

[2011] CCJ 13 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Appeal No CV 2 of 2011
BB Civil Appeal No 5 of 2007**

BETWEEN

SEA HAVENS INC.

APPELLANT

AND

JOHN DYRUD

RESPONDENT

Before The Honourables

**Mr Justice Saunders
Madame Justice Bernard
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson**

Appearances

Mr Roger C Forde, QC, Mr Amilcar Branche and Ms Nargis Hardyal for the Appellant

Mr Leslie F Haynes, QC and Ms Karen Pereira for the Respondent

**JUDGMENT
of
The Court
delivered by
the Honourable Mr Justice Hayton
on the 3rd day of November, 2011**

An Overview

[1] At all material times the Appellant was a lessee of the Respondent and on the leased property carried on the business of providing accommodation for visitors to Barbados. Over ten years ago the Appellant exercised an option contained in the lease to purchase the leased property from the Respondent. Throughout this judgment we refer to the contract arising from the exercise of the option simply as “the contract”. Attempts to complete the contract by the end of December 2000 and then by 30 March 2001 failed. Both parties believed the other was responsible for the failure. The courts below found that the brevity of the option clause in the lease contributed to misunderstandings and a lack of progress in completing the sale. As this Court emphasised in *Colby v Felix Enterprises Limited and Felix Broome Inc*¹, conveyancing in Barbados would be much simpler and quicker if a small committee of experienced conveyancers could produce a set of standard conditions that could be incorporated into options and contracts to purchase land (subject to any specific modifications required in a particular case).

[2] Following the abortive attempts to complete, in the absence of a condition as to notices to complete the sale, the Appellant on 24 July 2001 served on the Respondent what it regarded as a valid notice to complete by 31 August 2001. Completion did not take place on that date. In the litigation that ultimately ensued much argument focused upon the validity of this notice to complete. It is not disputed, however, that the Respondent never exercised whatever rights he may have had to terminate the contract for breaches thereof by the Appellant, nor did he counterclaim for rescission of the contract. Thus there remained a contract of sale capable of being specifically enforced when the Appellant on 6 June 2002 brought proceedings for specific performance. The courts below overlooked this in refusing to grant specific performance. Instead, they focused almost entirely on whether the Appellant was ready, willing and able to complete the contract on 31 August 2001 (the date the notice to complete expired) and whether the Appellant was in breach of obligations, all of which, however, could have been made good on or before a date fixed by the court for completion.

¹ [2011] CCJ 10 (AJ) at [52]

- [3] Since, at the hearing commenced before the trial judge on 7 February 2007, the contract was still in existence and the Appellant was alleging that it was ready and willing to complete the contract, the trial court was obliged to consider whether it was more likely than not that the Appellant, at a date to be set by the court for completion, would then have been able specifically to perform its side of the contract. In other words, as we held in *Vernon O'Connell Hope v Shaka Wayne Rodney and Portfolio Investments Limited*², the court had to determine whether in all the circumstances the purchaser at the date of the hearing had demonstrated by evidence its financial capacity to complete the contract.
- [4] The lower courts did not approach the matter in this manner, having heard the case before *Hope v Rodney* had been decided. This Court, therefore, is required to examine in detail the material in the Record to see whether the Appellant did demonstrate such capacity. Looking at such material, we hold that it was more likely than not that, had the trial judge so considered the matter, the Appellant at the date of the hearing would have been able to establish that it had the necessary capacity to complete the purchase of the property. Completion pursuant to an order by the trial court for specific performance should then have taken place by, say, 30 March 2007.
- [5] We thus allow the appeal and order specific performance on terms detailed below.
- [6] We note that the times taken by the trial judge and the Court of Appeal to produce their written judgments have been shorter than in some previous cases heard by us but are still too long, respectively 14 February 2007 (order made) to 21 May 2008 (written reasons) and 8 October 2008 (appellate hearing) to 27 May 2010 (appellate judgment). As exhorted by Saunders JCCJ in *Yolande Reid v Jerome Leon Reid*³, judges should strive to deliver judgments within three months normally or in complex cases within six months, though it is appreciated that an unfortunate backlog of judgments waiting to be drafted may delay matters for some time.

² [2009] CCJ 12 (AJ)

³ [2008] CCJ 8 (AJ) at [22]

[7] There was, however, a longer delay of four years eight months from 6 June 2002 to 7 February 2007 before the Appellant's case was heard. So far as counsel before us were aware, the delay was due to the civil justice system not to any negotiations between the parties leading to their delaying matters. This is a most unsatisfactory situation that needs to be remedied and we trust that the new Civil Procedure Rules will considerably improve matters. The expeditious resolution of commercial disputes yields a net benefit not just to the litigants but also to the economy of Barbados. It is very important that specific performance cases such as this be identified early as needing timely disposition. Indeed, amortisation tables for the agreed purchase price of US\$600,000.00 over eight years at 10% reveal that if this case had been heard expeditiously so that completion ordered by the court had taken place, say, on 31 May 2003, US\$776,994.42 principal and interest (less some payments) would have been payable as opposed to US\$871,374.67 (less the same payments) payable in respect of a completion taking place on 30 March 2007.

