorneys withdrew their appeal so that the associated counter-appeal fell away.

[24] Subsequently, the judge produced an undated written judgment under pressure of an order of the Court of Appeal of 4 August 2005. The judgment focused upon the appropriate treatment of the Purchaser's rental payments of $3,000 a month. The judge held that the Appellant had been entitled to appropriate the payments to the arrears of rent as she had done. The judge, surprisingly, did not deal with the Appellant's notice to complete, subsequent letters designed to make time of the essence and the Purchaser's failure to pay or tender whatever was due as the balance of purchase price within any requisite extended period. The judge, having resolved only the rents issue, simply and shortly concluded at [10]

> "The Defendants have part performed the contract. They have spent much money on renovations and have used the premises as a restaurant in their hotel operation. It is my order that counsel for both parties should meet, the Defendant having breached the agreement of 15th May and settle the application of rent and if unsuccessful to come back to court on 8th November 2004".

[25] In the judge's order of 8 November 2004 he ordered the contract to be specifically performed and carried into execution. The order continued

> "IT IS FURTHER ORDERED that the First Defendant [the Purchaser] do on or before the 30th day of November 2004 pay to the firm of Clarke Gittens & Farmer the sum of $460,500.00 (the purchase price being $535,000.00 less the deposit of $53,500.00 and less the rent credits to the purchase price $21,000.00) the balance of the purchase money for the property comprised in the Agreement and the sum of $219,000.00 due to the Plaintiff [the Appellant] in respect of the mesne profits from 9th day of October 1998 to the 30th day of November 2004 thereof with the Plaintiff's costs to be taxed
>
> AND UPON such payment being made to the firm of Clarke Gittens & Farmer

IT IS ORDERED that the Plaintiff do deliver a proper conveyance of the said property in the form agreed upon between the Attorney-at-Law for the Defendant and the Attorneys-at-Law for the Plaintiff

AND in default of such payment as aforesaid by the time appointed

IT IS ORDERED that the First Defendant do forthwith deliver up to the Plaintiff possession of the said property and do pay to the Plaintiff the said sum of $195,000.00 for rent [representing an earlier calculated figure of 65 months at $3,000.00 a month from 10 October 1998 to 10 February 2004] and the Plaintiff's costs to be taxed or agreed

AND the parties are to be at liberty to apply".

Subsequent Events

[26] On 8 November 2004, immediately after Greenidge J had settled his order, the Purchaser's attorney wrote to the Appellant's attorneys

> "My client is prepared to complete the sale and purchase of the property at Maxwell, Christ Church in accordance with the Order made by the Court earlier today, namely the payment of the sum of $460,500.00. In the circumstances, my client requires the following:
>
> 1) That the Line marks be pointed out to Mr. Felix Broome;
> 2) The original Conveyance duly executed by your client and adjudicated by the Registrar of Titles together with proof that the Transfer Tax and Stamp Duty has been paid by your client;
> 3) Prior title deeds, i.e. the Registrar's conveyance which your client was required to obtain under the Agreement;
> 4) Evidence that all water rates have been paid;
> 5) The usual Section 12A forms and the Change of Ownership forms;
> 6) Copy of the Land Tax Certificate.
>
> Once the matters mentioned herein at 1 & 4 have been satisfied, I will exchange for the documents mentioned at 2 & 3 herein, a Banker's draft in the sum of $460,500.00.
>
> Kindly advise how soon we can close the matter. In the meantime, my client will soon be tendering a cheque for payment of rent up to the end of November 2004".

[27] The Purchaser's attorney followed this up with some minor queries as to the wording of the judge's order but on 12 November 2004 the Appellant's attorney responded by a letter pointing out that the order had been engrossed and presented for filing but he would be happy to appear before the judge if the Purchaser's attorney wanted to

pursue these queries. In any event he had "now received instructions to appeal the final order" of Greenidge J.

[28] On 16 November 2004, by letter to the Appellant's attorney, the Purchaser's attorney, in accordance with his promise at the end of his letter of 8 November, enclosed his client's cheque for $216,000.00 representing rent or mesne profits from 9 October 1998 to 30 November 2004 (being seventy-two months) though the order had set out the sum of $219,000.00 as due for that period (as seventy-three months). The letter continues "As previously advised, my client is ready and willing to exchange its cheque in the sum of $460,500.00 for the Conveyance and other documents of title mentioned in my letter dated November 8, 2004."

