ST. LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 528/2005

BETWEEN:

ANNETTE PHYLLIS SEWELL

Claimant

AND

JOSEPH ALLAIN
STEPHANIE ALLAIN

Defendants

Appearances:
Mr. Peter Foster in association with
Ms. Diana Thomas for Claimant
Mr. Dexter Theodore for Defendants

....

2006: July 3, 4,
August 2,
November 27

....

JUDGMENT

Mason J

[1] This case is a vendor and purchaser dispute in which the Claimant is claiming:

1) an injunction preventing the Defendants from having any dealings with the property until this matter is completely settled;

2) specific performance of the Agreement to sell the property Block 0029B Parcel 3 to the Claimant;

3) further or alternatively general damages for breach of contract;

4) special damages;

5) loss of interest on any sums awarded as damages for such period and at such rate as the court may think fit, pursuant to Article 1009A of the Civil Code Chapter 242 of the 1957 Laws of Saint Lucia.

6) Costs hereof

7) Further or other relief as the court in its discretion decrees fit.

[2] The Defendants are counterclaiming for:

1) damages for breach of contract;

2) a declaration that they were entitled to rescind the agreement for sale;

3) a declaration that the Defendants are entitled to refund the deposit paid by the Claimants;

4) further or other relief;

5) costs

Background

[3] The parties met in late 2004 in St. Lucia and the Claimant indicated an interest in purchasing the property of the Defendants. On realising that the Claimant was from England, the Defendants accepted that she would first have to procure an alien landholding licence from the Government of St. Lucia before she would be allowed to

purchase the property. An agreement for sale was drawn up in October 2004 by the then attorney at law for the Claimant with the assistance of the real estate agent for the Defendants. It was signed by the Claimant and then taken by the said real estate agent to the Defendants for their signature. The Defendants queried two (2) items contained in the agreement which the real estate agent promised to rectify but they nevertheless signed the document and the real estate agent returned it to the attorney at law for the Claimant.

[4] The terms of the agreement for sale are hereby reproduced:

This Agreement made this 6th day of October 2004

Between: Joseph Terrance Allain and Stephanie Allain both of Soufriere, St. Lucia, Retirees (hereinafter jointly and severally referred as **the Vendor)**

And: Annette Phyllis Sewell of 294 Smedley Street, Madlock, Derbyshire DE4 3LH, U.K. retiree, at present in Soufriere, St. Lucia (hereinafter referred to as **the purchaser)**

The Vendor hereby agrees and consents:

1) to sell to **the Purchaser** a portion of land measuring .24 hectares and the building erected thereon situate at Malgretoute in the Quarter of Soufriere registered at the Land Registry as Block 0029B Parcel 3 for a purchase price of **six hundred and fifty thousand dollars ($650,000.00)**;
2) to get a qualified electrician to check the electrical wiring in the building;
3) to install a wooden jalousie door at the front entrance of building;

4) to install the louver window at back of building;

5) to replace ceiling fans

6) to reconnect water tank

7) to trim the trees so as to get a view of the sea;

8) to execute a Deed of Sale free and clear of all encumbrances on completion of the payment of the full purchase price being paid by the **Purchaser**

The Purchaser hereby agrees and consents:

1) to purchase the portion of land measuring .24 hectares and the building erected thereon situate at Malgretoute in the Quarter of Soufriere registered at the Land Registry as Block 0029b Parcel 3 for a purchase price of **Eastern Caribbean six hundred and fifty thousand dollars EC($650,000.00)**
2) to deposit a sum of 15% of the purchase price equivalent to **Eastern Caribbean ninety seven thousand five hundred dollars EC$97,500.00)** upon execution of this Agreement: (Deposit refundable upon the Alien's Landholding Licence being denied)
3) to pay the balance of **Eastern Caribbean five hundred and fifty two thousand five hundred dollars EC($552, 500.00)** in (90) days pending any extension necessary to obtain Alien Landholding Licence.

[5] The agreed deposit was paid and accepted by the Defendants not on the date of the execution of the agreement that is 6th October 2004 but one (1) month after on 3rd November 2004

[6] In order to have the licence processed, there are certain documents which have to be appended to the application viz:

a) finger prints and police certificate of character (the certificate to be from the area in which the applicant resides)
b) four (4) passport size photographs
c) two (2) bankers references
d) two (2) personal references

[7] The Claimant with the permission of the Defendants employed a gardener to landscape and maintain the grounds of the property.

[8] On her return to the United Kingdom in November 2004, the Claimant set about gathering the documentation necessary to support the application for the licence. It is her evidence which I believe that because of the privacy laws in England, she experienced some difficulty in procuring the bank references. The documents were subsequently sent to the Claimant's attorney at law who submitted the application for the licence on 5th January 2005 to the Ministry of Physical Development, Environment and Housing.

[9] A letter dated 3rd March 2005 was sent from this Ministry to the attorney at law for the Claimant indicating that Cabinet had granted approval of the licence subject to the satisfactory fulfillment of certain conditions and that the licence when prepared should be forwarded to the office of Attorney General for vetting.

[10] During the month of March 2005, the arrangement for the gardener came to an end as a result of a visit to the property by the Defendant at which time his presence there was queried by the gardener. The Defendant took umbrage at the gardener's position and made a complaint to the Claimant who immediately asked the gardener to discontinue his work on the premises.

[11} By letter dated 19th April 2005 from the Attorney General's Chambers, the attorney at law for the Claimant was informed of the receipt of triplicate copies of the licence and that the office would continue to visae and process the documents.

[12] By letter dated 25th May, 2005, the Defendants through their attorney at law wrote to the attorney at law for the Claimant as follows:

25th May 2005

Ms Althea Valmont

Laborie Street

Castries

Dear Madam

JOSEPH TERRANCE ALLAIN

STEPHANIE ALLAIN

We act herein and represent the above named:

Our clients instruct us that on or around the 6th day of October 2004, they entered into written agreement for sale with your client ANNETTE PHYLLIS SEWELL. In that agreement, it was agreed between the parties that our clients would sell their property registered in the Land Registry of Saint Lucia as Block and Parcel No: 0029B 3 together with the building erected hereon at a total cost of *Six hundred and fifty thousand dollars ($650.000.00).*

A further term of the agreement was that the balance of the sale price would be paid within a period of ninety (90) days subject to any extension agreed between the parties to facilitate the granting of an Alien's Land Holding Licence.