The Background Facts

- [8] By a lease ("the Lease") dated 28 March 1997 Mr John Dyrud ("the Respondent"), an attorney now resident and practising in Anguilla after having been resident in Barbados, granted to Sea Havens Inc ("the Appellant") a lease of the property known as "The Moorings" situate at Fitts Village, St. James "together with the business carried on therein"
- (a) for the term of eight months commencing on the 1st day of April 1997 yielding and paying therefor during the said term such rates taxes insurance wages charges liens mortgage payments and other outgoings
 - (b) for the term of two years commencing on the 1st day of December 1997 yielding and paying therefor yearly the rent of sixty thousand dollars currency of the United States of America (US\$60,000.00) by equal instalments of US\$5,000.00 and
 - (c) for the term of eight years commencing on the 1st day of December 1999 yielding and paying therefor monthly during the said term the rent of US\$9,104.50 payable on the first day of each and every succeeding month during the said terms.

[9] In clause 3 of the Lease the Appellant as Tenant entered into the following covenants with the Landlord Respondent (a) to pay all taxes charged upon the demised property, (b) to keep the property and items such as drains, septic tanks, pipes, water heaters and air conditioners in good working order and tenantable repair and condition, (c) to keep and maintain the interior and exterior of the property and gardens in similar condition to those which obtain for premises of a like nature, (d) to pay all expenses payable in respect of maintaining items in (b) to the proper standard, (e) to replace such of the Landlord's fixtures and fittings as may become worn out, lost or unfit for use by replacing them, (f) to permit the Landlord to enter and view the property, (g) if the Landlord served a notice requiring the Tenant to do necessary repairs and the Tenant did not comply, the Landlord was to be permitted to enter and execute the repairs at the Tenant's cost, to be a debt due from the Tenant, (h) to insure the property in the joint names of the Appellant and the Respondent against fire, hurricane or explosion damage. If failure so to insure the property led the Respondent to effect insurance the loss would be recoverable as rent in arrears. Under sub-clause (l) the Tenant was on termination of the tenancy to yield up the property and any additions thereto (and Landlord's fixtures and fittings) in good and tenantable repair.

[10] Following upon a fairly standard clause 5 enabling the Landlord to forfeit for any breach of the Tenant's obligations, in clause 6 the Respondent granted the Appellant an option to purchase the property as follows:

- (a) The Tenant and/or its nominee or nominees or assigns shall have the option to purchase the said property at any time after the second year of the third term hereby granted but not later than the fourth year of the third term for the price of six hundred thousand dollars currency of the United States of America (US\$600,000.00).
- (b) All money paid during the third term shall be applied towards the purchase of the demised property firstly as to the purchase price and secondly as to interest thereon at the rate of ten dollars per centum per annum on the said sum of US\$600,000.00 as amortized during the said third term.
- (c) The Tenant may on any anniversary of the third term pay a lump sum of the agreed purchase money provided that such sum is not less than US\$30,000.00. Such payment will not decrease the monthly payments hereby agreed but will

accelerate completion of the payment of the purchase money and shorten the term of the lease hereby agreed.

- (d) The Tenant will make its best endeavours to secure a certificate of compliance with respect to the buildings forming part of the demised premises provided always that if any enforcement notice is served on the Landlord or the Tenant requiring the said building or buildings or any part thereof to be demolished the value of such demolished building or part thereof and making good any reconstruction shall be deducted from the agreed purchase price.
- (e) The landlord will convey the demised premises to the Tenant at the end of the third term or any shortened period thereof provided the Tenant shall have performed and observed all his obligations (sic) hereunder and will give a good and marketable title to the Tenant free from encumbrances.
- (f) For the purposes of property transfer tax and stamp duty the property shall be conveyed to the Tenant at the price of US\$400,000.00 or such other sum as may be used for land tax purposes as assessed by the Commissioner of Land Tax at the time of the conveyance. The value of the furniture shall be the difference between such said sum and the agreed purchase money.

[11] Although the option was not expressed to be exercisable before 1 December 2001, in March 2000 the Respondent upon enquiry from the Appellant indicated he was prepared to allow the option to be exercised earlier. It is not disputed that the option was validly exercised.

