THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2014/0005

BETWEEN:

GEDDES MEYER

Appellant/Counter Respondent

and

KEHVIN DICKINSON

Respondent/Counter Appellant

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. George Lake for the Appellant
Ms. Safiya Roberts with her Ms. Kamilah Roberts for the Respondent

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2019: June 19;
October 31.

Civil appeal – Contract – Breach of contract for sale of land – Specific performance – Whether time was of the essence in the contract – Frustration – Whether judge erred in concluding that the contract had been frustrated – Whether judge erred in refusing to order specific performance – Whether judge erred in not awarding mesne profits and costs.

The appellant, Mr. Geddes Meyer ("Mr. Meyer") leased land from the respondent, Mr. Kehvin Dickinson ("Mr. Dickinson") on which Mr. Meyer built a structure and carried on business for several years. Subsequently, Mr. Meyer entered into a contract with Mr. Dickinson for the purchase of the land. To secure financing for the purchase of the land, Mr. Meyer was required to pay taxes owed to the Government of Antigua and Barbuda ("the Government"), which were to be assessed by the Government. The tax value was to be incorporated in the financing which was being sought, which meant that

obtaining the financing was dependent on the assessment being completed. The Government's assessment was not carried out in a timely manner. The delay in the assessment resulted in the failure of Mr. Meyer to acquire the requisite financing from the bank.

The contract for the sale of land did not indicate that time was of the essence. However, the parties had agreed to a single extension of time for completion of the sale. Mr. Dickinson refused to agree to further extensions and sold the land to a third party a few days after the extended date and for a price which was higher than that agreed to with Mr. Meyer. Mr. Meyer sued Mr. Dickinson for specific performance of the contract. The crux of his position was that he ought to have been given the first option to purchase the land having been in occupation of it. Mr. Dickinson filed a counter claim on the basis that Mr. Meyer had breached the contract and unlawfully occupied the land thereafter. In his counter claim, Mr. Dickinson claimed mesne profits.

The learned judge held that the contract had been frustrated by the act of the Government, and that Mr. Dickinson was entitled to treat the contract as at an end. The learned judge however, did not award Mr. Dickenson mesne profits.

Being dissatisfied with the decision of the learned judge, Mr. Meyer's has appealed and Mr. Dickinson has cross appealed, each raising several grounds. The issues arising on the appeal and the cross appeal are: whether time was of the essence in the contract; whether the learned judge erred in concluding that the contract had been frustrated; whether the judge erred in refusing to order specific performance of the contract; and whether the learned judge erred in not awarding Mr. Dickinson mesne profits and costs.

Held: allowing the appeal in part and awarding to Mr. Meyer nominal damages in the sum of $40,000.00; allowing the counter appeal and ordering Mr. Meyer to pay Mr. Dickinson mesne profits in the sum of $6,625.00 per year from 1st January 2011 to the end of Mr. Meyer's occupancy of the land; ordering Mr. Meyer to vacate the land within six months of the delivery of this judgment; and making the costs order stated at paragraph 66 of the judgment, that:

1. It is the law that a term or stipulation in a contract relating to the time of performance is not generally regarded as being 'of the essence'. Time is made of the essence where the parties have expressly stipulated in the contract that the time fixed must be met or that time is to be 'of the essence' In cases where time has not been made of the essence, the law requires that agreed obligations are to be performed within a reasonable time. Where there has been unreasonable delay by one party, the innocent party should give notice of an intention to terminate due to the breach or the failure to complete the contract. In this case, there is no evidence from which it could be correctly concluded that time was to be of the essence. Indeed, it was not so stipulated in the contract and there was no notice issued to make it so.

D & B Trucking and Trailer Hauler Service Ltd v Caribbean Insurers Ltd BVIHCVAP2008/0025 (delivered 8th February 2010, unreported) followed; **Universal Cargo Carriers Corporation v Ciatati** [1957] 2 All ER 70 applied.

2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is being called for would make the contract radically different from what was agreed. The effect of frustration in law is the immediate termination of the contract. In the present case, time was not of the essence in the contract and Mr. Dickinson had not issued a notice that time was of the essence. Therefore, in order for the contract to have been frustrated, the delay ought to have been a frustrating delay at the time Mr. Dickinson opted to treat the contract as at an end. There is no doubt that Mr. Meyer was not afforded a reasonable amount of time within which to complete the payment. A delay of a mere few days cannot be regarded in law as having frustrated the contract, bearing in mind that Mr. Meyer was in occupation of the land as a lessee for several years and the need to have the land evaluated for taxes in order for him to secure the loan. Accordingly, there was no frustration of the contract and the learned judge erred when he ruled that the contract had been terminated by frustration.

   Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1 applied; **Hirji Mulji and Others v Cheong Yue Steamship Co Ltd** [1926] AC 497 applied; **Davis Contractors Ltd v Fareham Urban District Council** [1956] 2 All ER 145 applied.

