MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL No. 2 of 2000

BETWEEN:

THOMAS MOWRY

Appellant

and

DAVID PAYNE

Respondent (1)

WOODSVILLE DEVELOPMENT CORPORATION LIMITED

Respondent (2)

HOGARTH SERGEANT

Respondent (3)

Before:

The Hon. Mr. Justice Albert Redhead	Justice of Appeal
The Hon. Mr. Mr. Justice Albert Matthew	Justice of Appeal
The Hon. Madame Justice Suzie d'Auvergne	Justice of Appeal [Ag.]

Appearances:

Mr. Jean E. H. Kelsick for the Appellant
Mr. Karl Markham for the first and second Respondents

2001: March 26;
June 4;
September 17

JUDGMENT

[1] D' AUVERGNE J.A. [Ag.]: The Appellant dissatisfied with the decision of Saunders, J. delivered on the 20th of June 2000 whereby he refused the Appellant's claim for rescission of the agreement to purchase and ordered the second named defendant to specifically perform the said agreement, appealed and after amending his notice of appeal filed the following:

1. The learned Judge erred in law in granting the Second Defendant an order of specific performance having regard to the fact that the First and Second Defendants were guilty of fraudulent concealment.

2. The learned Judge erred in law in not holding that the failure of the Defendants to disclose the debenture charge to the Plaintiff on or before the signing of the Agreement entitled the Plaintiff to avoid the Agreement and was a valid defence to the counterclaim for specific performance.

3. Further, the learned Judge was wrong to and could not order specific performance against the party seeking the order i.e., the vendor/Second Defendant.

4. The learned Judge erred in law in not awarding the Plaintiff damages in lieu of rescission of the Agreement for defect of title.

5. The learned Judge was wrong in faulting the Plaintiff for giving notice of rescission by his writ and for seeking in his pleadings a declaration of the Court that the Agreement be rescinded, for the following reasons:

    (a) there is no need to precede a writ claiming rescission by a written notice claiming rescission;

    (b) the Plaintiff was entitled to give notice of rescission by his writ;

    (c) given that the purchase monies had already been paid when the concealment was first discovered, this was a case in which it was necessary for the Plaintiff to seek the assistance of the court in rescinding the Agreement and recovering his money.

6. Alternatively, the learned Judge erred in law in not holding that by the letter dated 17th June, 1997 form Kelsick & Kelsick to Payne, the Plaintiff had made no election and that by the issue of the writ of summons he elected to rescind the Agreement.

7. The learned Judge erred in law in not holding that the letter dated 17th June, 1997 written by Kelsick & Kelsick to the First and Second Defendants was a notice to make time of the essence and so a condition of the Agreement on breach of which the plaintiff was entitled to sue for damages.

8. The learned Judge erred in finding that the Plaintiff delayed too long in taking steps to rescind the Agreement and/or in issuing his summons, bearing in mind the conditions prevailing in Montserrat at the time and the fact that he excused the First and Second Defendants' delay in perfecting title, after being put on notice by the Plaintiff's solicitors to do so, on the basis of those very conditions.

9. There being no evidence that the Plaintiff was motivated by opportunism the learned Judge was wrong in drawing such an inference from the facts and consequently his decision was founded partly on speculation, thereby rendering it unsound.

FACTS

[2] The Appellant is a retired psychologist who after working for many years in Indonesia decided to retire on the island of Montserrat. In 1993, while holidaying on the Island a block of Condominiums owned by the second named Respondent (herein called the Company), which was and is still being managed by the first named Respondent, David Payne, the principal director and majority shareholder of the Company, (hereinafter called Payne) caught his interest.

[3] Discussions ensued between the Appellant and Payne and it was agreed that the Appellant would purchase an unfurnished condominium unit for the price of U.S.$68,000.00.

[4] Consequently, on the 4th of January 1994 a Purchase Agreement was signed by the Appellant and Payne at the office of the third named Respondent, a Barrister at Law.

[5] The Agreement required the Appellant to pay a deposit of U.S.$18,000.00 and to complete payment within six months. At that same visit to the third named Respondent's office, Payne requested the third named Respondent to prepare an Alien Land Holding Licence for the Appellant, who paid a sum of money to cover the expenses and fees in obtaining the licence.