We are informed that since the expiration of the ninety day period, the balance of the monies have not been paid and no extension has ever been requested from your client or agreed with our client.

On the basis of that breach, amongst other things, please be advised that our clients have treated themselves as discharged from their liability further to perform their own obligation under the agreement for sale and to accept performance by your client if made or tendered.

Please be advised therefore, that our clients are prepared to return the deposit of *ninety seven thousand five hundred dollars ($97,500.00)* less their expenses, loss of income and incidental costs, which was suffered by them, as a result of your client's breach of the agreement for sale.

Please be guided accordingly.

Yours faithfully,

MAUREEN JOHN

[13] On 27th May 2005 the attorney at law for the Claimant filed a caution on the property in the Land Register,

[14] A number of letters passed between the two (2) attorneys at law specifically with reference to the term in the agreement "pending any extension necessary to obtain Alien Land Holding licence".

[15] On 23rd June 2005, the attorney at law for the Claimant informed her client that the licence was about to be received whereupon the Claimant wire transferred the balance of the purchase money which was received by the attorney at law on the next day 24th June 2005.

[16] On 5th July 2005 attorney at law for the Defendants sent to the attorney law for the Claimant the following letter:

5th July 2005

Ms Althea M Valmont

Balboa Edwards Building

7 Jeremie Street

Castries

JOSEPH & STEPHANIE ALLAIN

We have just received instructions from our client.

Please be informed that our client wishes to state categorically once again that they do not wish to sell their property anymore.

We would be pleased therefore if you could inform us as to how and/or where payment should be made for the return of the deposit less expenses.

Please be guided accordingly.

Yours faithfully,

....

MAUREEN JOHN

Evidence

[17] Evidence was by witness statements and cross examination. There were seven (7) witnesses for the Claimant and two (2) for the Defendants.

For the Claimant

[18] The first to give evidence was Althea Valmont, the attorney at law for the Claimant who prepared the agreement for sale and the application for the licence. In her witness statement she spoke among other things of from December 2004 frequent telephone calls either to or from the Defendant about the status and progress of the application for the licence, of herself speaking twice to the Defendant, of hearing while she was on a visit overseas that the Defendant had called the office to say that he was not intending to complete the sale, of the exchange of letters between the two (2) attorneys at law offices.

[19] Under cross examination she stated that the purchase money was not wired before March because it was their understanding that the balance of funds would not be paid until the licence was obtained. She stated that she did not formally make any application to the Defendants to have time extended in respect of the application for the licence but that it did worry her about the length of time it was taking.

[20] The next witness was, Shanel Mondesir Francois who lives near the property and is very familiar with it. Her evidence related to seeing the gardener, the improvements he made to the property and then not seeing him on the property anymore, from around April 2005.

[21] The gardener Ray Butcher told of being employed by the Claimant, of the work he did on the property and of being paid by the Claimant. He told also of his "run in" with the Defendant and of being told by the Claimant not to go to the property anymore.

[22] Under cross examination he denied challenging the presence of the Defendant on the property. He also denied telling the Defendant that he hadn't got paid for all of the time he worked on the property.

[23} The Claimant, Annette Phyllis Sewell was next. Interestingly in her witness statement she noted that in her Affidavit dated 27th July 2005 it was stated that in reliance on the argument she had sold her dwelling house. She said that what she had meant to say was that she had sold her house with the intention of getting a house to stay in St. Lucia. She also stated that she incurred certain expenses in anticipation of the completion: employment of the gardener, construction of front doors for the house, pest control treatment of the property and payment to the real estate agent for organizing and supervising these jobs. In addition she had to pay for storage of her furniture in England. About the middle of February 2005 during a conversation with the first Defendant, she expressed concern about the amount of time it was taking to obtain the licence. According to her he expressly stated that he was not surprised since he was aware that the process

usually takes a long time. She stated that neither during that conversation nor at any time did the Defendants request payment of the balance of the purchase money. During that conversation she repeated her intention to pay the balance as soon as the licence was obtained and he acquiesced. He also complained about the gardener so she discontinued his services.

[24] The Claimant spoke of being notified by her attorney's office that Cabinet had granted approval of the licence and of its being approved by the Attorney General's Office and later of its being sent for signature to the Cabinet Secretary. She also spoke of making several telephone calls during all of these processes to the Attorney's office.

[25] On 25th May, 2005 she was informed by her attorney of the Defendants' actions and on 26th she received a call from their solicitor informing that the Defendants no longer wished to sell her the property. On 23rd June 2005 she telephoned the first Defendant of her intention to wire transfer the balance of purchase money. She stated his intention not to complete the sale because he had had the property valued twice since their agreement and he believed the property had increased in value. She said that she refused to pay the new price but as a gesture of goodwill she would add EC15,000.00 to the purchase price. The first Defendant asked her to speak to his attorney. On that said date – 23rd June 2005 - she was informed by her attorney's office of the receipt of the licence but by that time the banks in England were closed but at the first opportunity on the next day 24th June, she wire transferred the balance of the purchase price together with the additional sum of $15,000.00.

[26] The Defendants still refused to complete the sale.

[27] Under cross examination she stated that when the sale of her house in England was complete in 2004, she had not yet met the Defendants. In response to suggestions from Counsel regarding the misinformation in her affidavit, the Claimant states that although she is literate, she is not a person who reads and writes well, that she had read the Affidavit briefly before she signed it and that she did not understand some of the legal language e.g. "in reliance of the agreement for sale". She said to the Allains that she would be using the money from the proceeds of sale of her house in England to purchase their property. When she signed the affidavit, she was not aware of the error but when she found out, she tried to correct it.

[28] The Claimant admitted that between November 2004 and June 2005 she was not in position to complete the sale but this was because she did not have a licence. She also admitted that she did not tell the Allains that she needed an extension because it was never discussed. It was never said to her that she needed an extension so she never did. She was aware of the approval of the licence in March.

[29] She understood that until the licence was granted she was not allowed to agree to purchase or enter into an agreement. Nobody had at this time asked her for money. She assumed that everybody was waiting for the licence. It did not occur to her to transfer the money to the lawyer's account.