3. Specific performance is an equitable remedy to a cause of action for breach of contract. The remedy is not available where damages would be an adequate compensation to an innocent party. Further, where the parties have not made time of the essence, the courts would not usually grant the remedy of specific performance where the obligation to complete was not performed. In this case, since time was not of the essence in the contract, Mr. Meyer was required to prove that all of his contractual obligations had been fulfilled or that he was ready and willing to perform all of the obligations required by the contract. However, Mr. Meyer has not provided to this Court, or to the court below, any proof that he had performed or was able to perform his main obligation under the contract, namely the payment of the purchase price. Accordingly, specific performance is not an appropriate remedy in the circumstances. Damages would be an adequate remedy to compensate Mr. Meyer for any losses suffered as a result of Mr. Dickinson's breach.

   Ramsbury Properties Limited v Ocean View Construction Limited SKBHCVAP2011/0020 (delivered 29th January 2019, unreported) followed; **Beswick v Beswick** [1968] AC 58 applied; **Greer v Alston's Engineering** [2003] UKPC 46 applied.

4. The owner of land will have an action for wrongful use and occupation or mesne profits against a person who has been in occupation of land without a contract. Generally, mesne profits may be claimed from the date on which the landlord became entitled to possession of the land. There is no doubt in this case that at the end of the lease, Mr. Meyer was a tenant holding over and as such is under an obligation to pay rent. The lease came to an end after one year, namely on 31st December 2010 and Mr. Meyer remains in possession of the land and has not paid rent. In the circumstances, Mr. Dickinson is therefore entitled to recover, from Mr. Meyer, mesne profits from the date on which the land should have been yielded up to the date Mr. Meyer vacates the land.

   Ministry of Defence v Thompson [1993] 2 EGLR 107 applied; **Beswick v Beswick** [1968] AC 58 applied; **Greer v Alston's Engineering** [2003] UKPC 46 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal by Mr. Geddes Meyer ("Mr. Meyer") against the decision of the learned judge in which he dismissed Mr. Meyer's claim against Mr. Kehvin Dickinson ("Mr. Dickinson") for breach of a contract for the sale of land. There is also a counter appeal by Mr. Dickinson on the basis that he had been successful in establishing his counterclaim against Mr. Meyer. Mr. Dickinson's counter appeal includes an appeal against the learned judge's refusal to award him costs and mesne profits. The appeal and the counter appeal are respectively resisted by Mr. Dickinson and Mr. Meyer.

Background

[2] Mr. Dickinson was the owner of a parcel of land located on All Saints Road. Mr. Meyer had leased the land from him and constructed a building on the land which he (Mr. Meyer) used for his mechanical business for several years.

[3] In 2010, Mr. Meyer entered into a contract with Mr. Dickinson for the purchase of the land from him. Mr. Meyer required financial assistance to make the purchase and therefore sought a loan from a bank in order to effect the purchase. To obtain the loan from the bank, he was required to pay the taxes that are owed to the

Government of Antigua and Barbuda (the "Government"). The Government was required to assess the value of the land for the purpose of his payment of taxes. The taxes due also had to be assessed in order to be included in the loan sum. The Government did not carry out the assessment in a timely manner and due to the delay, Mr. Meyer was unable to obtain an indication of the outstanding taxes and was therefore unable to provide that information to the bank in order to obtain the loan.

[4] There was nothing in the contract for purchase which made time of the essence. However, the parties seemed to have agreed to one extension of time for completion of the sale. Mr. Dickinson was unwilling to further extend the time and sold the land to the Mansoors for a higher price, a mere few days after the date for the payment of the purchase price had expired. Before the contract for purchase of the land could have been entered between Mr. Dickinson and the Mansoors, Mr. Meyer caused a caution to be placed on the land register, which clearly indicated his interest in the land.

[5] Mr. Meyer held the view that he was entitled to have the land and he therefore focused on his right pursuant to the contract for sale. He insisted that since he had occupied the land for several years, he ought to have been given the first option to purchase the land. He maintained that Mr. Dickinson ought not to have given the Mansoors priority over him and sued Mr. Dickinson for specific performance of the contract. Mr. Dickinson counterclaimed, alleging that since Mr. Meyer had breached the contract and had continued to occupy the land unlawfully after the agreement had been terminated, that he, Mr. Dickinson, was entitled to receive mesne profits for the unlawful continued occupation of the land by Mr. Meyer.

Judgment in the court below

[6] The learned judge held that the contract between Mr. Meyer and Mr. Dickinson for the purchase of the land had been frustrated by the act of a third party, namely the

Government, which had failed to assess the taxes and that the contract was at an end. The learned judge also held that Mr. Dickinson was justified in treating the contract as at an end and that he had not breached the contract. However, he refused to award mesne profits and costs to Mr. Dickinson.

The Appeal

[7] Mr. Meyer was dissatisfied with the decision of the learned judge and appealed to this Court. The notice of appeal challenges the following findings of the judge:

> "(a) That in the circumstances of the case a contract can be frustrated by the failure of a third party to perform. And that the time that had expired could amount to a frustration of the agreement.
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> (b) That it is not the law that where an agreement for sale of land has no completion date a party must indicate to the side who has failed to perform that time is of the essence and must give them a reasonable date to complete by."