[6] It appears that the Appellant was ignorant of all that was entailed in an alien purchasing real estate in Montserrat and erroneously thought that the Land Holding Licence was actually his Document of Title. The Appellant returned to Indonesia and continued working until the month of June 1994 when he returned to Montserrat and entered into occupation of the condominium which was by then, fully paid.

[7] Sometime after the Appellant's return to Montserrat he received his Alien Land Holding Licence from the third named Respondent. It was a single sheet of paper which bore the date "12th October 1994" and was signed by the Governor, whereupon the Appellant asked "Is this it?" and third named Respondent replied, "That is your Alien's Land Holding Licence."

[8] A material aspect of this case is that, on the 24th day of January 1986 the company executed a debenture in favour of the Royal Bank of Canada (hereinafter called the Bank). It secured two sums of E.C.$50,000 to be loaned to the Company by way of a floating overdraft. It created a draft on all the Company's property including the freehold parcel of land measuring 1.93 acres registered in the Register of Titles of Montserrat as block 7/2 Parcel 7 of Elberton Registration Section and all those tenements situate thereon.

[9] It is also to be noted that there was no provision in the debenture for transfer of any part of the property charged or in respect of repayment of any sums loaned and the interest thereon.

[10] It is to be specifically noted, that at no time, neither before, at the time of, or after the signing of the Agreement was the Appellant informed by Payne of the existence of the debenture; also that on Payne's instructions the Appellant paid the deposit to Payne, personally, on the 4th January 1994, and the balance of the purchase price on the 13th June 1994 to Payne's personal bank account at a bank in the United States of America.

[11] As stated earlier the Appellant entered into occupation of the said condominium and was on very friendly terms with Payne who loaned him some furniture until his own arrived.

[12] Now, the Appellant having received the Alien Land Holding Licence which authorized him to own Parcel 12-14 block 7/2 in the registration section of Woodsville, thought albeit, erroneously, that he was the owner of the said condominium. He hired a carpenter to do repairs, paid maintenance fees and also, insurance, water, electricity and telephone rates on the property.

[13] In May 1997 the Appellant's suspicions were aroused as he was not paying property tax. He had discussions with Payne and found out that many unsold condominiums were mortgaged. He called the third (3rd) named Respondent regarding the title to his condominium who informed him that the licence was not his title but gave him a document relating to the transfer of the condominium which he signed and paid for. The following day the third named Respondent made a search at the land registry and discovered the debenture charge. He promptly informed the Appellant and advised him that before the registration of the title could be done, the encumbrance would have to be removed after which he, the (third Respondent) would prepare the transfer. Payne was informed of the discovery.

[14] The Appellant was dissatisfied with the progress of the third Respondent on the matter so he terminated his services and engaged Kelsick & Kelsick as his new attorneys.

[15] On the 17th day of June 1997 Kelsick & Kelsick wrote a letter to Payne in which the following were stated:

(a) that the failure to mention the Debenture in the Agreement was a misrepresentation of contract on the part of himself and the other officer of the Company who had executed the contract;

(b) that if under the terms of the Debenture the Bank's consent to the transfer of the unit (the Condo) was required then the sale was in violation of the debenture;

(c) that despite payment of the proof of purchase price and Sergeant's charges in full almost three years ago was still without title.

The letter concluded as follows:

"We are to inform you that unless a land certificate in favour of our client regarding the said unit is delivered to our officer by 27th instant further action will be taken in this matter".

[16] The Appellant's evidence was that he left the condominium "just after the big explosion that killed people" (This was the latter part of 1997). He said "I would have returned about three (3) or four (4) weeks later. When I returned I intended to return to my condominium."

The Pleadings

[17] In his statement of claim the Appellant pleaded that he was induced by Payne to enter into the Agreement by Payne's warranty and representation and that the title to the condominium was unencumbered. It was further alleged that the representation was fraudulent, reckless or negligent and that Payne did not care whether his representation was true or false.