[30] It was not until the letter of May 25th that she realized that the Allains were becoming anxious . She had expressed her concern to her lawyer but she was assured that the documents had to go to a number of departments to be vetted so she stayed patient. She also made reference to the length of time it took to secure the bank references.

[31] She spoke of receiving a telephone call from Ms. John, the Defendants' lawyer to the effect that the Defendants were "pulling out of the contract". She denied that the first Defendant had ever complained about the delay and that he had ever discussed his financial arrangements, or that he was interested in a quick sale or that he was raising funds for a particular project.

[32] The witness Stephanie Popo was the Secretary at the office of the attorney at law for the Claimant. She told of knowledge of the agreement between the Claimant and the Defendants and of several telephone calls with both during the application process and that up until the letter of May 25th, she believed that the first Defendant was receptive to news on the progress of the licence and that he expressed patience in waiting for the Claimant to obtain the licence.

[33] Under cross examination the witness said that until 25th May when "everything fell apart" all the telephone calls had been made by Mr. Allain except when she called him to let him know that the application had been approved and that most of the conversations were with her although he always asked for Ms. Valmont. She referred to a conversation in which the first Defendant told her he was not selling the property any more because he would be selling at a lower value than the property was worth. She stated that every call Mr. Allain

made to the office an enquiry was made about the licence but that these calls only began in March and not November/December 2004.

[34] The witness Desmond Emmanuel admitted to being a friend of the Claimant and to knowing the Defendants who owned a store in Vieux Fort. She told of having a conversation at the store in May 2005 with the second Defendant and of asking the second Defendant what was happening with the house because the Claimant had informed her, Ms. Emmanuel, that the first Defendant did not want to proceed with the sale. She said that the second Defendant said that it was she, the second Defendant, who did not want to continue with the sale because she had been on the internet and realized that they were selling the house cheaply. Cross examination of this witness did not produce anything to refute the crucial aspects of the case.

[35] The last witness for the Claimant was her common law husband. While expectedly supporting the Claimant's side of the case, he impressed me with the clarity of presentation of the facts. I could not say that he was guilty of any prevarication. He was also forthright in his responses to cross examination.

[36] Evidence for the Defendants was given by Maureen John, their first attorney at law and author of the letter of May 25th, the date on which she said she received formal instructions from the Defendants to communicate to the Claimant that the agreement had been breached and that they considered themselves discharged from their obligations under it.

[37] She spoke of receiving numerous calls from the first Defendant, the main thrust of which was to complain and to express his disappointment over the amount of time which was being taken for the issuance of the licence. Her interpretation of Clause 3 was converse to that of the attorney at law for the Claimant. She was of the opinion that in the event that the sale could not be completed within the stipulated three month period, an extension whether orally or verbally ought to be agreed or requested from the Defendants.

[38] This witness stated that she was aware that the Defendants had agreed to sell their property to the Claimant to raise capital to transact some other business without the burden of incurring a mortgage. Due to the lengthy delay they were obliged to apply for and obtain an interest – bearing bridging loan.

[39] Cross examination of this witness centred mainly around the procedure for application and grant of the licence. This will be referred to later. However the witness agreed that in spite of her knowledge about the Defendants concern and frustration over the grant of the licence and their application for the bridging loan, they never gave her instructions to terminate the agreement until May 25th.

[40] The final witness was the first Defendant who gave evidence on behalf of both Defendants. He stated that he understood clause 3 to mean that the Claimant had a deadline of 90 days to pay the balance of the purchase price, that from November 2004 he started making inquiries at the office of the Claimant's solicitor about the progress of the licence, that at no time in November or December 2004 was he ever informed that the application had not even been made.

[41] He never said to anyone that he had no problem with the delay because he was very concerned that the delay was defeating the whole purpose of the transaction which was for him to get quick cash otherwise he stood to pay his bank a lot of interest. He said that he called often because he was very concerned that the deadline had passed and he had not heard anything from the Claimant about her intentions. He said that he did tell the Claimant about the bridging finance. He stated that he never received anything from the Claimant unless he initiated the calls until he felt that "enough was enough" and he rescinded the contract.

[42] Under cross examination the first Defendant revealed that he had his property revalued on 30th May 2005. It was valued at $976,660.00 at that time. He agreed that the need for quick cash was never put in the agreement. He stated that the property had been up for sale 1for about 4 to 5 months, that it had previously been put up with a real estate agency but he had subsequently removed it but he could not recall if this was before the four months he had spoken of.

[43] He admitted telling the Claimant and her partner that the process would be a lengthy one. With respect to the agreement, he took objections to items 3 and 4 (under the vendor's obligations) but he did not cross them out. The real estate agent promised to rectify them. All he did was sign the document as it was. He agreed that when he signed the document, he agreed to everything except items 3 and 4.

[44] He admitted giving the real estate agent the keys so the Claimant could store some of her "stuff" on the property. He said that he indicated to the agent that he intended to rescind

the contract and he also told Ms. John that if he did not get satisfaction that he was going to rescind the contract.

[45] However he agreed that after the 90 day period, he was still willing to continue with the agreement but he was concerned that the Claimant had not paid the balance of the purchase price. He was of the opinion that the Claimant was in breach even before the application was made. Yet he accepted that he never had anyone write either to the Claimant or her attorney at law asking for the balance of the purchase monies. He agreed that when it was done it was perhaps not prudently and that he should have had his lawyer write to request the balance of the purchase price.

[46] He denied wanting more money for the property that he had the valuation done because he wanted more money and that was the reason he rescinded the contract.

Submissions

For the Claimant

[47] Counsel for the Claimant suggests that the issues arising for consideration are:

1. whether the Claimant's failure to pay the balance of the purchase price within 90 days of the date of the agreement was a breach of contract.
2. If yes, whether that breach was a repudiatory breach entitling the Defendants to rescind

3. If no, what are the Claimants remedies. What are the Defendants' remedies, if any.

[48] Counsel submitted that the Claimant's failure to pay the balance of the purchase price within 90 days of the date of the agreement could not be seen as a breach of contract, that there was no express requirement in the agreement for any extension agreed between the parties, that once the 90 days had expired and it became apparent that more time was required to obtain the licence the contract had made provisions for an automatic extension of time that was necessary until the licence was obtained.