The Counter Appeal

[8] Mr. Dickinson's counter notice of appeal outlines the following four grounds of appeal:

> "(i) The Learned Trial Judge erred in law by finding that the Respondent who is the registered proprietor and holder of the legal interest in the parcel of land was not entitled to claim mesne profits from the Appellant in circumstances where it was admitted that the Appellant had remained in occupation of the land and had failed to pay rent since December, 2010.
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> (ii) The Learned Trial Judge erred in law by finding that the Registered Proprietor's rights to claim mesne profits as against the Appellant, being a tenant holding over were extinguished by the transfer of the beneficial interest in the property to Esau Mansoor, Edward Mansoor and George Mansoor in July 2010, in circumstances where the transfer of the legal estate had not yet been completed by the registration of the Mansoors as registered proprietors.
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> (iii) The Registered Proprietor remains entitled to claim rents and profits from the Appellant until the transfer of the legal estate is completed by the registration of the beneficial owners as registered proprietors, although the mesne profits paid after the transfer of the beneficial interest would be held on trust for the beneficial owners of the property.

(iv) The order that each party should bear his own costs was based on a finding that the Claimant had failed to establish his claim and the Defendant had failed on the counterclaim. As it is submitted that the decision on the counterclaim was wrong in law, the consequential costs order should also be reversed and substituted with an order that the Appellant should pay the costs of the court below."

Issues on Appeal

[9] The issues on appeal and cross appeal that arise for determination by this Court are:

(a) whether time was of the essence in the contract;

(b) whether the learned judge erred, as a matter of law, in concluding that the contract had been frustrated;

(c) whether the learned judge erred in refusing to order specific performance of the contract;

(d) whether the learned judge erred in not awarding Mr. Dickinson mesne profits and costs.

Submissions on behalf of Mr. Meyer

[10] Learned counsel, Mr. Lake, stated that there was never an intention between the parties that time was to be of the essence in the contract. Mr. Lake also stated that Mr. Meyer admitted that the terms of the contract had no reference as to time. He also said that there was no indication at any time from Mr. Dickinson that there was a deadline given for the completion of the contract. Mr. Lake argued that, in light of the evidence, Mr. Meyer was 'entitled to a reasonable time having regard to the circumstances as they actually existed'[1] and that the delay caused by the failure of the Revenue Department of the Government to assess the taxes in a timely manner was through no fault of Mr. Meyer. He therefore said that the judge should not have treated the contract as being frustrated on that basis.

[1] See: amended claimant's submissions, p. 6.

[11] Relying on **Chitty on Contracts**[2] and **Behzadi v Shaftsbury Hotel Ltd.**,[3] Mr. Lake argued that Mr. Dickinson had two options available to him, one being to issue a notice making time of the essence as soon as there was any delay, or to wait for a longer period of time until the delay was sufficient to amount to a frustrating delay. Mr. Lake therefore posited that Mr. Meyer was not given any reasonable time to remedy any breach.

[12] Furthermore, Mr. Lake maintained that the learned judge erred in finding that the contract was frustrated. Relying on **Universal Cargo Carriers Corporation v Ciatati**,[4] Mr. Lake contended that since time was not of the essence, there was no basis for the judge to conclude that the contract was frustrated without any notice being given. Mr. Lake said that the learned judge should have considered that the contract commenced on 28th April 2010 and that it was understood that Mr. Meyer had to obtain a loan and had to wait for the Government to assess the taxes. Mr. Lake pointed out that the type of delay that occurred was customary, and not exceptional, in Antigua and Barbuda.

[13] In addition, Mr. Lake argued that the judge should have held that since Mr. Dickinson did not, at any time, give Mr. Meyer any notice to make time of the essence, he therefore could not, on 26th May 2010, contend that the contract was frustrated. He further opined that as illustrated by **Universal Cargo Carriers Corporation**, it would have required much more time, in order for the contract to have been treated as at an end. Mr. Lake also relied on **Carl Khan et al v Randath Holdings Limited**[5] in support of his argument that, the time required to end a contract by frustration is not weeks as in this case. He further posited that it was unreasonable for Mr. Dickinson to have treated the contract as frustrated without so indicating to Mr. Meyer.

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[2] Chitty on Contracts, 28th edn. Vol. 1, Sweet & Maxwell 1999.
[3] [1991] 2 All ER 477.
[4] [1957] 2 All ER 70.
[5] HCA S 539 of 1998.

[14] Mr. Lake emphasised that the contract was finalised in April 2010 and any subsequent change to the terms would have required agreement by both parties. In the alternative, Mr. Lake indicated that seven days after Mr. Meyer spoke to Mr. Dickinson, the latter sold the land to a third party. He therefore complained that a reasonable amount of time was not given to Mr. Meyer, as seven days cannot be considered reasonable.