[12] On 31 July 2000 the Royal Bank of Canada offered the Appellant credit facilities of BB\$1,717,000.00 to be secured on The Moorings and another property of the Appellant referred to as “Sunhaven”, Fitts Village, St. James, (already charged to the Bank and appearing from the evidence to have been known as “Sea Haven Beach Villa”). These facilities needed to be supported by personal guarantees of the owners of the Appellant, Mr William Stone and his wife Sheila, and an assignment of life policies to be arranged on each of their lives for BB\$250,000.00. On 8 August 2000 the Appellant’s attorney, Mr Floyd Phillips (“Mr Phillips”), wrote to the Respondent telling him of this and on 30 August 2000 the Respondent replied authorising him to deal with the mortgagee of The Moorings so as to check the title deeds held by it.

[13] On 22 November 2000 the Respondent wrote to Mr Phillips enclosing a spreadsheet as to the Appellant's payments and as to 10% interest due on the agreed purchase price – and referring to a column for insurance paid by the Respondent to be treated as rent in arrears.

[14] On 20 December 2000 Mr Phillips replied by a faxed letter referring to a discussion a fortnight earlier and stating

“You will note that from December 1999 rent was payable at \$9,104.50 per month based on an amortisation over 8 years of the US\$600,000.00 commencing from December 01st 1999 and that there is a provision that all moneys paid during that third term would be applied toward the purchase money firstly as to interest at 10% and secondly as to principal. The foregoing was based on the premise that the lease did run into the third term and the option became exercisable. Only then could those provisions take effect.

I would summarise the present situation to be as follows:

At the end of November 1999 a total of \$114,664.39 had been paid as rent leaving a balance of \$5,335.61. The payment of \$20,000.00 on 2nd February 2000 would have cleared the arrears of rent (\$5,335.61) and the balance of \$14,664.39 applied to interest from 31st December 1999 on \$612,737.65 (i.e. purchase money plus insurance of \$12,737.65). My calculation of interest payments from 31st December 1999 would therefore be as follows:

	<u>Principal</u>	<u>Interest Payments</u>	<u>Balance</u>
	<u>612,737.65</u>		
31/12/99	5,204.07		617,941.72
31/01/00	5,248.27		623,189.99
02/02/00	341.47	14,664.39	608,867.07
28/02/00	4,337.13		613,204.83
31/03/00	5,208.04		618,412.87
04/04/00	677.71	9,858.86	609,231.72
30/04/00	4,339.73		613,571.45
31/05/00	5,211.15		618,782.60
30/06/00	5,085.88		623,868.48
31/07/00	5,298.60		629,167.08
31/08/00	5,343.61		634,510.69
30/09/00	5,215.15		639,725.84
31/10/00	5,433.28		645,159.12
30/11/00	5,302.67		650,461.79

Please let [me] have your early response so that we can settle all outstanding balances prior to 31st December 2000”.

[15] On 22 December 2000 the Respondent replied by fax stating

“1. I have reviewed your figures and accept them i.e. the balance owed to November 30.

2. Interest must be added for the month of December in the amount of US\$5,601.20. The total owed therefore would be US\$656,062.99 to December 31, 2000.

3. After deduction for whatever Government fees there are on transfer of title and settlement of the amount due and owing to Barfincor [the Respondent’s mortgagee] (approximately US\$244,000.00) I shall expect a bank cheque in United States dollars for the balance payable to John O. Dyrud. (I have discussed this with my Attorney, Ms Ella Hoyos and she has confirmed that she has no objection to this course of action.) Please confirm that this course of action is acceptable to the purchaser and yourself”.

[16] On 8 January 2001, following upon his dealings with the Respondent, Mr Phillips sent a statement to the Royal Bank of Canada’s attorneys setting out the sums required for completion of the purchase, such sums including BB\$1,200,000.00 (relating to the US\$600,000.00 purchase price), BB\$12,737.65 for insurance, BB\$55,986.26 for interest to 31 December 2000 that seems to have been a target date for completion, and BB\$8,700.00 for land taxes.

[17] Delays, however, occurred due to problems concerning Exchange Control and the life assurance policies on the lives of Mr and Mrs Stone that the Royal Bank of Canada required. The Stones’ applications were only accepted on 15 March 2001, but completion was hoped to occur on 30 March 2001, the Bank having the Stones’ personal guarantees and a Further Charge executed by the Appellant.

[18] To this end the Royal Bank of Canada’s attorneys wrote to the Appellant on 23 March 2001 stating that title to The Moorings was a good marketable one, that on completion the Further Charge to secure BB\$1,342,000.00 would need to be stamped, and requesting a cheque to enable Mr Phillips to complete the purchase.

[19] Indeed, the Respondent travelled to Barbados ready to sign the conveyance and complete the sale on 30 March 2001 as stated in his oral evidence and in his lawyer’s letter of 11 April 2001 to Mr. Stone. In paragraph 4 of the letter the reasons for the Respondent’s failure to complete were stated at (a) and (b) thereof. The first issue as set out in (a) was that the Appellant had not paid the monthly rents promptly and the Respondent had expected the amount of the outstanding rents “to be available in US dollars separate from the sale proceeds. To his amazement, John [Dyrud] was

informed by Mr Phillips that this sum cannot be separated from the Sale Proceeds. This is clearly totally unacceptable”. The second issue related to the responsibility to pay the transfer tax on the sale of the property, the Respondent having “been advised by Barbados counsel” that this was clearly the responsibility of the Appellant. The Respondent’s current counsel, Mr Leslie Haynes QC, rightly conceded that this was not the case as clause 3(a) of the Lease, obliging the Appellant to pay, *inter alia*, all “taxes”, only covered taxes payable *qua* Tenant.