[29] Subsequently, the Purchaser's attorney, keen to complete the purchase, pursued the Appellant's attorney with letters of 14 and 29 December 2004, 4 and 26 January 2005 and 4 March 2005 but received no response until 22 April 2005 when the Appellant's attorney faxed to him a letter stating "I understand from my client that she is prepared to instruct a completion of this sale if your client will pay the Land Taxes." By letter of the same date the Purchaser rejected this since clause 6 of the Contract, as set out at [6] above, expressly provided for apportionment of the Land Tax. On 26 May 2005 the Purchaser's attorney wrote again to the Appellant's attorney pressing for completion of the purchase by delivery of a signed conveyance and a pointing out of the line marks and threatening to go to court for an Order authorising the Registrar to sign the conveyance and effect the transfer of the property.

[30] As it happened, on 20 May 2005 the Appellant died. Her executor then duly replaced her in the proceedings and on 15 December 2006 an appeal from the judgment of Greenidge J was filed with the leave of the Court of Appeal.

The Judgment of the Court of Appeal

[31] Peter Williams JA, giving the judgment of the Court of Appeal, rejected the Appellant's claim to have validly rescinded the Contract so as to be entitled to forfeit the deposit and to recover possession of Maristow. His reason for this was that when the Appellant served the 23 November 1998 notice to complete the purchase the

notice was invalid because she was not in a position to be able to complete because no court order had been obtained to enable the property to be conveyed to the Purchaser's nominee, Felix Broome Incorporated. This order was not obtained until 30 December 1998.

[32] There are two flaws in this reasoning. The Appellant on 23 November 1998 was in a position to convey the property to the Purchaser as provided for in the Contract. It was only on 27 November 1998 that the Appellant's attorneys received a letter dated 18 November from the Purchaser's attorneys requesting a variation of the Contract so that the conveyance could be made to the Purchaser's nominee, Felix Broome Incorporated. By their letter of 1 December the Appellant's attorneys responded that they would facilitate this request but that it would be up to the Purchaser's attorneys to arrange for a variation of the court order of 5 June 1998 and that this must be done within the notice period.

[33] The second flaw is that, even if the Appellant had not been able to make good title to Felix Broome Incorporated on 23 November 1998, once the court order had been varied on 30 December 1998 the Appellant was in a position thereafter to make time of the essence for completion by giving a valid notice to complete that permitted a time for completion that was reasonable in all the particular circumstances, as pointed out below at [42].

[34] Peter Williams JA, however, awarded specific performance in favour of the Purchaser though he rejected the Purchaser's contention that in determining the balance of the purchase price credit should be given for all but two rent payments in the period May 1995 to October 1998.

[35] Although after 30 November 2004, the date specified for completion in the Order of Greenidge J, the Purchaser had continued in possession of the property and was going to continue in possession until it completed its purchase, Peter Williams JA ignored any issue as to compensating the Appellant for this. In dismissing the appeal and ordering the contract to be specifically performed he simply confirmed the order of Greenidge J with liberty for the parties to apply. He ordered the appellant to pay the respondent's costs of the appeal to be agreed or taxed.

The issues before this Court

(1) rescission or not by the Appellant

[36] The major issue before this Court was whether the Appellant had validly rescinded the Contract. If there was no valid rescission, the Contract would have to be specifically performed in the Purchaser's favour by conveyance to its nominee, Felix Broome Incorporated. To have validly rescinded the Contract the Appellant needed to show (a) that time for completion had been made of the essence and had not subsequently been waived and (b) that the Purchaser had breached this requirement by not paying or tendering in timely fashion the balance of the purchase price in circumstances where the Purchaser considered a lesser sum was required than that demanded by the Appellant for the Purchaser to fulfil its obligation to pay the due balance.