[15] Mr. Lake said that in the circumstances Mr. Meyer is entitled to the remedy of specific performance. The crux of his submission is that Mr. Meyer has performed all the terms of the contract and that the reason Mr. Dickinson sold the land to a third party was because he got a higher sale price. Further, he stated that the Mansoors are estopped from claiming they purchased the lands without knowledge that there were issues surrounding the land. Mr. Lake argued that the Mansoors were aware of the lease and the occupation of the land by Mr. Meyer and importantly that the caution had been placed on the land register. He stated that the fact that they have acquired third party rights cannot undermine the court's ability to grant specific performance.

[16] Finally, Mr. Lake stated that damages are not an adequate remedy. Relying on **Sudbrook Trading Estate Ltd v Eggleton and others**[6] he argued that in the circumstances, Mr. Meyer regarded the lands as particularly important to his use. Those circumstances being, that Mr. Meyer occupied the land prior to the ownership by Mr. Dickinson and that Mr. Meyer still occupied the land for his business after Mr. Dickinson's acquisition. He urged this Court to grant Mr. Meyer specific performance.

Submissions on behalf of Mr Dickinson

[17] Learned counsel, Ms. Roberts, said that the crux of her submissions is that Mr. Meyer breached the contract by failing to complete the transaction and pay the

[6] [1983] 1 AC 444.

purchase price "by the agreed completion date"[7] of 26th May 2010. Ms. Roberts said that time was of the essence because of the "expressed completion deadlines agreed by the parties"[8] and the surrounding circumstances of the contract.

[18] Ms. Roberts contended that Mr. Meyer gave Mr. Dickinson a clear and unambiguous assertion that he was not able to perform the contract by the "agreed" closing date. Relying on **Chitty on Contracts**, she stated that Mr. Dickinson had the right to bring the contract to an end since Mr. Meyer's actions, or lack thereof, amounted to an absolute refusal to perform his side of the contract. According to Ms. Roberts, there was a clear and unequivocal repudiation of the contract by Mr. Meyer and Mr. Dickinson duly accepted that repudiation. She submitted that even though the legal expression that "time would be of the essence" was not used, the parties indicated, through express statements, that this was the case. In support of her proposition, Ms. Roberts sought to rely on **Lyra Sewer Collazo v Percival Williams**.[9] She posited that the evidence is clear, that the language used by both parties indicated that time was of the essence, even though those exact words were not used and that Mr. Meyer had made it clear that the agreement would be completed within two weeks.

[19] Alternatively, Ms. Roberts submitted that even if time was not of the essence, Mr. Meyer still may not have been able to complete the transaction within a reasonable time and that there is no evidence that he could have remedied the breach within a reasonable time.

[20] Ms. Roberts opined that, in relation to frustration, the learned judge was correct to hold that the delay of the Government in completing the assessment of taxes frustrated the contract. Interestingly and relying on **Halsbury's Laws of England**,[10] on the topic of 'Contract and Frustration of Contract', she said that

[7] See: amended skeleton arguments on behalf of the respondent, p. 7.
[8] See: amended skeleton arguments on behalf of the respondent, p. 11.
[9] BVIHCVAP2007/0024 (delivered 22nd September 2008, unreported).
[10] Halsbury's Laws of England, 5th edn., Vol. 22, LexisNexis 2012.

Mr. Meyer had breached the contract and that this gave Mr. Dickinson the right to terminate the contract as Mr. Meyer caused self-induced frustration. In explaining, she said that Mr. Meyer relied on something outside of his control to determine whether he could have completed his contractual duty of paying the purchase price.

[21] Ms. Roberts said that Mr. Meyer is not entitled to specific performance since he failed to complete the contract on the date fixed for completion and that, in any event, damages are an adequate remedy. To further buttress her argument, she referred the Court to **Finkielkraut v Monohan**[11] to establish that a person seeking specific performance must show that he or she was able to complete the agreement on the date fixed for completion. She said that there was no evidence which indicated that Mr. Meyer was able to complete the purchase of the land at the completion date, neither has he shown that with reasonable notice to complete, that he would be ready and willing to perform the contractual duties.

[22] Ms. Roberts also said that the existence of a third party interest in the land undermines the claim for specific performance and in this case where the land has since been sold to a third-party, the Mansoors, Mr. Meyer is not entitled to specific performance. She further contended that there is no evidence that the Mansoors had any knowledge of Mr. Meyer's 'interest'. She stated that Mr. Meyer did not have a beneficial interest in the land, as a purchaser in occupation, as he made no deposit or payment towards the purchase price. She therefore submits that the learned judge was correct in not ordering specific performance of the contract.

[23] Ms. Roberts submitted that, in relation to an award of damages, Mr. Meyer has led no evidence that established loss as a result of the breach. She further submitted that if the court does find that there was a breach of contract by Mr. Dickinson, only nominal damages should be awarded.

[11] [1949] 2 All ER 234.

[24] Alternatively, Ms. Roberts emphasised that in any event, the judge was correct in refusing to grant specific performance against Mr. Dickinson. She reminded this Court that specific performance is a discretionary remedy and highlighted the factors that must exist before the court could make an order for specific performance. Importantly, Ms. Roberts stated that none of those factors existed in the present case. Accordingly, she argued that the learned judge was correct in not ordering specific performance since Mr. Meyer failed to prove that he was/is in a state of readiness to pay the purchase price. At the very highest, this Court should award him nominal damages which would be an adequate remedy, she posited.