[49] Counsel denied that there was any ambiguity in the clause, and argued that since at the time the parties knew that it was possible for the application process to extend beyond 90 days, it is apparent that this was in the contemplation of the parties when the particular phrase **"pending any extension necessary to obtain the Alien's Landholding Licence"** was included in the contract. In the circumstances it would be reasonable to assume that the parties meant for there to be an automatic extension of the contract for the period necessary to obtain the licence.

[50] Counsel suggests that the Defendants having admitted that they were aware of the Claimant's activities in the property and having contacted the Claimant's solicitor and permitted the Claimant to continue with the application, had led the Claimant to believe that the extension had been acknowledged and they were now estopped from claiming that there was breach after the expiration of 90 days.

[51] Counsel also rejected the contention of the Defendants that the Claimant should have paid the balance of the purchase price after the approval of the licence by Cabinet in March 2005 because Cabinet in approving the licence had only sanctioned the granting of the licence and that unless and until the conditions precedent to the issuance of the licence were fulfilled, the Claimant could not have obtained the licence. Counsel argued that in light of Clause 2 of the Agreement which states that the deposit will be refunded if the licence is refused, the Defendants' argument could not be a reasonable interpretation of the agreement.

[52] Counsel is of the view that if the Court finds that the Claimant was in breach then it would be necessary to examine whether that breach was repudiatory, the consequences of the breach and whether this entitles the Defendants to rescind the contract.

[53] Counsel quoted Article 1446 of the Civil Code of St. Lucia and stated that Article must be interpreted according to the Laws of England relating to contracts as is provided for in Article 917A. Counsel therefore suggests that once the contract does not state that it will be avoided if the price is not paid within 90 days of the date of the contract, the Defendants cannot succeed in their claim because they must show that this stipulation as to time was a fundamental or essential term of the contract.

[54] Counsel further submitted that the contract being one for the sale of land, equity will interfere where there is no such express term once there are no special circumstances to suggest that time was of the essence. Counsel made reference to section 41 of the 1925

Law of Property Act of England which provides that there should be implied in every contract for sale of land a term that time was not of the essence.

[55] Counsel argued that the factor which caused the delay was the application for the licence and that no reasonable person could construe the clause to mean that the 90 day period was fundamental to the discharge of the Claimant's obligation to pay the balance of the purchase price. The Defendants' first complaint was in the letter of 25th May 2005 and it was never evident in his conduct before that date that the 90 day period was fundamental to the performance by the Claimant.

[56] Counsel further argued that the Defendants also did not serve notice making time of the essence, that the first written notice was the letter of 25th May 2005 repudiating the contract, that there was no notice or subsequent communication giving notice to complete nor treating the Claimant's failure to obtain the licence as unreasonable.

[57] Counsel contends therefore that time was not of the essence of the contract, that a failure to pay the balance within 90 days or after the approval by Cabinet was not a breach of contract, that the contract itself only required the balance to be paid after the Claimant had obtained the licence which was 23rd June 2005. But however if it is found that the Claimant did breach the contract by failure to pay within 90 days or after Cabinet's approval, the breach was not a repudiatory breach entitling the Defendants to rescind.

[58] In conclusion the Claimant at all times indicated her willingness to pay and complete the transaction even after receipt of the letter of 25th May 2005 repudiating the contract.

For the Defendants

[59] Counsel for the Defendants does not dispute the existence of the contract between the parties. He considers that the sole question for the court is the proper construction of clause 3 of the agreement, that the contract was subject to the grant of the licence, which was a condition precedent which meant that the whole existence of the contract is suspended until the happening of the stated event.

[60] Counsel contends that the contract stated clearly that the balance of the purchase price was payable within 90 days and having been entered into on 6th October 2004 the 90 days expired on 4th January 2005, the date fixed for the completion of the contract.

[61] Counsel argues that although no date was specifically fixed for the fulfillment of the condition precedent i.e. the obtaining of the licence, this did not mean that the Claimant was permitted to obtain the licence on any date after the date fined for the completion of the sale.

[62] Counsel relied on the Privy Council case of Aberfoyle Plantations Ltd., v Cheng (1960) AC 115 that where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date. This meant therefore that the contract having fixed 4th January 2005 as the date for completion of the sale, then the licence ought to have been obtained by that date.

[63] Counsel suggested that the words **"pending any extension necessary"** contemplated that the completion date may have been extended if the licence was not obtained by 4th January 2005 and that while the Claimant contends that such extension was automatic, the Defendants maintain that the onus was on the Claimant to request an extension because the date was not expressly stated in the agreement to be automatic and also if the contract is capable of more than one meaning, it must be construed against its maker, the attorney at law for the Claimant.

[64] Counsel further submitted that in considering whether the Defendants by their conduct agreed to an extension, it must first be stated that an agreement of the extension presupposes an offer from the Claimant that there be an extension but in fact there is no evidence that any such offer was made to the Defendants. The contract having fixed the date for completion (expressly) and the date by which the condition was to have been fulfilled (by implication) such date **"must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles"**. Lord Jenkins in Aberfoyle (supra). The Claimant therefore could not rely on the equitable remedy of specific performance.

[65] There having been a condition precedent which was not fulfilled by the completion date, the whole existence of the contract was suspended and never came into effect for the Claimant's lack of performance.

Findings

[66] It is accepted that the initial issue for determination is the construction to be placed on clause 3 of the agreement for sale. It will be recalled that that clause reads:

> ***"The purchaser hereby: - agrees and consents:***
>
> ***(3) to pay the balance of Eastern Caribbean five hundred and fifty two thousand five hundred dollars EC ($552,500.00) in ninety (90) days pending any extension necessary to obtain Alien's Landholding Licence".***

[67] The general rule in construing a contract is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word. The intention of the parties taken from an objective stance must also be considered. It is not what one or the other of the parties meant or understood by the words used but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract": Chitty on Contract 29th edition volume I paragraph 12 – 043 citing the case of Investors Compensation Scheme Ltd v West Bromwich Building Society (1998) IWLR 896 at 912.