(a) *Was time made of the essence and did it still remain of the essence or had it been waived when the Appellant purported to rescind the Contract on 10 August 1999?*

[37] It is to be noted that, subject to satisfying requisitions on title, the Appellant was in a position to be able to transfer title to the Purchaser on obtaining the court order of 5 June 1998. After that date the Appellant could produce the necessary evidence for invoking clause 10 of the Contract in relation to a completion within 30 days thereafter. It was not, however, until 23 November 1998 that the Appellant's attorneys served their notice to complete within twenty-eight days of such date, having on 8 October 1998 provided the Purchaser with a completion statement setting out the balance of the purchase price payable on completion. It seems that completion did not take place within the notice period due only to the dispute as to whether or not this balance was correct in not crediting the Purchaser with a significant sum in respect of rental payments of $3,000 per month.

[38] Due to this ongoing dispute the Appellant chose not to rely on the 23 November notice soon after it had expired but, by letter of 5 January 1999, required a time of the essence completion on or before 8 January 1999 and, this date passing without any

completion, then, by letter of 29 January 1999, required a time of the essence completion by 8 February 1999. Both letters were expressed to be "without prejudice to our Notice dated 23 November". Such formulaic expression was meaningless. The setting of new periods of time within which the Purchaser could still duly complete the contract was wholly inconsistent with any alleged right to be able to forfeit the deposit and terminate the contract for non-completion within twenty-eight days of 23 November: the Appellant's attorneys had not "blown cold" by exercising their right to rescind but were continuing to "blow hot" by giving the Purchaser two further extensions of time. Thus they had evinced an intention not to rely on the 23 November Notice.

[39] Unfortunately, in Barbados what periods are appropriate for effective notices to complete cannot be ascertained from any set of standard general conditions of sale of land to be incorporated by attorneys settling contracts for such sales, subject to such amendments or special conditions as appropriate for individual contracts.

[40] As a matter of general contract law in relation to open contracts for sale of land, where one cannot find a target date fixed for completion it is not disputed that a vendor must wait until there has been an unreasonable delay in completing the transaction before he can serve a notice requiring completion to be within a reasonable time, time to be of the essence for such completion. If the purchaser then fails to meet the deadline the vendor can treat the contract as repudiated and forfeit the deposit (and recover possession if the purchaser had been allowed into possession).

[41] Where a target date has been set for completion, as appears here under clause 10 as set out at [6] above, we endorse the view of the High Court of Australia in *Louinder v Leis*[4] and of the English Court of Appeal in *Behzadi v Shaftesbury Hotels Ltd*[5] that it is not necessary to wait for an unreasonable delay of the other party before serving a notice to complete which itself is required to allow a reasonable time to complete and needs the server to be ready, willing and able to complete. It is unjust and impractical

[4] (1982) 149 CLR 509
[5] [1992] Ch 1

to defer the innocent party's right to rescind until the guilty party has delayed for two periods each of which constitutes unreasonable delay.

[42] In the current circumstances where a third time of the essence date, 8 February 1999, was fixed by a letter dated 29 January 1999, it is clear that the Purchaser was afforded a final reasonable period to complete its purchase, having been made well aware of the Appellant's pressure to complete over the preceding two months and the only dispute being as to the crediting of rents against the purchase price.

[43] Indeed, in the light of the building up of such pressure, once the Purchaser had failed to complete by 8 February and the Appellant's attorneys had on 9 February received the Purchaser's attorneys' letter of 8 February (noted above at [18]) making it very clear that, although they stated they were willing and able to complete the same, they would not do so without being credited with substantial payments of rent, one would expect that the Appellant's attorneys would shortly rescind the Contract - unless they were prepared to take up the Purchaser's attorneys' suggestion that they complete on the basis of the Purchaser being credited with rental payments and seek the court's assistance (presumably under s. 54 of the Property Act Cap 236) as to whether further payment by the Purchaser was necessary.

[44] Instead, no action was taken by the Appellant's attorneys until six months' later when by letter of 10 August 1999 they suddenly wrote to the Purchaser's attorneys stating "our client must now treat this contract as terminated" and so "forfeits the deposit" and "demands that your client deliver immediate possession of the property".

[45] While there were no ongoing negotiations to encourage the Purchaser to believe the Appellant had waived her rights and was giving it more time, mere standing by can amount to a waiver if "it continues for an unreasonably long time", as Goff LJ stated in *Buckland v Farmer & Moody*[6] where the period from 1 December 1973 to 7 February 1974 was held not to be an unreasonably long time.