[25] In addition, Ms. Roberts argued that this Court should not award Mr. Meyer any special damages as no losses were pleaded nor proven.

[26] In relation to the counter appeal, Ms. Roberts pointed out that Mr. Meyer was still in occupation of the land and has paid no rent for several years. She said that, at the very least, this Court should award Mr. Dickinson mesne profits.

[27] In addition, she stated that the learned judge erred in not awarding Mr. Dickinson costs in the court below since he had prevailed in defending the claim. She therefore urged this Court to award Mr. Dickinson his costs in the court below and on the appeal if he were to be successful.

[28] Mr. Lake, for his part, in relation to the counter appeal, stated that the learned judge was correct in not awarding Mr. Dickinson mesne profits and costs. He urged this Court to uphold the award of the learned judge and dismiss Mr. Dickinson's counter appeal.

Discussion

Issues (a) Whether time was of the essence in the contract and (b) Whether the learned judge erred as a matter of law in concluding that the contract had been frustrated.

[29] For the sake of convenience, issues (a) and (b) will be addressed together since they are inextricably linked.

[30] It is important to highlight the law on 'time of the essence' and 'frustration'. The following paragraph of **Halsbury's Laws of England**[12] is instructive:

> "The Court of Chancery adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless either they were made so by express terms, or it appeared from the nature of the contract, or the surrounding circumstances, that such was the intention of the parties: unless there was an express stipulation or clear indication that time should be of the essence of the contract, specific performance would be decreed even though the plaintiff failed to complete the contract or take the various steps towards completion by the date specified.
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> The current law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."

[31] **D & B Trucking and Trailer Hauler Service Ltd v Caribbean Insurers Ltd**[13] states that the prevailing equitable rule is that a stipulation as to time of performance in a contact is not generally regarded as being "of the essence" and that the general rule is that delay will justify termination only when it does cause serious prejudice to the other party.

[32] It is settled law that time is made of the essence where the parties have expressly stipulated in the contract that the time fixed for performance must be met or that

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[12] 5th edn., Vol. 22, LexisNexis 2019 at para. 293.

[13] BVIHCVAP2008/0025 (delivered 8th February 2010, unreported).

time is to be "of the essence".[14] Where time, however, was not made of the essence, specifically in a contract, the law requires that the obligations under the contract be performed within a reasonable time. Usually, late performance can be a ground for termination where it causes a frustrating delay[15] but, notably, not every frustrating event brings a contract to an end.

[33] It is equally clear that where there has been unreasonable delay by one party, the innocent party should give notice stating the intention to terminate the contract as a result of the breach or the failure to complete the contract. In **Universal Cargo**, the court stated that, "if a party rescinds without giving reasonable notice thereby making time of the essence, he is in the same position as one who acts before a reasonable time has expired".[16]

[34] It is also settled law that frustration is one method of discharging contracts. In **National Carriers Ltd v Panalpina (Northern) Ltd.**,[17] Lord Simon stated:

> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

[35] In the case of **Davis Contractors Ltd v Fareham Urban District Council**,[18] it was stated that:

> "Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

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[14] Chitty on Contracts, 32nd edn., Vol. 1, at p. 1593.
[15] Universal Cargo Carrier's Corporation v Citati [1957] 2 QB 401.
[16] Universal Cargo Carrier's Corporation v Citati [1957] 2 QB 401 at p. 448.
[17] [1981] AC 675 at p. 700.
[18] [1956] 2 All ER 145 at p. 160.

[36] When a contract is frustrated, it is brought to an absolute end automatically. This principle is recognised by the learned authors of **Chitty on Contracts**.[19] In the Privy Council decision of **Hirji Mulji and Others v Cheong Yue Steamship Co Ltd**,[20] Lord Sumner stated that the law is that "the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen".[21] Lord Sumner went on to state that:

> "Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions, or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure."[22]

[37] Furthermore, any claim of frustration, is subject to several limitations which includes whether the frustrating event was foreseeable or, as seen in **Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two**,[23] whether the frustration was self-induced. In **the Super Servant Two**, the English Court of Appeal held that the defendants could not rely on the doctrine of frustration as the loss of the vessel was caused by the negligence of the defendant.

[38] In the case at bar, the relevant contract contains no provision making time of the essence and it is clear therefore that the obligations under the contract were to be completed within a "reasonable time".

[39] I agree with Mr. Lake that there was never a real intention between the parties that time was to be of the essence. There was no notice given that time was of the essence. I also agree with Mr. Lake that Mr. Dickinson had options in law available to him if he thought that Mr. Meyer was taking too long. That is, to make time of the essence by issuing a notice to that effect. Having not exercised the option to issue a notice that time was being treated as of the essence, the delay

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[19] Chitty on Contracts, 32nd edn., Vol. 1, at p. 1716.
[20] [1926] AC 497.
[21] supra, n. 20 at p. 505.
[22] supra, n. 20 at p. 509.
[23] [1990] 1 Lloyd's Rep 1.

had to have been a frustrating delay at the time he opted to treat the contract as at an end. It must be remembered that Mr. Dickinson proceeded to sell the land to third parties within a week of the last meeting with Mr. Meyer. He did not even give Mr. Meyer a reasonable time within which to pay the purchase price.