[68] Thus while it is not open to the Court to put upon the words a meaning other than that which they ordinarily bear in order to bring them into line with what the court may think the parties really intended or ought to have intended, the Court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties: J. Evans and Son (Portsmouth Ltd V Andres Merzario Ltd., (1976) 1WLR 1078 at1083. Extrinsic evidence in the form of surrounding circumstances

can therefore be admitted by the Court to aid in the interpretation of the agreement, for in the words of Lord Wilberforce in Reardon Smith Line Ltd v Yngvar Hansen – Tangen (1976) 1WLR 989: "No contracts are made in a vacuum: there is always a setting in which they have to be placed". Surrounding circumstances are to be confined to what the parties had in mind and what was going on around them at the time when they were making the contract: per Staughton LJ in Scottish Power plc v Brittoil Exploration Ltd. The Times December 2, 1997.

[69] Earl Loreburn in F. A. Tamplin S. S. Co. Ltd v Anglo Mexican Pertoleum Products Co., Ltd (1916) 2AC 403 at 404 opined:

> ***"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would come to exist.***
>
> ***And if they must have done so, then a term to that effect will be implied though it be not expressed in the contract. No court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted".***

[70] The question in the instant case would therefore be: by what period did the parties agree that the purchase monies would be paid.

[71] To answer this question, we need to ask, what were the surrounding or relevant circumstances in which the parties to the agreement were placed at the time of its execution on 6th October 2004.

[72] It is an uncontroverted fact that the parties understood and accepted that the Claimant not being a citizen of St. Lucia had first to obtain an alien landholding licence from the Government before she could be allowed to purchase land in St. Lucia. It was also accepted by the parties that a 90 day period for the processing of the licence was not likely to be enough time.

[73] The Claimant in her Affidavit and witness statement said that the first Defendant expressly stated that "He was not surprised by the amount of time it was taking to obtain the licence since he was aware that the process in obtaining such licences usually takes a long time". The first Defendant for his part stated. "I realized that this (the Claimant being from England) meant that she would require an alien landholding licences before she could be in a position to buy our land. I knew this may take 6 weeks or more ….." and under cross examination: "when I spoke to Ms. Sewell and her partner, we spoke about the licence. I recommended a relative of mine to represent them. I told them that the process would be a lengthy one".

[74] This "lengthy process "according to the witness for the Defendants, Maureen John, herself an attorney at law, entailed a number of steps but did not necessarily take a long time, It was stated that of the documents which must accompany the application for the licence,

"the most ticklish part is getting the police certificate of character. The fingerprints do not take long. It takes about 6 weeks to get a police certificate of character …..". The application is submitted to the Ministry of Planning and an acknowledgement from the ministry is sent to the applicant. According to the witness "the time between submission of application and getting the letter from Planning is about three (3) weeks. It is not uncommon for the period between submission of application and approval to be two (2) months".

[75] By her accounting and recounting, the court was of the opinion that despite the witness' protest, the process takes in excess of three (3) months. After approval in principle by the ministry, the licence is sent to the Attorney General's Office for vetting, then a fee must be paid after which the licence is sent to Cabinet for the Prime Minister's signature and then to the applicant.

[76] The witness boasted that if she did not get back her licence she would be "on their backs to ensure that my work is done", and that she had even got a licence in one (1) day. With this the court was suitably impressed until it was revealed that this witness had a distinct advantage over many applicants since her father was the Minister responsible for the ministry where the applications were processed. Consequently I am of the view that her assertions regarding the length of the application process could not be relied upon. I am satisfied that the delay which resulted was due, not to any recalcitrance on the part of the Claimant but because of the steps necessary to complete the process.

[77] The witness had stated that it was her practice once the licence had been approved in principle to conclude the purchase at that point and she did not consider it reckless to do so. While such action may hasten the process, it is clear that until the licence has been signed by the Prime Minister, the process has not been finalized.

[78] The question is whether the Defendant by their conduct had led the Claimant to believe that they would not have enforced their legal right to rescind the agreement.

[79] Denning LJ in Charles Rickards Ltd v Oppenhaim (1950) 1KB 616 at 623 had this to say:

> *"….. if the Defendant as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time agreement then. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it".*

[80] See also Lord Mersery in the Privy Council decided case of Bidaisse v Sampath et al (1999) P C 1.

> *"After the long delay which had taken place, the plaintiff had a right to make time of the essence of the contract …..and he can only be deprived of this*

> ***right by contract or by conduct of his own which would make it unfair for him to insist upon his right.....It remains therefore only to consider whether he had created anything in the nature of an estoppel which precluded him from asserting his right".***

[81] It was given in evidence by both Claimant and first Defendant that the Defendants permitted the Claimant to employ a gardener to maintain the grounds of the property and to store the doors made for the house by the Claimant in the house, this last act some two (2) months after the expiration of the so called completion date of the agreement. The first Defendant denied knowledge of the Claimant's intention to treat the house for termites and woodworms.

[82] The evidence also discloses that notwithstanding the failure of the Claimant to pay the balance of the purchase price on the expiration of the 90 days, the Defendants took no obvious steps to rescind the contract. At that point it would appear to a reasonable person that he displayed the behaviour of a person who is prepared to wait until the licence had been secured and this despite his claims that:

> ***"I know that this (obtaining the licence) may take about six (6) weeks or more, so I explained to the Claimant that we were selling at undervalue because we needed cash within a short period of time and we could not wait for more than 90 days for her to obtain a licence. It is for this reason that a deadline of 90 days for completion was set in the agreement that we signed on 6th October 2004".***

[83] The Claimant claimed that in February 2005 she expressed concern to the first Defendant about the length of time the licence was taking but he indicated that he himself was not surprised. The Defendant denied the date of the conversation and put it much later on 14th March and stated that he reminded the Claimant that he urgently needed the sale to be completed because he needed the monies for another transaction and as a result of the sale not being completed, he had to secure a building loan at a high interest rate. This the Claimant denied.

[84] The Defendants are there fore estopped from claiming that they were not in agreement with the activities carried out by the Claimant:

> ***"Lord Denning MR in <u>Moorgate Mercantile Company Ltd. v Twitchings</u> (1976) 3 WLR on the question of estoppel said:***
>
> ***"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this. When a man by his words or conduct had led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable to do so".***

[85] Under cross examination, the first Defendant accepted that despite these concerns, he agreed that "after the 90 day period I was willing to continue with the agreement " and that " no one wrote to either Ms. Sewell nor Ms. Valmont asking for the balance of the purchase monies". He had earlier stated that he had indicated to Mr. Alphonse (the real estate

agent) that he intended to rescind the contract and also he told Ms John (attorney at law) that if he did not get satisfaction, he was going to rescind the contract. Yet in March 2005 he had given the keys to the property to Mr. Alphonse so that the Claimant could store some materials there. In addition the first Defendant stated that the Claimant was in breach of the agreement even before the application for the licence had been made. Yet the evidence reveals that the deposit had been made one (1) month after execution of the agreement and had been accepted by the Defendants.