[20] On 24 July 2001 in an endeavour to bring matters to a speedy completion the Appellant’s Mr Phillips served on the Respondent what he regarded as a valid notice to complete the sale and purchase of the property on or before 31 August 2001, in default of which the Appellant would “seek such relief as it may be entitled to by law”.

[21] On 5 October 2001 the Respondent served on the Appellant a notice of intended forfeiture of the Lease if specified breaches were not remedied within twenty-eight days. It must be noted, however, that this notice could not in any way affect the existence of the prior equitable interest in the property that had been obtained by the Appellant’s earlier exercise of its option: *Raffety v Schofield*⁴. It was conceded that the Appellant’s exercise of the option was not dependent upon satisfying a condition precedent of having, at the date of such exercise, complied with its obligations under the lease. It was argued, instead, that delivery of the Conveyance to the Appellant in return for the purchase price was conditional upon the Appellant having first complied with all its obligations under the Lease and the Appellant had not so complied.

[22] As the financial capacity of the Appellant to complete the purchase of the property has been a major issue, it is noteworthy that on 22 August 2001 the Royal Bank of Canada’s attorneys wrote to Mr Phillips that a further advance of BB\$78,000.00 was agreed (according to Mr Stone to cover accruing monthly payments). Also Mr Phillips wrote on 24 August 2001 to the Royal Bank of Canada setting out BB\$1,436,375.52 as the required sum needed for completion of the purchase, including BB\$1,200,000.00 for the US\$600,000.00 purchase price, BB\$171,147.12

⁴ [1897] 1 Ch 937 cited by Blackman J at [29]

for interest to 31 December 2000, BB\$12,737.65 for insurance premiums and BB \$8,700.00 for land taxes. On 13 November 2001 the Royal Bank of Canada wrote to its attorneys to revise its Further Charge for BB\$1,342,000.00 by increasing it by \$78,000.00 to \$1,420,000.00. On 1 July 2002, The Moorings not having been purchased, the Royal Bank of Canada cancelled these credit facilities.

[23] Earlier, on 8 June 2002 the Appellant had instituted proceedings for specific performance of the contract or damages for breach of contract, averring that it had at all material times been and was now ready and willing to complete the contract. The Respondent in his Defence alleged various breaches of the contract and denied that he was refusing to complete the contract but he counterclaimed that he had forfeited *the Lease* for breach of covenant as he was entitled to do under clause 5 of the Lease and was seeking possession of the property, arrears of rent and mesne profits.

The judgment of Blackman J

[24] Blackman J heard the case on February 7, 8, 9, 12 and 14, 2007 and made his order on 14 February 2007, following it with a reasoned written judgment on 21 May 2008. He dismissed the Appellant's claim and required it to pay the Respondent's costs as well as US\$765,390.55 (being arrears of rent) or the Barbados dollar equivalent, with interest from 14 February 2007 at 6% per annum till payment and also mesne profits at US\$9,104.50 per month (or the Barbados dollar equivalent) from 1 March 2007 to the date of delivery of possession. The Appellant was also ordered to deliver up possession of the premises to the Respondent on or before 30 June 2007.

[25] Blackman J's judgment at [38] pointed out that difficulties "flowed in large measure from the uncertainties inherent in the incomplete, poorly drafted and rather bare bones option clause in the Lease". He employed the *contra proferentem* principle at [41] to hold that ambiguities in the Lease should be construed against the Appellant, whose counsel, Mr Phillips, he held to have prepared the document. He accordingly held at [47] that the monthly payments of US\$9,104.50 remained rent after exercise of the option and so (at [51]) were part of the obligations that the Appellant had to perform (and had not performed) before the Respondent could be called upon to execute the conveyance to the Appellant pursuant to clause 6(e) of the Lease.

[26] Blackman J further held at [53] that the Appellant could not, in any event, obtain specific performance because “of its inability to meet the requirements of the Notice to Complete it purported to issue”. It was not ready and willing to complete because it was not in a position to pay the balance of purchase money on *31 August 2001* when its Notice expired.