[6] [1978] 3 All ER 929 at 942

[46] In the current circumstances it would reasonably appear to the Purchaser that matters would come to a head on the Appellant's receipt of the 8 February 1999 letter so that the Appellant would (i) make good her threat to rescind the Contract or (ii) take up the suggestion of taking out a vendor-purchaser summons under s. 54 of the Property Act or (iii) come up with some compromise as to the amount due for the balance of the purchase price. Once, however, six months had elapsed and the Appellant had not carried out the strong threat to rescind the Contract the Purchaser was in our view clearly entitled to regard the Appellant as having put her rescission remedy aside while reflecting upon the best course of action. Of course, the Appellant could have re-made time of the essence for completion by serving a fresh notice allowing a further short period within which the Purchaser had to complete its purchase but this was never done.

(b) *If time of the essence had not been waived, in the face of uncertainty as to the correctness of the Appellant's completion statement, what was the Purchaser obliged to do to avoid the Appellant rescinding the Contract for failure to comply with the notice to complete?*

[47] Obviously, it is unnecessary to answer this question, but it is worth considering this important practical issue. What ought to happen if the vendor and purchaser cannot agree on the amount required for completion? One course is for completion to be deferred until the vendor or purchaser has applied in a summary way under s. 54 of the Property Act to the court for it to make such order as seems just and to order how and by whom the costs are to be paid. We are, however, informed by counsel that such a course is not as speedy as it was intended to be so that it can delay matters for an unreasonable length of time.

[48] The starting point for a more practical approach is that the purchaser is contractually obliged to pay the required *proper* amount that is the due balance of the purchase price. Two English Court of Appeal cases, *Carne v Debono*[7] and *Hanson v SWEB Property Developments Limited*[8], indicate that it follows that if the purchaser does not pay or tender the *proper* amount before expiry of the time of the essence period he is

[7] [1988] 1 WLR 1107
[8] [2001] EWA Civ 1377, [2002] 1 P & CR 35

in breach of contract and the vendor is entitled to rescind it - unless the purchaser was unable to calculate the extra money needed to make up the proper amount due to the vendor not providing the relevant information necessary for the calculation (e.g. as to apportionments).

[49] Where the purchaser considers that the amount demanded by the vendor is not the proper amount due he has a choice. He can tender what he considers to be the proper amount, but if the vendor rejects it as too low and rescinds once the time of the essence period has expired, there is nothing the purchaser can do if it turns out he was wrong as to the proper amount.

[50] It seems better for the purchaser to tender and pay the proper amount as calculated and demanded by the vendor, and then to issue a vendor and purchaser summons under s. 54 of the Property Act to recover the amount by which the vendor's calculation exceeded his own calculation, also claiming interest and costs.

[51] Section 54 proceedings could also, of course, be initiated before expiry of a time of the essence period so as to determine the proper amount needed to complete the sale and purchase. It may, however, be that such proceedings could too easily be utilised to stymie notices to complete and leave contracts uncompleted for a considerable period of time due to the exigencies of the civil justice system in Barbados. If this be the case it may be that the courts would need to develop the law in favour of a purchaser taking the course advocated in [50] above. We, however, deliberately leave the question open, and encourage conveyancers to deal with the issue by the insertion of express terms in the relevant contract for sale and purchase of land.

[52] This is an appropriate stage to exhort conveyancing practitioners in Barbados and similarly circumstanced Caribbean countries to produce detailed standard conditions of sale for contracts for the sale of land that will then be used as the basis for all such contracts subject to such variations or ousters as might be appropriate for particular special circumstances. Currently, it seems that too many contracts afford scope for time-consuming arguments even on basic points e.g. involving the date and time and place for completion and what is required for a valid notice to complete and compliance with it.

(2) Did the Purchaser's default in not complying with the order of Greenidge J as to payment of the due balance require it to deliver possession to the Appellant who could also forfeit the deposit?

[53] It will be noted from the terms of the Order set out at [25] above that if the balance of purchase money was not duly paid by 30 November 2004 it was ordered that the Purchaser deliver up possession to the Appellant and pay the rent due from 10 October 1998 to 10 February 2004, the Contract being terminated so that the deposit would be forfeit. The parties, however, were at liberty to apply, the Order focusing on the specific performance and not the default clause, so, for example, ignoring the Appellant's obligation under clause 16 of the Contract to pay $200,000 to the Purchaser for improvements if she recovers possession.