[86] Ms. John agreed that while the first Defendant did express concern at the length of time the licence was taking, he never at any time gave her any instructions to terminate while they were having frequent calls between the date of the expiration of the 90 day period and 25th May 2005 when the agreement was rescinded.

[87] It is the argument of the Claimant that she did not believe that it was necessary for her to request an extension of the completion date. Under cross examination she states:

> ***I did not tell the Allains that I needed an extension. It was never discussed. It was never put to me that I needed an extension, so I never did. When the licence was approved in February I was aware of it, I knew in March that the licence had been approved in principle....I understood that until the licence was granted I was not allowed to purchase...Nobody at this time had asked me for any money. I assumed that everyone was waiting for the licence".***

[88] The first Defendant in his witness statement said that they did not rescind the agreement only because of the Claimant's failure to request an extension but because she had refused to pay the balance of the purchase price.

[89] Under cross examination he states:

> ***"I did tell the Claimant that I needed the cash within 90 days. After 90 days I asked for it. I have proof, telephone calls. I asked for the money. I did not document it. I did not instruct my lawyers to ask for the money after the 90 day period".***

[90] Vounard in his book Sale of Land at page 303 states:

> ***"Once a party who is entitled to rescind elects to do so and intimates that election to the other party his act is final and conclusive and cannot be withdrawn. Similarly if a party having the right to rescind does any unequivocal act indicating an intention to treat the contract as still subsisting, he would be deemed finally and conclusively to have waived that right but to amount to a waiver an act must be one which is inconsistent with the idea that the party still intended to rely on the strict letter of the condition question".***

[91] It is evident by the words and conduct of the Defendants that they agreed to the automatic extension of the completion date to allow for the grant of the licence and even if as they argue that the extension was not automatic and the onus was on the Claimant to request

an extension, they are nevertheless estopped from seeking to make the extension an implied term of the agreement by their conduct subsequent to the "expiry" date.

[92] The first Defendant sought to give the Court the impression that they rescinded the contract because "the delay was defeating the whole purpose of the transaction which was for me to get quick cash otherwise I stood to pay my bank a lot of interest ….I did not tell the Claimant that I had no problems with the delay. In fact I said to her that the delay was causing me to secure bridging finance from the First Caribbean International Bank at high interest". He stated that he had told the Claimant that they were selling at an undervalue.

[93] I have had the benefit of seeing and hearing this witness and I should state that his testimony impacted on his creditability. I found his statements to be disingenuous and I formed the firm conviction that his assertions regarding the bridging loan and the quick sale to be of recent fabrication made only to meet the evidence of the reason for rescission.

[94] Under cross examination it was revealed that the Defendants had had the property valued and thereby discovered that the value was now significantly greater than the price at which they had agreed to sell to the Claimant. I therefore have serious doubts about the bona fides of the Defendants' reason for rescinding of the contract: that it had less to do with the failure of the Claimant to obtain the licence or to do with the fabricated story about bridging loans and quick sale and more to do with the increase in value of the property. The Defendants used the delay in obtaining the licence to attempt to extricate themselves for the agreement.

[95] To answer the two interconnecting questions previously asked:

(1) by what period did the parties agree that the purchase monies would be paid, and

(2) whether the Defendants by their conduct led the Claimant to believe that they would not have enforced their legal right to rescind the agreement

[96] It is my opinion that the language of the agreement of the 6th October in its primary meaning is unambiguous and is quite realistic taking into account the extrinsic circumstances referred to and in which the parties were placed at the time of entry into the agreement. That primary meaning was taken by the court to be the meaning intended to attribute to their agreement. Clause 3 was revealed as meaning that the Claimant would pay the balance of the purchase money on 90 days after the execution of the agreement but the parties being of the understanding that obtaining the licence being a lengthy process, the balance of the purchase price would be paid when the licence was obtained by the Claimant.

[97] Counsel for the Defendants urged this Court to be guided by the direction of the Privy Council in the case of Aberfoyle Plantations Ltd. v Cheng (1960) AC 115 in which the following general principles were reiterated:

1) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date

2) when a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time

3) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles

[98] Counsel suggested that the decision in that case should be followed and this court should find that in the instant case, the agreement for sale was conditional upon the Claimant obtaining an alien landholding licence, that a date for completion was fixed, that the completion date be strictly adhered to and the time allowed not "be extended by equitable principles".

[99] Counsel cited Lord Jenkins who delivered the judgment of the court and said:

> ***"their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest".***

[100] In the Aberfoyle case, the parties entered into an agreement for the sale of property to which the appellant vendor had a good title to part of the property but title to the other part depended on the successful negotiation for the renewal of certain leases. The agreement for sale incorporated conditions relating to the renewal of the leases and in fact the suit created around the construction of the conditions when negotiations for the renewal of the leases which had been ongoing for over five (5) years had, by the date of the agreement, achieved no conclusive result.

[101] The relevant condition was contained in clause 4 of the agreement and provided that "The purchase was conditional on the vendor obtaining at his expense a renewal of the leases and 'and if for any cause whatsoever the vendor is unable to fulfill this condition this agreement shall become null and void ………" (emphasis supplied)

[102] Clause 1 of the agreement had provided that "subject to the condition contained in clause 4, the vendor will sell and the purchaser will buy" the property.

[103] The argument for the purchaser which was accepted by the Court was that the agreement demanded fulfillment on the date set because "at the very outset of the agreement, the vendor's obligations were by clause 1 expressed to be subject to the condition contained in Clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfillment of which the function of a binding contract of sale between the parties was made to depend. Thus in clause 4 itself the "purchase was made "conditional upon" the vendor obtaining a renewal of the leases, and in the event of the vendor "being unable to fulfill this condition" the agreement was to become null and void:

[104] The court found that the parties chose to fix April 30th as the date fixed for what they themselves described as "completion" and must be bound by the choice.

[105] While it would be presumptuous of me if I were to be seen to be diverging from the principles in the Aberfoyle case, I hold that our case can be distinguished from that case.