The Court of Appeal Judgment

[27] The Court of Appeal heard the appeal of the Appellant on 6, 7 and 8 October 2008 and delivered its judgment on 27 May 2010. It affirmed the order of Blackman J, and the Appellant vacated the property on 13 July 2010. At [65] the Court agreed with the judge that the monthly payments remained rent after exercise of the option. It held at [66] and [69] that the Appellant was in breach of clause 6(e) of the Lease in not having duly paid rent or insurance premiums or land taxes and that settlement of these outstanding obligations was a prerequisite for conveying the property to the Appellant in return for the balance of the purchase price and interest. Moreover, the court stated at [34] and [70], the Appellant had served a valid Notice to Complete on the Respondent making time of the essence, but had then not been in possession of funds to enable it to comply with its obligation to complete by 31 August 2001. The Court of Appeal stated at [41] “It was incumbent on Sea Haven to have the purchase money. On their own evidence (Mr Stone) they did not”. Because of this failure and the failure to have satisfied the preconditions for delivery of the conveyance in return for the purchase price with interest, the Court of Appeal held that no specific performance could be ordered as the Appellant was not ready willing and able to complete the purchase: see at [66] and [67]. It is noteworthy that the Court gave no consideration to the fact that its affirmation of the order that the Appellant pay the Respondent US\$765,390.55 for arrears of rent and then mesne profits at US\$9104.50 a month from 1 March 2007 to the date of delivering possession of the property to the Respondent - amounting to US\$336,866.50 by May 2010 - meant that the Respondent would have been paid more than the amortised US\$600,000.00 purchase price at 10% interest - amounting to US\$874,031.85 - and yet still remain owner of the property.

The Issues

[28] The following issues arise.

- A. What were the terms of the contract?
- B. Does breach of the Appellant's obligations under the contract prevent it from being entitled to specific performance?
- C. Has the Appellant demonstrated that at the material time it had the financial capacity to complete the contract, and what was the material time?
- D. If specific performance is to be ordered what should be the terms of the order?

A. The terms of the contract

[29] Much was made of the *contra proferentem* rule of construction before Blackman J and whether or not Mr Phillips, who drafted the Lease was acting for the Appellant or for both the Appellant and the Respondent. Blackman J held at [41] that he was acting for the Appellant and proceeded to apply that rule of construction accordingly. But there is also another rule, ie that if there is ambiguity present where grants of land are concerned, as *Johnstone v Holdway*⁵ shows, one should construe such grants against grantors (who must not derogate from their grant). Before considering either of these rules, however, one must first focus objectively upon the "intention of the parties, to be discovered from the terms of the contract into which they have entered".⁶ If that exercise produces a sufficiently clear result there is no need to resort to these rules of construction.

[30] Taking the relevant document at face value, it is clear that this case is concerned with the grants of two separate interests in land: *Griffith v Pelton*⁷. The grant of the Lease containing within it the grant of an option, created (a) a legal term of years and (b) an equitable estate contract capable of maturing into a full estate contract. It matters not whether such a contract is contained in a separate document from the lease or contained in a single document along with the agreed terms of a lease. The duty of the court is to construe the relevant grants in their commercial context to ascertain the

⁵ [1963] 1 QB 601 at 612-613

⁶ Per Romer LJ in *Nightingale v Courtney* [1954] 1 QB 399 at 409-410

⁷ [1958] 1 Ch 205

meaning which they would convey to a reasonable person having all the background knowledge (other than evidence of pre-contractual bargaining) which would reasonably have been available to the parties at the time they entered into their legal relations: *Investors Compensation Scheme v West Bromwich Building Society*⁸. So construing the document the following picture emerges.

[31] The Moorings was used in the business of providing accommodation for visitors to Barbados. Mr and Mrs Stone, the owners and directors of the Appellant, leased the property in April 1997 for (a) eight months in which no formal rent was payable, (b) two years at US\$5,000 a month from 1 December 1997 and (c) eight years at a rent of US\$9,104.50 a month from 1 December 1999.

[32] It is reasonable to assume that the amount of the monthly payments almost doubled in the third term because it was clearly envisaged that the Appellant would exercise its option, exercisable in year two or three of the eight year term, to purchase the property from the Respondent. The monthly amounts for the third term agreed by the parties were calculated by reference to the amortisation of the agreed purchase price of US\$600,000 over this eight year term at 10% interest. The very essence of amortisation requires regular monthly payments of an unchanging sum initially paying off primarily interest and only a small amount of capital until, towards the end of the agreed period, payments increasingly pay off more capital than interest. Both parties thus agree that the “firstly” and “secondly” in clause 6(1)(b) of the Lease were mistakenly in the wrong order as accepted in calculations agreed by the parties in December 2000 in correspondence at [14] and [15] above.

[33] It is to be noted that the Respondent was expecting to use some part of the monthly payments to cover his own mortgage liabilities in respect of the property, but neither clause 6 nor any subsequent communication from the Respondent made time of the essence for the making of such payments. Pressure, however, could have been brought to bear upon the Appellant for breaches of the monthly payment obligation. Once an unreasonable period of time had elapsed for completing the contract, the Respondent could have made time of the essence by serving on the Appellant a notice

⁸ [1998] 1 All ER 98 at 114-115

to complete the contract within a specified reasonable time, so that he could rescind the contract if the Appellant did not comply with the notice. Alternatively, assuming that the Lease continued despite the exercise of the option, if any of the obligations therein were broken the Respondent at any time could have invoked clause 5 to claim forfeiture and possession of the property.