[18] The Appellant pleaded in the alternative, that Payne failed to disclose the existence of the charge on the property which he was in duty bound to do.

[19] The Appellant further pleaded and urged the court at the trial and the hearing of the appeal to consider Payne's actions in instructing the Appellant to divert the purchase money for the condominium from the company and the bank to himself, personally, and the balance thereof, to his personal account at a Bank in Florida.

[20] The Company did not file a defence but Payne did. He denied that there was a representation and warranty whether innocent, fraudulent or negligent in order to obtain the agreement for the purchase of the unfurnished condominium.

[21] He further pleaded that there was initially an arrangement with the bank to pay 50% of the proceeds of sales of the condominiums to the bank and later an additional monthly payment of $11,000.00 was also demanded by the bank with which he disagreed. He pleaded that this was taking place more or less simultaneously with the agreement between the Appellant and himself.

[22] Payne counterclaimed for declarations that there be specific performance of the "Agreement" between the Appellant and the Company and or of the agreement between the Appellant and the Company for the sale of the condominium to the Appellant.

[23] In his reply, the Appellant joined issue with the defence but stated that neither Payne nor the company had informed him of the existence of the charge or the willingness of the bank “to grant the necessary release.”

[24] The Appellant’s defence to the counterclaim was that any order for specific performance of the agreement would be against the company only and should be refused, as Payne could not transfer title of the condominium to the Appellant.

At the Trial

[25] Learned Counsel for the Appellant argued the grounds in chronological order. He argued that since the company and Payne were guilty of fraudulent concealment the Learned Judge was legally wrong to order specific performance in favour of the company.

[26] Counsel said that the concealment amounted to a criminal offence in breach of Section 88 of the Conveyancing and Law of Property Act. He further urged the Court to consider the cross examination of Edward Roberts, the manager of the Bank who said "I am aware that the cheques were wired to David Payne and not to Woodville Development. I am aware that this was in violation of the terms of the debenture. Where there is a debenture on real property the bank's consent is necessary before the property can be sold."

[27] He contended that at the date of the agreement there was no voluntary agreement for the partial release of the condominiums for the debenture charge.

[28] He quoted Halsbury's Laws of England 4th Edition Volume 42 paragraphs 47 and 50 which in summary states that a contract may be avoided on the ground of misrepresentation, fraud or mistake and also on the ground of non disclosure of latent defects of title. He said that it follows that a non-fraudulent concealment by the vendor is a defence to a counterclaim for specific performance of the contract for sale.

[29] He argued that even if there was no evidence of the concealment being fraudulent on the basis of non disclosure the Appellant was entitled to rescind the contract and was also entitled to resist the vendor's claim for specific performance on the ground of non-disclosure of the debenture.

[30] He quoted Peyman v Lanjani [1984] 3 All ER 726a per Lord Justice Stephenson who said:

"There is no difference, in my judgment between the right of rescission for fraudulent misrepresentation and the right of rescission for defective title. In Rignall Developments Ltd v Halil 1987 3 AER page 170 at 178e Millet J said:

"I cannot think that a vendor who knew of the existence of a registered charge, and who deliberately deceived the purchaser by telling him that there was no such charge, or that it was not registered, could escape liability for fraud by claiming that by virtue of Section 198 the purchaser must be taken to have had actual notice of the truth. Similarly, I am not prepared to hold that a vendor who knows of a registered charge and who wishes to make the sale subject to it, is exonerated by Section 198 from his obligation to make full and frank disclosure of its existence before he can take advantage of an appropriate condition of sale.

[31] Learned Counsel told the court that he was concerned with the second sentence of the above which depicts circumstances of non-disclosure as in the present case.

[32] He further argued that if rescission of the agreement was ordered, then to give effect to the rule of *Restitutio in Integrum* the Appellant would be entitled to the return of his purchase money for the condominium and quoted Spence v Crawford 1939 3 All ER at pages 279. BCGH and 280 A to E.

[33] Learned Counsel conceded that there was no evidence in the instant case of a positive statement by Payne that the condominium was encumbered but contends that it was not necessary to assert or prove Payne's failure to disclose the defect of the title, that the mere failure by him to disclose the debenture charge, on or before the signing of the agreement entitled the Appellant to avoid the contract and that it was a valid defence to the counterclaim for specific performance.

[34] He argued that the court could award the Appellant damages in lieu of rescission of the agreement for defect of title. He said that the letter from Kelsick & Kelsick to the first and second named Respondents constituted notice to rescind the agreement for sale but also argued in the alternative that if it was incapable of constituting such notice then the issue of the writ of summons constituted such a notice.

[35] I pause here to note the relevant paragraph of the letter of 17th June to the Respondents.

"We are to inform you that unless a land certificate in favour of our client regarding the said unit is delivered to our offices by 27th instant further action will be taken on the matter."

[36] Counsel contended that the closing words in the letter of 17th June meant that the land certificate was to be delivered by the 27th or else the Appellant could either commence an action for rescission for which no previous notice would have been necessary or file an action for damages.

[37] He urged the court to accept that the agreement had not been affirmed by express words or an unequivocal act and quoted Clough v London and North Western Rail Co 1861-73 All ER 646.

[38] He further argued, that the election to be bound by the contract is a defence to the claim of rescission and has been construed by the court under the principles of "affirmation". "If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation."

[39] Counsel argued that the same conditions were prevailing in Montserrat for the Appellant as well as the Respondents who were excused by the Learned Judge for their delay in perfecting title and not for the Appellant whose only relevant delay was between the letter of 17th June 1997 when the Appellant became aware of the debenture and the date of the issue of the writ In July 1998, a mere thirteen months. He compared the instant case to Pesco Arts Inc [1983] 3 All ER, 193, (a case based on mistake where proceedings were commenced eleven (11) months after discovery of the mistake and the relief was granted).

[40] Learned Counsel for the first and second named Respondent commenced his argument by stating that if the Appellant intended to terminate the contract by rescission he should have done so immediately and quoted Halsbury's Laws of England 4th Edition volume 9 Para 538.

"Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract; the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach. The breach itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission".

[41] He emphatically stated that the right which a purchaser has to repudiate immediately he became aware of a defect in the vendor's title is an equitable right and further quoted from Lord Parker in Halkett v Dudley 1907 1 Ch 590 at page 597 where he states:

"but it is in my opinion equally clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose".

[42] He argued that while it is true that the Appellant had the right of election to proceed with the contract or to rescind it, it must be an unequivocal assertion by him that he regarded himself as no longer bound by the contract (Halsbury's Laws of England 4th Edition. Vol9-Par.556).

[43] He quoted the case of Forrer v Nash (1865) Beav 107 [Sir John Romily at page 170 where he said "when a person sells property which he is neither able to convey nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case may say, "I will have nothing to do with it".

[44] He further contended that the election to determine arises only on service of the writ and not the issue of the writ since until service the individual may change his mind Car and Universal Finance Co. Ltd v Caldwell [1964]1 All ER 290 - Lord UpJohn at 397.

[45] He argued that the Respondents were free to claim and receive specific performance of the contract and quoted the case Price v Strange [1977] 3 All ER 371 where Goff LJ states at page 381, "unless the right to repudiate is exercised properly, the vendor is allowed to put his title in order after the contract and claim specific performance."

[46] Learned Counsel concluded his argument by emphasizing that the purpose of rescission was to restore the *status quo* ante and asked the question whether it was possible in the instant case to restore the parties to their original position. He said that as far back as 1878 Lord Blackburn in Erlanger v New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218 at 1278 stated:

> "…….It would obviously be unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other parties' hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its disposal for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity of all that the party has lost.

[47] He further argued that although a Court of Equity could not give damages and unless it could rescind the contract, give no relief it could take account of profits and make allowances for deterioration……." O'Sullivan and another v Management Agency & Music Ltd and another 1985 3 A.E.R.

CONCLUSION

[48] I have considered carefully the background to this case, the ongoing activity at the Soufriere Hills Volcano in Montserrat from 1995, of which 1997 was the worst and I have also considered the submissions of counsel.

[49] I do not find that the conduct exhibited by the first named Respondent to be fraudulent but I find that he misrepresented the position of the condominium, namely the material facts to the Appellant who logically concluded that the condominium he agreed to purchase was free and clear of all encumbrances.

[50] It is trite law that a contract may be avoided on the ground that the consent of one of the parties was given in ignorance of material facts which were within the knowledge of the other party. See Halsbury's Laws of England 4th Edition Vol 42 Para 47.

[51] It follows therefore, that the Appellant upon discovery of the real facts in May 1997 should immediately elect to either affirm or disaffirm the contract. He should have immediately given notice to Payne of his intention to repudiate the contract and demand from him a complete restoration of the *status quo.* The ultimate question is. What did the Appellant do in this case? He sent many letters through his new solicitors to his former solicitor, the third named Respondent and to Payne who denied receiving them.

[52] What does the Appellant mean by, "We are to inform you that unless a land certificate in favour of our client regarding the said unit is delivered to our officers by the 27th instant further action will be taken on the matter?."

[53] In my judgment the Appellant was Informing Payne that if within ten days (27th June 1997) he does not complete the title to the condominium then that will be the end of the contract, the agreement to purchase and also that further action will be taken against Payne.

[54] In Clough v Linden & North Western Rail Co. [1871] LR7Ex26 page 646-1861-1873 All ER Reprint the Learned Judge said that upon someone in the Appellant's position discovering a defect in title which had been concealed from him he may do one of the following:

1. elect to avoid the contract
2. elect not to avoid the contract;
3. make no election;
4. commence an action for rescission.

The learned judge stated "that as long as he has made no election he retains the right to determine it either way, subject to this - that if in the interval while he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position of the wrongdoer is effected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contact and when the lapse of time is great it probably would be treated in practice as conclusive evidence to show that he has so determined."

[55] The Appellant filed his action for rescission on the 17th of July 1998, thirteen months after his letter of 17th June 1997 and fourteen months after discovering the defect in the title.

[56] I am of the view that the question now to be answered was whether that period could be considered as within "reasonable time" or would it constitute delay bearing in mind that rescission is an equitable remedy and the circumstances of the case play a great part in the determination.

[57] In my judgment the Appellant was well within his right and within reasonable time when he wrote to the third named Respondent and to Payne on the 17th of June 1997 giving notice albeit, in around about way, that he would file an action for rescission if the title to the condominium was not completed by the 27th of June 1997 but the filing of the writ thirteen months after would constitute delay or lapse of time which would lead Payne to act on the belief that the contract would not be rescinded. The silence for thirteen months would certainly create the impression that he no longer wished to rescind the contract (see Hanbury and Maudsley Modern Equity 12th Edition 798.

[58] Based on the above the Appellant would have lost his right to rescind through his delay which would then be construed as conclusive evidence that he had decided to affirm the contract. Further he gave evidence that he intended to return to live in the condominium after the big explosion.

[59] Learned Counsel for the Appellant argued that the Appellant is entitled to damages. Again I ask the question, "What damages would the Appellant be entitled to?."

[60] It is trite law that a Court of Equity cannot give damages unless it can rescind the contract. What a court of Equity can do, as was shown in the case of O'Sullivan Management Agency Ltd. mentioned earlier, is to give relief for profits and make allowances for deterioration.

[61] It is my considered opinion that the above noted principle cannot be applied to this case and therefore the Appellant is not entitled to damages.

[62] I now turn to the aspect of specific performance granted to Payne to specifically perform the agreement within two weeks of the date thereof.

While I agree that there are situations in which a court acting in its equitable jurisdiction is not bound to decree specific performance in every case in which it will *not* set aside the contract, in this case I am of the view that Payne should be granted the decree of specific performance of the agreement between the Appellant and himself for the sale of the unfurnished condominium to the Appellant.

[63] I therefore affirm the decision of the Learned Judge and dismiss the appeal but would make no order as to costs.

Suzie d' Auvergne
Justice of Appeal [Ag.]

I Concur

Albert J. Redhead
Justice of Appeal

[64] MATTHEW J.A.: I have read the judgment of d'Auvergne J.A. [Ag.] but I have come to a different conclusion as to whether the Appellant should lose the right to rescind the contract. This appeal pertains to an agreement signed on January 4, 1994 for the sale of a condominium by the Respondents to the Appellant. The land on which the condominium is erected was before and after the sale encumbered by a debenture in favour of the Royal Bank of Canada.

[65] There is no dispute, and in fact during the trial the learned Judge intimated that he was already satisfied, that the Appellant did not know of the existence of the debenture at the time that he entered into the purchase agreement. The Court in effect found that Payne was not a truthful witness when he said he told Mowry that there was a debenture on the property and that he would have to obtain a release before Mowry could get a land certificate.

[66] I agree with Mr. Markham that Mowry became aware of the fact of the debenture in late May, 1997 and then proceeded to make efforts to get a transfer and his title perfected.

[67] Mr. Mowry sought advice from Mr. Sergeant and later from Mr. Kelsick who on June 17, 1997 wrote to Mr. David Payne about the said title. The last sentence of the letter read as follows:

> "We are to inform you that unless a land certificate in favour of our client regarding the said unit is delivered to our offices by 27th instant further action will be taken on the matter."

[68] In RIGNALL DEVELOPMENTS Ltd. v HALIL 1987 3 All ER 170 it was held that the defendant had failed to show good title to the property at the date of completion of the contract, notwithstanding the wording of condition 11, because the defendant, as vendor, was subject to the equitable rule that, if there was a defect in title or an incumbrance of which the vendor was aware, he could not rely on exempting conditions in the contract unless he made full and frank disclosure of the existence of the defect or incumbrance.

Since the defendant had been aware that the charge had been registered when she had purchased the property, it had been incumbent on her to disclose the existence and nature of the charge before the contract with the plaintiff was concluded, and in the absence of such disclosure the conditions of the contract could not be relied on by her.

[69] In CLOUGH v LONDON AND NORTH WESTERN RAIL Co 1861-73 All E.R.Rep 646 The Court of Exchequer Chamber comprising seven judges held that the fact that a contract had been adduced by fraud does not render it void or prevent property, dealt with by it, passing. It merely gives the party defrauded a right, on discovering the fraud, to elect whether he will continue to treat the contract as binding or disaffirm it and resume his property. The contract continues valid until the party defrauded has determined his election by avoiding it; he may keep the question open so long as he does nothing to affirm the contract. MELLOR, J., who read the judgment of the Court stated at page 652 the following: "In all this we agree, and think that, mutatis mutandis, it is applicable to the election to avoid the contract for fraud. In such cases the question is: Has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it? Or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this that if, in the interval, while he is deliberating, an innocent third person has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind."

[70] The Learned Judge went on: "we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is party to the fraud has issued and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind. Neither can we see the principle nor discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea."

[71] By the letter written on his behalf on June 17, 1997 Mowry did not elect to avoid the contract neither did he elect to affirm it.

[72] The evidence is that Mowry vacated the condominium after the big explosion in the latter half of 1997 without making an election one way or another. In his evidence of the condition of Montserrat at the time Payne said "In June 1997 everything in Montserrat was confused, mix-up. You didn't know if you were going or coming. It was a difficult period for all of us here in Montserrat" And Mr. Hogarth Sergeant paints a similar picture when he said "Between May 1997 to late 1997 Montserrat was in utter chaos. It was the height of the volcanic crisis. It was ashing every day. Offices were being constantly moved. Government worked half day. People were constantly leaving the island."

[73] It seems to me difficult to say in these circumstances that because of Mowry's delay the position of the Respondents was affected so as to preclude the Appellant from exercising his right to rescind. He hardly had time to make an election in 1997 until he brought his action six to seven months later in July, 1998.

[74] I think the Appellant was entitled to an order of rescission of the agreement and to get back his money spent on the condominium less a reasonable amount for his use and occupation of the premises for the three years or so that he did.

[75] I would accordingly allow the appeal and set aside the order of the Learned Judge and enter judgment for the Appellant with costs here and below.

(signed)
A. N. J. Matthew
Justice of Appeal