[106] In the Aberfoyle case, the parties were very clear:

1) that their agreement was conditional
2) as to what their intentions were regarding completion and
3) what would be the result if the date for completion were not adhered to

[107] In the instant case, the parties were equally clear viz that an express stipulation as to time could not be read into the agreement, that if the date for completion came, that is 90 days after execution and the licence was not granted, an extension would become necessary. I could not find either by the intention of the parties or by the conduct of the parties that the words "pending any extension necessary to obtain Alien's Landholding Licence" constituted a condition precedent.

[108] It is clear then that the term "pending any extension necessary to obtain …." does not relate to what I choose to refer to as the fundamentals of the agreement but to the time for payment of the purchase price. It is not a condition precedent. The parties intended to be bound by the agreement and that particular clause, it appears to me, was introduced

specifically to make clear beyond any doubt that the parties were to be bound. The insertion of the clause was deliberate and was meant to be for the mutual benefit of the parties.

[109] The Defendants argued that the document having been drafted by the Claimant should be construed against her and should impliedly exonerate them from complying with that particular clause.

[110] It was the evidence of the first Defendant that when the real estate agent brought the agreement to him and his wife to sign that he made queries not about that particular clause but about two other items. The Defendants then signed and returned the document.

[111] In Delta Vale Importers Ltd v Mills and others (1990) 2 AER 176, Slade J said at page 181(g):

> ***"It is always open to a party to a contract without the assent of the other party, wholly or partially to waive compliance with a provision which would operate solely for his own benefit, either indefinitely or for a specified period provided that he makes his intention plain".***

[112] Therefore the Defendants having asked no questions about nor made any reference to that particular clause are taken to have read, understood and accepted it and determined

that awaiting the obtaining of the licence would redound to their benefit in concluding the sale. To state otherwise at this stage is to my mind, a mere afterthought.

[113] I therefore come to the conclusion that there never was here such a breach by the Claimant as would have been equivalent to a fundamental breach of the agreement and so on the 25th May 2005 when the Defendants purported by their letter to rescind the agreement, that the agreement was still in force and therefore enforceable and the Defendants were not at liberty to terminate it.

[114] However if I am wrong to have so construed the agreement and the agreement did in fact contain a stipulation as to time, that aspect will now stand to be considered.

[115] The Defendants by their letter of 25th May 2005 "treated themselves as discharged from their liability further to perform their own obligations under the agreement" since on the expiration of the 90 day period the balance of the purchase monies had not been paid and no extension of the time had either been requested or sought by the Claimant.

[116] Article 1446 of the Civil Code of St. Lucia provides:

> ***"The seller of an immovable cannot demand .and the avoidance of the sale by reason of the failure of the buyer to pay the price unless there is a special stipulation to that effect".***

[117] Under Article 917A of the Code it is to be noted that "the law of England for the time being relating to contracts ……..shall *mutatis mutandis* extend to this Colony" and consequently regard should be had to section 41 of the Law of Property Act 1925 which provides that:

> ***"Stipulations in a contract as to time or otherwise, which according to the rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules".***

[118] Chitty on Contract (op cit) at paragraph 21-012 explains this section thus:

> ***"…….the rules at law are now the same as those in equity: the effect of s.41 that "contractual stipulations as to time ……shall not be construed as essential except where equity would before 1875 have so construed them – that is only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication", or in other words, S. 41 does not negative the existence of a breach of contract where one has occurred, but in certain circumstances it bars any assertion that the breach has amounted to a repudiation of the contract" which entitles the innocent party to treat the contract as terminated".***

[119] Chitty goes on to make reference to the three (3) instances in which time is of the essence of a contract viz:

1) where the parties have expressly stipulated in their contract that the time fixed for completion must be exactly complied with, or

2) where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, or

3) where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other may give notice requiring the contract to be performed within a reasonable time.

[120] But where none of these three (3) instances applies, the effect of section 41 is that the breach of a stipulation as to time is not of itself a repudiatory breach which entitles the innocent party to terminate further performance of the contract.

[121] Walton J in interpreting this section in the case of Rightside Properties v Gray (1975) 1 Ch. 72 had this to say at page 83:

> ***"The date fixed for completion by the contract is not to be taken to be one of which time is of the essence; it is to be taken to mean that completion is to take place by that date, or within a reasonable time thereafter. Accordingly, there is no fundamental breach by a party who cannot or does not complete on the day fixed for completion, provided he completes or is ready to complete within a reasonable time thereafter".***
>
> ***(Emphasis supplied)***

[122] In the earlier case of Stickney v Keeble (1915) AC 386, Lord Parker of Waddington said:

"……in a contract for the sale and purchase of real estate, the time fixed for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect………."

In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of contract.

[123] Reference is to the Australian case of Louinder v Leis (1982) 149 CLR 509, the headnote of which reads:

Where a contract for the sale of land contains a stipulation as to time which is not of the essence of the contract, and one party is in breach or guilty of unreasonable delay, the party not in default may give notice fixing a reasonable time for performance and making it of the essence of the contract. When the other party is in breach, the notice may be given even though he has not as well been guilty of unreasonable delay".

Gibbs C. J. in that case said at page 512:

"There is no doubt that where a contract contains a promise to do a particular thing on or before a specified day, and time is not of the essence of the promise, the promisee can, generally speaking, only rescind for non-performance on that day if he has given a notice requiring performance within a specified reasonable time and there has been a failure to comply with that notice ...... The question which arises is whether it is enough to enable the party not in default to give a notice that the other party is in breach of the contract, whether as some text writers suggest, the notice can only be given to a party who has been guilty of unreasonable delay".

And also at page 514:

In principle it seems to me that such delay entitles the innocent party to treat the contract as at an end provided that if time is not of the essence of the contact, he first gives a reasonable notice which is not complied with (Emphasis supplied)

[124] Also in the case of Stickney v Keeble (supra) Lord Parmoor quoted the legal text of Sugden on Vendors which I found to be quite apposite to the present case:

> ***Where time is not made of the essence of the contract itself although a day for performance is named, of course neither party can strictly make it so after the contract, but if either party is guilty of delay a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given; but a reasonable time must be allowed". (Emphasis supplied)***

[125] At the risk of being prolix I refer for emphasis to the Trinidad and Tobago case of Bridaisee v Sampath et al which reached the Privy Council but where Goopesingh JA at the stage of the Court of Appeal had this to say:

> ***" I hold that in a contract which fixes a date for completion (as opposed to an open contract) if one party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non essential term. The date fixed for completion cannot be treated as a mere target date. As a result the innocent party may immediately thereafter give a notice that the other party is in breach of contract and make time of the essence. However the time limited for completion by that notice has to be reasonable. It is no longer necessary to***

wait until there has been an unreasonable delay after that breach before such a notice may be served. Such a breach of a non essential term does not however entitle the innocent party to treat the breach as a repudiation of the contract justifying rescission and to rely on same as a ground for avoiding an action for specific performance by the party in breach. It is only if the party after being served with a notice to complete within that reasonable period fixed by the notice (which in effect makes time of the essence) that the innocent party can treat such failure as a repudiation of the contract justifying rescission".

[126] It is evident therefore from the legal authorities that whether a day is or is not fixed for completion by a contract for the sale of land, unless time has been made of the essence, neither party is entitled to rescind on the ground of delay of the other in completing without first giving him notice calling upon him to complete within a reasonable time: Cover v MacLaughlin (1897) 18ZR NSW 107 reported in Volume 42 of the Australian Digest.

[127] Applying these principles to the case at bar, I am prepared to say that in the absence of an express stipulation as to the date for completion of the sale of the property by the Defendants to the Claimant, it is seen that time is not of the essence of this agreement. However, although time was not originally of the essence of the agreement, it could have been made so by the Defendants giving proper notice to the Claimant to complete with a reasonable time in spite of their being earlier apparent acquiescence by them in the inordinate delay in procuring the licence. Therefore having within the period 4th January 2005 (the computed 90 days after execution of the agreement) and 25th May 2005

(termination of the agreement by the Defendants) acquiesced to the delay, the Defendants are precluded from asserting their right to "treat themselves as discharged from their liability further to perform their own obligations under the agreement".

[128] And I so find.

Remedies

[129] It is an established principle of law that a purchaser who enters into a specifically enforceable contract for the sale of land acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable. On making precompletion payments on account of the price, the purchaser acquires an equitable lier on the land to secure their repayment if the contract goes off.

[130] By Article 956 of the Civil Code it is provided:

> ***The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which by equity, usage or law are incident to the contract, according to its nature".***

[131] To be read in conjunction with this Article is in my opinion Article 997 which deals with the effect of such obligation. That Article provides:

The creditor may without prejudice to his claim for damages, demand specific performance or fulfillment in a case which admits of it or that he may be authorized to execute the obligation at the debtor's expense.

[132] A "creditor" is defined by the Code as "not merely one to whom money is owing but one to whom is owing any kind of obligation" and a "debtor" is "merely one who owes money, but who owes or is subject to any kind of obligation, whether arising from contract, quasi contract, delict, quasi delict or any other source".

[133] It is also an established principle that specific performance is a discretionary remedy which the court will not grant where the complainant is in default of an essential condition. For a Claimant to obtain specific performance he must show himself "ready, desirous, prompt and eager".

[134] In the above cited case of Stickney v Keeble, Lord Atkinson quoting from the case of Tilley v Thomas (1867) LR 3 CR 61 and more specifically Lord Cairns had this to say:

"The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be in equity the same as in a Court of law. A court of Equity will indeed relieve against (sic), and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v Berry (2) there is nothing in "the express stipulation between the

parties, the nature of the property, or the surrounding circumstances", which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract".

[135] He was echoed by Lord Parker of Waddington in the same case to the effect that where it (equity) could do so without injustice to the parties, specific performance would be decreed. See paragraph above.

[136] Also in the previously cited case of Louinder v Leis, Mason J said:

"(Accordingly) delay beyond the stipulated date will give rise to a liability in damages. But because equity treats the time stipulation as nonessential breach of it does not justify rescission by the innocent party and will not bar specific performance at the suit of the party in default".

[137] In our case, the Claimant was of the belief that the purchase price only became due on the grant of the licence. The evidence reveals that immediately upon receipt of information from her attorney at law that the licence had been granted, she wire transferred the balance of the purchase monies, indicating that she was ready, desirous, prompt and eager. And this despite having been given notice that the agreement had been terminated by the Defendants one (1) month earlier.

[138] Walter J in the Rightside case (supra) said:

"It is surely at the "material" time(s) that the purchaser must be ready with his finances. One of such times must have been when completion ought to have taken place".

[139] For our purposes as has been decided completion was on the grant of the licence.

[140] In light of the foregoing, it is my opinion that, in addition to there being no evidence that an order of specific performance would be unconscionable, inequitable or unjust, that on a construction of Article 997 of the Code the Defendants owed to the Claimant an obligation to perform the term of the agreement and so the Claimant may demand specific performance.

[141] In the premises, this court will make an order for specific performance.

[142] According to Article 997 a demand for specific performance is without prejudice to a claim for damages. The Claimant's claim is for damages with reference to miscellaneous items.

[143] The evidence of the Claimant in her affidavit was that in reliance on the agreement between herself and the Defendant she had sold her house in England. She corrected this in her subsequent witness statement by saying "what I meant to say is that I had sold my house with the intention of getting a house to stay in St. Lucia. Under cross examination she admitted that her house in England had been sold in September before she met the Defendants. I did not conclude that this error in judgment affected

her credibility or impinged upon the enforceability of the contract.

[144] The court having decided that the material time for completion of the contract being the date on which the licence was granted that is 20th June 2005, but the purchase monies having been paid on 24th, that the Claimant can only be reimbursed for such storage fees as have accumulated since 24th June 2005.

Counterclaim of the Defendants

[145] Certain figures were proffered to the court but not supported by any evidence documentary or otherwise. However having decided that the Defendants were themselves in breach of the agreement, their counterclaim is denied.

Order

Judgment is given for the Claimants

Counterclaim of the Defendants is hereby dismissed.

An order for specific performance is hereby granted directing the Defendants to complete execution of the Deed of Sale within one (1) month of this judgment.

Damages limited to storage fees at the rate of £418.18 from 24th June 2005 until execution of Deed of Sale.

Cost prescribed in accordance with part 65 CPR 2005.

Sandra Mason QC

High Court Judge