[34] Whether the parties in fact intended to continue the Lease once the Appellant had exercised his option to purchase is “to be discovered from the terms of the contract into which they have entered”.⁹ Such terms are found in clause 6 of the Lease. Clause 6(c) enabled the Appellant on top of its monthly payments to pay a lump sum on any anniversary of the 1 December 1999 third term so as to accelerate payment of the purchase money “and shorten the term of the lease”. This indicates that the parties contemplated themselves continuing in a landlord-tenant relationship for the eight year term until the full purchase price was duly paid. Clause 6 (e) reveals the same contemplation in that it requires the Landlord Respondent to convey the property to the Tenant Appellant “at the end of the third term or any shortened period *thereof*” arising from purchase of the property in accordance with its obligations.

[35] Thus, after exercise of the option the Lease continued to subsist until expiry of its eight year duration or its earlier termination, whether by the Respondent Landlord for breaches of the Lease or by operation of law upon the Appellant’s acquisition of the Respondent’s reversionary interest. Until completion of the contract the Appellant as Tenant remained under all the obligations in the Lease (eg under clauses 1(c), 3, 5 and 6). If the contract were to be lawfully terminated the Appellant as Tenant would continue to be entitled to possession and the Respondent as Landlord would continue to have his rights to require the tenant to observe all its obligations as tenant, including the obligation to pay US\$9,104.50 a month. Until the option was exercised these monthly payments were properly “rent” for use of the property (though, despite this, they were exceptionally to be credited against capital in the form of the purchase price if, as expected, the option were to be exercised). Once, however, the option was exercised, the monthly payment was no longer a simple payment for the use of the property, but instead was also part payment of the aggregate purchase price of

⁹ See footnote 6

US\$600,000 plus 10% interest: the payment ceased to have the character of mere rent but took on the added character of money provided *qua* purchaser as part payment of a purchase price. Significantly, while clause 1(c) of the Lease refers to “rent” of US\$9,104.50 a month, clause 6(b) refers to “all moneys paid during the third term” and clause 6 (c) refers to “the monthly payments hereby agreed”. “Monthly payments” thus covers payments of “rent”, for the use of the property as long as the lease is on foot, as well as “payments” made as part payment of the amortised purchase price of US\$600,000.00 at 10% interest over eight years if the option contract was completed.

[36] The Appellant’s counsel tried to argue that clause 6 (e) did not become part of the contract arising from exercise of the option pursuant to clause 6(a) because he was faced with the difficulty that it required the Appellant to have “performed and observed all his obligation (sic) hereunder”, including the obligations to pay taxes, insurance premiums and the monthly payment (whether as “rent” or as a part payment of a purchase price) before the Respondent should have to convey the property to the Appellant. We, however, can find no ground to justify regarding paragraph (e) of all the paragraphs in clause 6 as not becoming part of the contract arising upon exercise of the option. Inclusion of paragraph (e) makes perfect business sense.

B. Does breach of the Appellant’s obligations under clause 6(e) prevent it from being entitled to specific performance of the contract?

[37] There is no doubt that the Appellant has been in breach of its obligations as to payment of insurance premiums and land taxes as well as monthly payments of US\$9104.50 towards payment of the purchase price with interest. The Respondent’s counsel, however, has conceded before us that the Respondent has not expressly rescinded the contract for breach of any such obligations and that any issue relating to the 24 July 2001 Notice to Complete is now a “red herring”. Counsel did submit that paragraph 14 of the Respondent’s Defence in which he states that he “denies that he is refusing to complete the said sale” amounted to a tacit rescission of the contract. This submission is untenable as counsel himself seems to have appreciated when in his oral

submissions he accepted that the contract of sale was still extant. Paragraph 14 implicitly accepts that the said sale is still a prospect. If a party to a contract for the sale of land contends that he has terminated the contract for particular breaches by the other party he needs to communicate this to that party and be prepared, in court, to support with appropriate evidence the basis for his contention.

[38] The Appellant admits that it was in breach of its obligations but submits that, since the Respondent has not taken any appropriate steps to rescind the contract for such breaches, such breaches are irrelevant if they can subsequently be cured. The contract is still extant so why should it not have the right to have the contract performed if, as it alleges in its pleadings, it was at the date of the hearing - and apparently remains - ready and willing to complete the contract, even if it was not so ready and willing at times before it issued proceedings for specific performance?

[39] The Respondent's first submission is that to complete the sale for US\$600,000.00 with 10% interest it is first necessary for the purchaser to pay the sums needed to cover the insurance premiums, land taxes and, most importantly, the monthly payments towards the purchase price and interest that the Appellant should have duly made: call this "the Preliminary Payment". After this, which could, of course, be later the same day, the Appellant needs to pay the balance of the purchase price less the monthly payments made ("the Balance").

[40] The Appellant could do this, but why should it not simply pay the two sums together as one sum as was envisaged for completion in March 2001? After all, what does it matter whether one morning one receives two banker's drafts for \$X and \$Y or one banker's draft for \$(X +Y)? Thus, there is nothing to stop the Appellant being entitled to enforce the contract, whether by making two payments of the Preliminary Payment and the Balance or one payment covering both. Indeed, it makes better sense to perform all the financial obligations at once in one payment at completion, as the Appellant's counsel submitted in his oral reply.

C. **Has the Appellant demonstrated that at the material time it had the financial capacity to complete the contract, and what was the material time?**

[41] Both Blackman J and the Court of Appeal held that because the Appellant had not proved that it had the necessary money in hand to complete the purchase on 31 August 2001, when the Appellant's notice to complete expired, it was not then ready and willing to complete, so that specific performance would not be ordered. Unfortunately, both courts failed to appreciate that the Respondent had not taken any steps to rescind the contract so that the contract still subsisted at the date of the hearing. In such a case, as this Court had laid down on 4 December 2009 in *Hope v Rodney*¹⁰, a court is not concerned to look back to ascertain the position at a key past date (like the date of expiry of a notice to complete) but to look forward to an expected completion date. Where one is not concerned with rescission pursuant to a valid notice to complete, a plaintiff purchaser needs to show that at the date of the hearing, in the event of specific performance being ordered, he has the ability to come up with the necessary completion moneys at such time thereafter as a proper conveyance will be tendered to him in accordance with the court's order.

[42] Normally, the plaintiff will easily be able to show this at the hearing e.g. by bank statements, a recent letter or a witness statement from the prospective mortgagee who at completion is to provide the necessary balance of the purchase price in return for taking security. In this case (and also in *Hope v Rodney*) the plaintiff and the lower courts did not appreciate that the date of the hearing was the appropriate date so counsel and the court did not look beyond August 2001. Thus this Court, as in *Hope v Rodney*, has to peruse the evidence in the Record to form its own conclusion as to the likely ability of the Appellant at the date of the hearing in early February 2007 to be able to raise the necessary moneys to complete the purchase at a future date for completion to be laid down by order of the court. In the concrete circumstances of this case this Court is prepared to assume such a future completion date of Friday 30 March 2007 (ie approximately six weeks after the hearing date). The issue is then whether the Appellant had demonstrated a capacity to raise the purchase moneys in time for such date.

¹⁰ [2009] CCJ 12 (AJ) at [22] and [24]

[43] We have looked at the evidence of the Appellant purchaser's financial dealings to secure the purchase price before it instituted proceedings. In particular these dealings have been dealt with above at [12], [17], [18] and [22] which are concerned, for example, with Further charges over The Moorings and another property of the Appellant, personal guarantees of the directors of the Appellant, and assignments of life policies taken out by those directors. We consider that those paragraphs show an ongoing relationship with the Royal Bank of Canada as prospective mortgagee of The Moorings and another property owned by the Appellant. The totality of the evidence suggests to us that it is more likely than not that the Appellant would have been able to produce the necessary moneys to complete a purchase of The Moorings by 30 March 2007. Quite apart from that finding, we bear in mind that a reasonable businessman is hardly likely to institute proceedings for specific performance and so incur significant costs (with the risk of further costs on any appeal) if he will not be able to raise the completion moneys within the period likely to be ordered by the court if his suit is successful.

[44] Thus specific performance will be ordered.

D. What are to be the terms of the order for specific performance?

[45] Since it is our view that Blackman J should on 14 February 2007 have made an order for specific performance in favour of the Appellant, it would have been appropriate to have required completion to take place in about six weeks on Friday 30 March 2007. As indicated at [17] above, due to Barbados Exchange Control laws the Appellant can only be ordered to pay a sum in US dollars or its equivalent in Barbados dollars, while as indicated at [40] above there can be one banker's draft for the whole sum due from the Appellant to be tendered in return for the deed of conveyance. As it is this Court and not the trial judge that is now making the order for specific performance, we will order that completion should take place within 28 days as suggested by Counsel for the Appellants (ie on or before Thursday 1 December 2011), at which date the Respondent should deliver up vacant possession and the appropriate conveyance of a good marketable title to the Appellant in exchange for a banker's draft for the completion moneys, detailed below, that should have been paid on 30 March 2007.

Interest on such money should run from 30 March 2007 until actual completion, except in respect of that part of the completion moneys representing payment of principal and interest of the contract sum. Interest on that part should be payable only until 13 July 2010 when the Appellant delivered possession of the property to the Respondent for him to enjoy. In all the circumstances a 6% interest rate as used by Blackman J should be paid, the contractual rate not being applicable after the date on which specific performance should have taken place.

[46] What sum should have been paid on 30 March 2007? If the Appellant had duly paid the US\$9,104.50 per month from 1 Dec 1999 up to the end of March 2007, amortisation tables reveal that it would have paid interest of US\$271,374.67 and principal of US\$529,821.20, leaving principal of US\$70,178.80 outstanding on the US\$600,000.00 purchase price. The Appellant, however, has made only three payments. As indicated in Mr Phillips' letter of 20 December 2000 (above at [14]) he paid US\$14,664.39 on 2 February 2000 and US\$9,858.86 on 4 April 2000, totalling US\$24,523.25. In cross-examination of Mr Stone the Respondent's counsel accepted that on 14 May 2001 a further payment of US\$9,000.00 had been made. Thus at the assumed completion date of 30 March 2007 the Appellant needed to tender US\$871,374.67 for principal (US\$600,000.00) and interest (US\$271,374.67) less payments totalling US\$33,523.25, a net figure of US\$837,851.42 or its equivalent in Barbados dollars.

[47] In addition, the Appellant should have paid land taxes and insurance premiums to 30 March 2007. A statement of account from the Land Tax Department dated 1 February 2007 reveals that land taxes totalling BB\$48,411.88 were due and unpaid up to and including the 2006-2007 year, though the Appellant's counsel accepts that the Respondent has subsequently paid land taxes due on the property. Thus the Appellant should have paid the Respondent at completion on 30 March 2007 BB\$48,411.88 but without interest up to that date.

[48] The Appellant's counsel admits in his skeleton that arrears in insurance, pro-rated to July 2010 when the Appellant vacated the property, amounted to BB\$78,629.11, and this was not challenged by the Respondent's counsel. Mr Stone in his evidence had, indeed, admitted that the insurance payments had not been made by the Appellant (but

by the Respondent) since the commencement of the term on 1 December 1999. Taking as a basis a 127 month period of insurance from December 1999 to July 2010 the pro-rated amount of premiums for 88 months to 30 March 2007 amounts to BB\$54,483.16. As to interest on those premiums, a standard 6% per annum simple interest should be payable from the time the relevant premiums were paid in each year. In the absence of clear evidence provided by the parties a relatively rough and ready approach is required for these relatively small sums. In all the circumstances we fix the amount of interest due at BB\$13,000.00.

[49] Thus, at 30 March 2007 when completion should have taken place the Appellant should have paid BB\$13,000.00 (interest on insurance premiums) plus BB\$54,483.16 (insurance premiums), BB\$48,411.88 (land taxes) plus US\$837,851.42 (principal and interest) or its Barbados dollar equivalent. Simple interest at 6% per annum should be paid from 30 March 2007 up to actual completion in respect of the BB\$13,000.00, BB\$54,483.16 and BB\$48,411.88 relating to insurance and land taxes, amounting in total to BB\$115,895.04 . So far as concerns the US\$837,851.42 or its Barbadian dollar equivalent, however, since the Appellant delivered up possession and enjoyment of the property to the Respondent on 13 July 2010, the 6% interest on that sum should only be payable to 13 July 2010. Liberty is granted to the parties to apply to a judge of the Supreme Court of Barbados if any matters need to be resolved over the implementation of the orders of this Court.

The position after 30 March 2007 as to taxes and insurance premiums

[50] While the Appellant continued in possession to 13 July 2010 it appears that the Respondent continued to pay the relevant land taxes and insurance premiums and so needs to be reimbursed those expenses from 30 March 2007, but there is a dearth of evidence on the matter. While this is a separate issue from the claim for specific performance it is closely related. Therefore, in exercising its equitable discretion to order specific performance, this Court makes such order conditional on the Appellant by its Managing Director undertaking in writing to pay those expenses (with interest at 6% from the time they were paid by the Respondent) upon receiving credible evidence of them. In the case of any failure to agree the amount of these expenses the issue is to be referred to a judge of the Barbados Supreme Court to determine the

amount to be paid by the Appellant in respect of these payments. For the avoidance of doubt, once the Appellant has given its undertaking, the order for specific performance is to be carried out as a matter entirely separate from the issue of the expenses covered by the undertaking. Indeed, once the amount of these expenses has been agreed it is to be offset against the costs of this case payable by the Respondent.

Costs

[51] Since the appeal has been allowed the Respondent is to pay the costs in this Court and the courts below, certified fit for two counsel, and to be taxed if not agreed.

The Hon. Mr. Justice A. Saunders

The Hon. Mme. Justice D. Bernard

The Hon. Mr. Justice J. Wit

The Hon. Mr. Justice D. Hayton

The Hon. Mr. Justice W. Anderson