[40] I am not persuaded by Ms. Roberts' argument that time was of the essence due to the expressed completion dates agreed by the parties. I am equally not persuaded by Ms. Roberts' alternative argument that Mr. Meyer may still not have been able to complete the transaction within a reasonable time. In any event, this is besides the point in relation to the issue at hand. If reasonable time had been given, then that statement could have been made. I agree with Mr. Lake and underscore that Mr. Meyer was not afforded a reasonable amount of time within which to complete the payment. There is no basis for Mr. Dickinson to assert that Mr. Meyer had been given that indulgence. Accordingly, there is no doubt that time was not of the essence and thus the learned judge erred in law by finding that there was a frustrating delay caused by the Government which brought the contract to an end.

[41] To be clear, I do not share the view held by Ms. Roberts that firstly, there was frustration of the contract and secondly that, that frustration was self-induced by Mr. Meyer. Having regard to the principles of frustration, I am not of the view that the contractual obligation had become impossible to perform. I am also not of the view that the obligation had become incapable of being performed because the circumstances in which performance is being called for would render it a thing radically different from what was agreed, at the time Mr. Dickinson decided to sell the land to third parties. Mr. Dickinson was not entitled to sell to another buyer at the date on which he did. Given the nature of the contract, being one for the sale of land, the time that passed between the contract and termination of the contract was not reasonable. It will be rather unusual for a delay of a mere few days to be regarded in law as having frustrated the contract, bearing in mind that Mr. Meyer

was in occupation of the land as a lessee for several years and the need to have the land evaluated for taxes in order to be able to secure the bank loan.

[42] It is not sufficient for Mr. Dickinson to now try to rely on what was said during negotiations to establish that time was of the essence. The mere fact that there were delays attributable to the Government is not sufficient to frustrate the contract. Not every contract that becomes more burdensome is rendered frustrated. In the present case, it should be emphasised that the contract had not become burdensome so as to reach the level of frustration.

[43] Accordingly, I am of the view that the learned judge erred when he held that that the contract had come to an end through frustration. By way of emphasis, it is restated that there was no frustration of the contract by any intervening circumstances and that time was not of the essence. Mr. Dickinson wrongfully treated the contract as at an end, without affording Mr. Meyer reasonable time to complete his obligations and this occurred in circumstances where Mr. Dickinson did not indicate by notice or action that time was of the essence. Given the factual circumstances, Mr. Dickinson is the person who breached the contract and Mr. Meyer should be granted a remedy. To be clear, there is no evidence to suggest that time was of the essence from the inception of the contract, or after the contract was made and the learned judge's failure to address any of those matters further compounds his error. In my view, the learned judge erred in law and did not arrive at the correct decision.

[44] Accordingly, Mr. Meyer's appeal in relation to those two issues succeeds. The learned judge's decision in relation to those issues is set aside.

Issue (c) Whether the judge erred in refusing to order specific performance of the contract

[45] Specific performance is an equitable remedy to a cause of action for breach of contract.[24] In cases involving a sale of land, the remedy is normally available in appropriate circumstances. As a general rule, each parcel of land is considered to have unique features and an award for damages would not be a sufficient remedy for the purchaser and thus the law considers that the purchaser cannot obtain a satisfactory substitute.[25] However, the limitations on the grant of specific performance are clear. Indeed, there are numerous circumstances in which specific performance would not be granted.[26] It is the law that, a party cannot gain a right to specific performance of an illegal agreement. It is important to note that this remedy is also not available where damages would be adequate in compensating the innocent party.[27] In **Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd**,[28] the House of Lords refused to grant specific performance where it would cause undue hardship to the defendant. The remedy will also not be available for contracts involving voluntary promises, constant supervision or contracts for personal work or services.[29] Importantly, the maxim "he who comes to equity must come with clean hands" means that Mr. Meyer must not have acted unfairly in conducting business with Mr. Dickinson. Normally, where parties have not made time of the essence, the courts would not grant the remedy of specific performance where the obligation to complete was not performed.[30] Having found that time was not of the essence, Mr. Meyer is not precluded from claiming specific performance. Therefore, Mr. Meyer must prove that: (a) there is a valid and enforceable contract; (b) a breach of the contract occurred; (c) monetary damages are inadequate to compensate his claim; and (d) he is willing to perform all obligations required by the contract.

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[24] Ramsbury Properties Limited v Ocean View Construction Limited SKBHCVAP2011/0020 (delivered 29th January 2019, unreported).
[25] Chitty on Contracts, 32nd, edn., Vol. 1, p.1964.
[26] See: Halsbury's Laws of England, 5th edn., Vol. 23, LexisNexis 2012, at para. 453.
[27] Beswick v Beswick [1968] AC 58.
[28] [1997] UKHL 17.
[29] Lumley v Wagner (1852) 42 ER 687.
[30] Brickles v Snell [1916] 2 AC 599.