[54] It is most significant that, as appears at [26] - [29] above, from the 8 November 2004 the Purchaser's attorney was pressing for completion while being studiously ignored by the Appellant's attorney, who on 12 November had made it clear (at [27] above) that he had received instructions to appeal the Order. The Appellant's attorney allowed matters to drift along and in no way assisted the Purchaser to complete, so he could hardly have been in a position to write to the Purchaser to claim that by virtue of the default clause in the Order the Contract was rescinded and the Appellant entitled to recover the premises and to forfeit the deposit. In any event, he never wrote such a letter. Indeed, on 22 April 2005 he ended his silence by writing to the Purchaser's attorney that his client was prepared to complete if the Purchaser paid the Land Taxes: see above at [29].

[55] In any event, it seems that the Appellant's attorney "reprobated" the Order which he was seeking to appeal and thus would not seek to "approbate" it by going back to Greenidge J in an attempt to invoke the default clause in the Order and having its operation worked out by the court. As Lord Wilberforce pointed out in *Johnson* v *Agnew*[9], "Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised [by the court] according to equitable principles."

[9] [1980] AC 367 at 399

(3) Is the Appellant entitled to rent from 1 December 2004 to the date of completion?

[56] While the Order of Greenidge J provided for the Appellant to have $219,000 (wrongly described as mesne profits rather than rents) covering $3,000 a month for 73 months to 30 November 2004 (when completion was supposed to take place), no provision was made as to the period 1 December 2004 to the date of actual completion which obviously has not yet taken place. Yet clause 2(e) of the Contract at [6] above specifically provides for the Purchaser to pay "rent of Three thousand dollars $3,000.00 per month on the 10th day of May 1995 and continuing on the 10th day of each and every month until completion".

[57] It is thus clear that the Purchaser cannot claim to have the benefit of free possession and use of Maristow from 1 December 2004 until completion. Its counsel, however, argued that in equity there was a discretion, instead, to award interest (at 6%) on the balance of the purchase moneys as this would be significantly less than $3,000 a month which the Appellant should not be allowed to benefit from by virtue of pursuing her time-taking appeal. Disappointed litigants, however, have a right to pursue an appeal and cannot be blamed if in the ordinary course of events this takes a long time. Moreover, while this Court applies equitable principles when dealing with contracts for the sale of land (as recognised by Lord Wilberforce at [55] above) it has, however, no reason to interfere with the agreed contractual position in clause 2(e) of the Contract in the absence of some special equitable ground such as fraud or undue influence or misrepresentation, and no such special ground has been alleged.

Resolution of the appeal

[58] It appears that the position as to the receipt of rents up to 30 November 2004 has been resolved by the Appellant having received such rents. The Contract must be specifically performed and carried into execution. The Purchaser has already accepted the Appellant's title. Within twenty-eight days of this order being entered the Appellant's executor, Mr David Victor John Bothway Colby (or in default, the Registrar of the Supreme Court), shall sign and deliver a proper conveyance as agreed upon by the parties' attorneys in favour of Felix Broome Incorporated upon receipt of the sum of $460,500 and rents from 1 December 2004 to the date of completion at the

rate of $3,000 a month, with Land Taxes to be duly apportioned under clause 6 of the Contract, the line marks to be pointed out to the Purchaser and payment of water rates to be evidenced as per the Purchaser's letter of 8 November at [26] above. The Purchaser is to receive from the Appellant three quarters of its costs relating to the appeal to this Court and certified fit for two counsel, to be taxed if not agreed. The costs orders in the courts below are undisturbed. Liberty is granted to the parties to apply to a judge of the Supreme Court of Barbados if any matters require to be resolved to give full effect to the orders of this Court.

_____/s/_____

The Hon. Mr. Justice Rolston Nelson

_____/s/_____
The Hon. Mr. Justice A. Saunders

_____/s/_____
The Hon. Mme. Justice D. Bernard

_____/s/_____
The Hon. Mr. Justice J. Wit

_____/s/_____
The Hon. Mr. Justice D. Hayton