[46] Critically, in order for Mr. Meyer to prevail in his claim for specific performance, he must show that all his obligations under the contract have been fulfilled or that he was ready and willing to perform those obligations. The learned editors of **Halsbury's Laws of England** explained in the following terms:

> "A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract...the plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication."[31]

[47] It is evident, given the totality of the circumstances, that I agree with Ms. Roberts that Mr. Meyer cannot successfully claim specific performance. This is because he has not provided to this Court, or to the court below, any proof that he was able to perform his obligation namely the payment of the purchase price. In addition, he has not demonstrated to this Court that he is now in a position to make the full payment towards the purchase price and fulfil his obligations under the sale contract. Therefore, after examining all of the criteria, I am satisfied that specific performance is not an appropriate remedy in the case at bar, since among other things, it could not be said that Mr. Meyer was ready, willing and able to pay the entire sum agreed. Also, I am not of the view that this Court should exercise its equitable discretion in Mr. Meyer's favour. Accordingly, in my view, the learned trial judge was correct in not awarding specific performance to Mr. Meyer.

[48] This leads me to consider what is the alternative appropriate remedy.

[49] It brings into focus the matter of damages. In the case at bar, it is apparent that I am of the view that damages are an appropriate remedy. Even though Mr. Meyer did not, as required, specifically plead special damages nor prove his losses, loss had undoubtedly been suffered, but only remains unquantified. The

[31] Halsbury's Laws of England, 5th edn., Vol. 44, LexisNexis 2012.

Privy Council in **Greer v Alston's Engineering**[32] settled the law in these cases holding that the court can make an award of nominal damages to compensate for unquantifiable losses that had been undoubtedly suffered. It is the duty of the court to recognise the loss by an award that is not out of scale. In the absence of proof of loss, this Court is therefore justified in awarding nominal damages to Mr. Meyer.[33]

[50] In view of the totality of the circumstances, I am of the opinion that the appeal by Mr. Meyer on this issue fails. The learned judge was correct in dismissing the claim for specific performance. Had Mr. Meyer sought special damages or losses, he may have been entitled to a grant of special damages, once they were proven.

[51] In the exercise of my discretion, I would award the sum of $40,000.00 to Mr. Meyer as Mr. Dickinson breached their contract. I do not consider such a sum to be out of scale.

Issue (d) Whether the learned judge erred in not awarding Mr. Dickinson mesne profits and costs.

[52] It is the law that where a person has been in occupation of land without an agreement, the landlord may bring an action against the occupier for use and occupation to recover a sum in reasonable satisfaction for the lands held or occupied. In such circumstances, the owner of the land will have an action for wrongful use and occupation or mesne profits against the trespasser. The learned authors of Hill and Redman in their text **Law of Landlord and Tenant**,[34] state:

> "The principle is that a trespasser shall not be allowed to make use of another person's land without compensating that other person for that use. Usually, where the landlord is kept out of his property by a tenant

[32] 2003 UKPC 46.
[33] Econo Parts Ltd & Mr. Parts Ltd v The Comptroller of Customs & Excise SLUHCVAP2017/0019 (delivered 30th July 2019, unreported).
[34] Hill and Redman's Law of Landlord and Tenant (LexisNexis 1996).

> wrongfully failing to deliver up possession he will be entitled to damages for trespass (or mesne profits as they are commonly called in the context of the law of landlord and tenant) for a sum equal to the rental value of the premises during the period when the landlord is kept out of possession."[35]

[53] It has long been accepted that a landowner may elect to claim damages on either a restitutionary or a compensatory basis. In **Ministry of Defence v Thompson**,[36] the court held that:

> "an owner of land which is occupied without his consent may elect whether to claim damages for the loss which has been caused or restitution of the value of the benefit which the defendant has received."

[54] There is no doubt that at the end of the lease, Mr. Meyer was a tenant holding over and as such is under an obligation to pay rent. The lease came to an end after the one year, ending 31st December 2010. On the facts, Mr. Meyer remains in possession of the land and has not paid rent. He is therefore liable to pay mense profits to Mr. Dickinson.

[55] In **Inverugie Investments Ltd v Hackett**,[37] Lord Lloyd of Berwick helpfully stated:

> "The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both."

[56] A person who has bound himself by a specifically enforceable contract to sell real property to the purchaser is, in a qualified sense, a trustee of it for the purchaser, although not a bare trustee. If the whole of the purchase price is paid, the vendor may properly be described as a bare trustee.[38]

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[35] Hill and Redman's Law of Landlord and Tenant (LexisNexis 1996) at para. 9624.
[36] [1993] 2 EGLR 107.
[37] (1995) 46 WIR 1 at p. 5.
[38] Halsbury's Laws of England, 5th edn., Vol. 48, LexisNexis 2007.

[57] As a general rule, mesne profits is claimed from the date on which the landlord became entitled to possession of the land. Thus, in this case at bar, Mr. Dickinson became entitled to possession of the land on 1st January 2011. As trustee for the beneficial owners, Mr. Dickinson is entitled to recover, and Mr. Meyer is obligated to pay, a reasonable rent for the land enjoyed since possession of it should have been yielded up on 31st December 2010.

[58] In assessing the amount of mesne profits to be paid, it is important to establish whether the claim is compensatory or restitutionary. The restitutionary version of mesne profits is awarded to a landlord for the relevant period the landlord was kept out of his land and where no actual damage has been proven. Compensatory mesne profits is based on the market value of the land during the period which the landlord was kept out. In this case, Mr. Dickinson has counter appealed for mesne profits based on the value of the rent Mr. Meyer paid during the lease, which would be restitutionary mesne profits.

[59] There is useful guidance in several cases. Indeed, the main issue in **Ministry of Defence v Ashman and Another**[39] was whether mesne profits should be calculated by reference to the market rent or by reference to the value of the property to the trespasser. In that case, Kennedy LJ held that, "[t]he measure of damages is the proper value to the trespasser of use of the property".[40] Lord Hoffman further stated:

> "A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive…"[41]

[39] [1993] 2 EGLR 102.
[40] [1993] 2 EGLR 102.
[41] [1993] 2 EGLR 102 at p. 105.

[60] The above principles are very applicable to the appeal at bar. I therefore apply them. In so doing, it is noteworthy that the lease between Mr. Dickinson and Mr. Meyer states the annual rent was $6,625.00, with the relevant period being 1st January 2010 to 31st December 2010. Therefore, mesne profits will be calculated based on the rent owed since Mr. Dickinson, as trustee for the Mansoors, was entitled to retake possession of the land, which would be from 1st January 2011 to the date Mr. Meyer vacates the land. I hold that Mr. Dickinson is entitled to receive mesne profits from Mr. Meyer at a rate of $6,625.00 per year from 1st January 2011 to the date Mr. Meyer vacates the land.

[61] It is evident the learned trial judge erred in dismissing the counter claim. Also, I have no doubt that Mr. Dickinson is entitled to possession of the land and mesne profits.

Possession

[62] In my view and considering the totality of the circumstances, the justice of the matter requires that Mr. Meyer be given six months from the date of this judgment to vacate the land.

[63] Accordingly, Mr. Dickinson is successful on this issue. Mr. Dickinson's claim for mesne profits is granted and Mr. Meyer is ordered to pay Mr. Dickinson mesne profits at the rate of $6,625.00 per year from 1st January 2011 to the date he vacates the land.

Costs

[64] In so far as Mr. Meyer has had success in relation to the appeal and having regard to rule 65.5(2)(b) of the **Civil Procedure Rules 2000**, I am of the view that prescribed costs should have been granted in the court below on the value of the claim being treated as $50,000 on the basis that Mr. Meyer's claim for specific performance is not a claim for a monetary sum. Mr. Meyer is therefore entitled to

prescribed costs in the court below on the value of $50,000 and, on the appeal, two thirds of the prescribed costs in the court below.

[65] Mr. Dickinson has also had success in relation to the counter appeal as the learned judge should have granted his counterclaim for mesne profits at a rate of $6,625.00 per year from 1st January 2011 to the date Mr. Meyer vacates the land. This sum, although monetary, is unquantifiable at present. Therefore, having regard to rule 65.5(2)(a) of the **Civil Procedure Rules 2000**, I am of the view that prescribed costs in the court below should have been awarded on the sum of mesne profits accrued at the time Mr. Meyer vacates the land. Accordingly, I consider the appropriate costs order to be that Mr. Dickinson is entitled to prescribed costs in the court below on the sum of mesne profits calculated at a rate of $6,625.00 per year from 1st January 2011 to the date Mr. Meyer vacates the land. In relation to the counter appeal, Mr. Dickinson is entitled to two thirds of the prescribed costs in court below.

Conclusion

[66] For the reasons given above, I would make the following orders:

(a) Mr. Meyer's appeal is allowed in part;

(b) Mr. Meyer is awarded nominal damages in the sum of $40,000.00;

(c) Mr. Dickinson's counter appeal is allowed;

(d) Mr. Meyer is ordered to pay Mr. Dickinson mesne profits in a sum to be calculated at the end of his occupancy of the land, at a rate of $6,625.00 per year from 1st January 2011 until he vacates the land;

(e) Mr. Meyer is ordered to vacate the land within six months of the delivery of this judgment;

(f) Mr. Meyer is entitled to prescribed costs in the court below on the value of the claim being treated as $50,000.00 and, on the appeal, two thirds of the prescribed costs in the court below; and

(g) Mr. Dickinson is entitled to prescribed costs in the court below on the sum of mesne profits calculated at a rate of $6,625.00 per year from 1st January 2011 to the date Mr. Meyer vacates the land. In relation to the counter appeal, Mr. Dickinson is entitled to two thirds of the prescribed costs in court below.

[67] I gratefully acknowledge the assistance of learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar