



[2020] JMSC Civ. 253

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013HCV02311**

<b>BETWEEN</b>	<b>DONALD GEORGE HINDS</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>CARMELETA JOAN HINDS</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>RUDOLPH GEORGE STEPHENSON</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>UNA ISADORE STEPHENSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>SANDRA MOORE</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**CONSOLIDATED WITH:**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013HCV03577**

<b>BETWEEN</b>	<b>RUDOLPH GEORGE STEPHENSON</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>UNA ISADORE STEPHENSON</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>DONALD GEORGE HINDS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CARMELETA JOAN HINDS</b>	<b>2<sup>ND</sup> DEFENDANT</b>

## IN OPEN COURT

Ms. Jacqueline Cummings instructed by Archer, Cummings & Company for the Claimants in Claim No. 2013HCV02311 and the Defendants in Claim No. 2013HCV03577

Ms. Kayann Balli and Ms. Annishka Biggs instructed by Balli & Associates for the 3<sup>rd</sup> Defendant

***Civil practice and procedure – Breach of contract –Breach of expressed term – Purchaser unable to complete– Rescission of contract– Specific performance***

**Heard: June 12-14, July 23 and 24, 2019, March 16-18 and December 11, 2020**

**PALMER HAMILTON, J**

- [1] The consolidated Claims in this matter concern an agreement for the sale of property described as all that parcel of land part of Seaview and Pigeon Valley in the parish of Saint Andrew being lot numbered 10 on the plan part of Seaview and Pigeon Valley and being all that parcel of land comprised in Certificate of Title registered (hereinafter “the title”) at Volume 1103 Folio 371 of the Register Book of Titles (hereinafter “the property”).
- [2] On the 15<sup>th</sup> day of November 2012, Mr. Rudolph Stephenson and Ms. Una Stephenson (hereinafter collectively referred to as “the Vendors”) entered into a written agreement to sell the property to Mr. Donald Hinds and Mrs. Carmeleta Hinds (hereinafter collectively referred to as “the Purchasers”). The purchase price was stated as Eleven Million Dollars (\$11,000,000.00). The Vendors have died during the life of these Claims. The 3<sup>rd</sup> Defendant is the widow of Mr. Rudolph Stephenson and was appointed as the Executrix of his estate. At the material time, she facilitated the agreement for sale on behalf of the Vendors and was noted in the agreement as being the “*Vendors’ representative with carriage of sale*”. The 3<sup>rd</sup> Defendant’s role is central to the dispute between the parties as it was expressly stated throughout the trial by the Purchasers that she represented herself to them as an Attorney-at-Law having carriage of the sale.

## BACKGROUND

- [3] For the sake of facilitating an ease of understanding, I will set out what I consider to be the background to the facts of this matter.
- [4] It was settled that Mr. Hinds was the caretaker of the property for approximately seven (7) years prior to entering into the agreement to purchase it. The Purchasers paid a five percent (5%) deposit of the sale price directly to Mr. Stephenson and it was agreed that the balance of the purchase price was to be provided by a mortgage from the National Housing Trust (hereinafter referred to as "NHT").
- [5] Crucial to the instigation of these Claims is Special Condition 6 of the Agreement for sale that provided that a Letter of Commitment was to be secured no later than sixty (60) days of the date of the agreement, that is, on the 18<sup>th</sup> day of January 2013. This letter was not secured as per the condition and the Vendors granted an extension of time to the 15<sup>th</sup> day of February 2013 to facilitate the provision of the Letter of Commitment.
- [6] The Purchasers obtained a Surveyor's Identification Report dated the 27<sup>th</sup> day of November 2012 which revealed that: -
- "The eastern boundary is not built in accordance with the registered plan but there is no encroachment."*
- [7] This report is also crucial to the issues herein. The Purchasers subsequently sought legal representation in relation to the sale transaction on or around the 22<sup>nd</sup> day of January 2013.
- [8] Despite the extension being granted, the Vendors rescinded the Agreement for Sale on the 28<sup>th</sup> day of January 2013 for the failure to provide the Letter of Commitment and returned all payments made to the Purchasers in respect of the sale by way of a manager's cheque. This resulted in the Purchasers lodging a caveat against the property on the 31<sup>st</sup> day of January 2013. The Purchasers subsequently filed a Claim seeking specific performance of the contract and/or damages for breach of contract in the alternative for failing to complete the sale.

- [9] The Vendors also filed a Claim seeking damages for breach of contract and a declaration that the contract was rightfully rescinded. They also seek damages for the caveat which they allege was wrongfully lodged against the title for the property. Both Claims were consolidated by an Order of the Court.
- [10] At this juncture I want to thank Counsel for providing written submissions to the Court. I have considered all of the evidence, law and submissions in this matter. I shall however only refer to those aspects which are necessary for the court to arrive at a determination of the Claims.

### **THE CLAIM AND SUBMISSIONS OF THE PURCHASERS**

- [11] The Purchasers indicated that they were purchasing the property and were obtaining a mortgage from the NHT to facilitate the purchase. They were also obtaining a contribution refund towards a deposit (hereinafter referred to as "CRTD") from NHT and NHT required certain documentation to be produced in order to facilitate and approve the mortgage application. One such requirement is a letter of undertaking from the Vendor's Attorney.
- [12] To assist their case, the Purchasers, through their Attorney-at-Law requested a letter from the NHT outlining the outstanding requirements as at the 18<sup>th</sup> day of January 2013 that prevented it from issuing its letter of commitment. In a letter dated the 26<sup>th</sup> day of February 2016, the NHT complied with this request. Learned Counsel for the Purchasers, Ms. Jacqueline Cummings, stated that there are five (5) noteworthy requirements, namely: -

1. *An attorney must have carriage of sale;*
2. *The boundaries of the property must be regularized;*
3. *Evidence of termite treatment;*
4. *Name must be amended on Agreement for Sale;*
5. *Undertaking for CRDT loan."*

- [13]** Ms. Cummings indicated that without these outstanding requirements, the Purchasers would be hindered from obtaining a loan from NHT. Learned Counsel submitted that the evidence from Mrs. Hinds is that they complied with the other requirements in the letter but could not go back without the other documents as NHT did not want partial documents but all at once and thereafter, Mr. Stephenson cancelled the sale.
- [14]** Learned Counsel submitted that the Vendors in this transaction failed to take steps to put the Purchasers in a position to obtain the letter of commitment for the mortgage from NHT. This failure cannot be used as a basis to cancel the sale. The Vendors are contractually bound by the contract they signed and the terms thereof.
- [15]** It was also averred that, in any event, having issued a notice making time of the essence of the agreement, the Vendors gave the Purchasers a new deadline to complete the sale. The new deadline being the 15<sup>th</sup> day of February 2013, the Vendors are estopped from terminating the agreement before this date.
- [16]** Ms. Cummings submitted that until the Vendors have corrected the issues outstanding with NHT, they cannot give notice making time of the essence. The Vendors cannot complete the sale, so they had no basis on which to give this notice.
- [17]** Learned Counsel submitted that it is grossly unfair and unjust for the Purchasers who diligently tried to have everything done to own their home to have the sale cancelled prematurely by the Vendors in this fashion. Ms. Samuels indicated that the 3<sup>rd</sup> Defendant in cross-examination agreed that the agreement for sale herein was cancelled prematurely as it was cancelled before the 15<sup>th</sup> day of February 2013.
- [18]** In relation to the issue of the of the Surveyor's Identification Report commissioned by the Purchasers, Learned Counsel submitted that the breach would amount to a defect of the title that needs to be rectified. It required a simple remedy, that is, to build a boundary in the correct location and this was not done.

**[19]** Ms. Cummings sought to highlight the delay suffered by the Purchasers by indicating the following: -

1. They made a payment in July 2012 and another payment in August 2012 and it was not until September 2012 before they were given an agreement for sale to sign and not until November 2012 when they received the fully executed Agreement for Sale.
2. In December 2012 after attending the NHT to have their loan application processed they advised Mr. Stephenson of the documents that NHT required and the response was that they were being addressed. When inquiries were being made again in January 2013 they received no response from Mr. Stephenson.

**[20]** Ms. Cummings submitted that the Purchasers have proved on a balance of probabilities that their Claim ought to succeed against the estates of the Vendors. In the Claim against the Purchasers, Learned Counsel submitted the following about the Vendors: -

1. They have not led any evidence of any damages that they claim to have suffered by any breach by the Purchasers. Based on the 2017 valuation report, the Vendors have an asset that has appreciated in value beyond the purchase price the Purchasers had with them, this means they suffered no damage herein;
2. The evidence that was elicited was that the 3<sup>rd</sup> Defendant is currently in possession of the premises so there was no loss of rental income;
3. Their pleadings indicated that they lost out on a subsequent cash sale but they did not produce any letter of offer nor any draft agreement for sale for this alleged offer;

4. In relation to the caveat, as per the case of **Riverton City Ltd v Haddad** (1986) 23 JLR 45, it is trite law that once the vendor and purchaser enter into an agreement for the sale of land the purchaser upon execution of the agreement become the equitable of beneficial owners of the property and the vendors hold it upon trust for them until completion. As a consequence, the Purchasers acquired an equitable interest in the property herein and validly lodged a caveat to protect their equitable interest in the property.

[21] Learned Counsel ended her submissions by detailing the measure of damages that should be awarded. She submitted that based on the case of **Diamond v Campbell-Jones and Other** [1960] 1 All ER 583, the measure of damages is the difference between the contract price and the higher market value at the date of which the breach or assessment of damages for the breach. In this case, the most recent Valuation Report prepared by Tavares & Finson Realty Limited in 2017 gave the market value as Sixteen Million Dollars (\$16,000,000.00). Hence, the difference between the purchase price of Eleven Million Dollars (\$11,000,000.00) and the market value of the property is Five Million Dollars (\$5,000,000.00). In relation to special damages, the sum of Eight Hundred and Twenty-Three Thousand One Hundred and Seventy-Seven Dollars and Nineteen Cents (\$823,177.19) with interest at a rate of Three percent (3%) per annum from the date of the breach to the date of judgment should be awarded to the Purchasers.

#### **THE CLAIM AND SUBMISSIONS OF THE VENDORS**

[22] Learned Counsel for the Vendors, Ms. Kayann Balli, submitted that the Vendors have not led any evidence as to the property having any special significance to them nor of them suffering any actual damages in relation to the agreement for sale being cancelled. She submitted that equity will only grant specific performance if under all the circumstances, it is just and equitable to do so. Equity posits that *“He that cometh to equity must come with clean hands”*. Ms. Balli further submitted

that the Purchasers do not have clean hands and as such, they are not entitled to specific performance of the agreement for sale.

- [23]** Learned Counsel asserted that the evidence showed that the delay was solely as a result of the Purchasers' dilatory and sluggish approach in going about their responsibility as purchasers to secure the outstanding ninety-five percent (95%) of the purchase price to complete the sale. The failure of securing what was required by their own mortgage company was wholly the fault of the Purchasers. Ms. Balli maintained that the reasons put forward by the Purchasers purporting the delay on the part of the Vendors and the 3<sup>rd</sup> Defendant cannot be substantiated and should be rejected.
- [24]** On the issue of the Vendors not employing an attorney to deal with the sale, learned Counsel submitted that there is nothing in law that requires an Attorney-at-Law in the preparation, execution and/or completion of an agreement for sale of land. Vendors may act in their personal capacity if they choose to do so. It is therefore not illegal for these transactions to take place without an attorney. Also, there was nothing preventing the Purchasers from obtaining their own Attorney-at-Law to represent their interests in the sale, if they chose to do so.
- [25]** Ms. Balli indicated that for the Purchasers to aver that the Vendors not employing an Attorney-at-Law to deal with the sale was a reason for their non-compliance is in fact the Purchasers' admission that they did not do what they could and ought to have done to ensure that they received a commitment letter from NHT which they were fully depending on to fund the sale within the specified time.
- [26]** In relation to the contention of the Vendors not correcting the encroachment as required by NHT, it was submitted by Ms. Balli that the surveyor's report speaks for itself and it clearly and unequivocally states that there was no encroachment. In any event, Ms. Balli stated that it was the Purchasers' responsibility to rectify the boundary and they asserted that they would in several correspondences with the Vendors. Consequently, they cannot justify their non-compliance with reference to

an act that they agreed to do and thus this reason is also due to their own failure to do what was required of them as purchasers.

- [27] On the issue of the 3<sup>rd</sup> Defendant not providing the Purchasers with a receipt thereby causing a delay, Learned Counsel maintained that this assertion was false as there are email correspondences from Mrs. Hinds where she made reference to the receipt which she had received and brought to NHT. Further, Ms. Balli indicated that the receipt was not enumerated as one of the outstanding documents that the Purchasers required to complete their mortgage application.
- [28] On the allegation that the delay was caused by the 3<sup>rd</sup> Defendant's alleged inaccessibility, Learned Counsel indicated that there was nothing in the evidence to indicate how, the 3<sup>rd</sup> Defendant's absence from the island for less than two (2) weeks prevented the Purchasers from fulfilling their obligations under the agreement for sale.
- [29] Learned Counsel proffered that the delay in providing the Letter of Commitment within the specified time lies wholly at the feet of the Purchasers. The documentary evidence all indicate that communications relating to the requests of the outstanding requirements came after the deadline for providing the letter was passed.
- [30] Learned Counsel maintained that the failure to provide the Letter of Commitment was a clear breach of an expressed condition of the agreement for sale which entitled the Vendors to terminate the contract. The cases of **Bunge Corporation v Tradax SA** [1981] 2 All ER 513, **Lee-Parker and another v Izzet and others (No.2)** and **Leighton McKnight v Novelette McKnight and Jamaica Mortgage Bank** [2012] JMCA Civ. 44 were cited in support of this submission. Ms. Balli asked the Court to find that in view of the various conditions that they had not yet satisfied as at the 18<sup>th</sup> day of January 2013, the Purchasers were not in a position to give the Letter of Commitment on the date due as per the agreement for sale and consequently, the Purchasers breached the agreement.

[31] It was further submitted that the failure to produce the Letter of Commitment was a breach of a fundamental term, especially in light of the following: -

1. Mr. Stephenson was ill and in dire need for funds;
2. The Purchasers were not in a financial position to finance the purchase without more; and
3. The Vendors had made it clear that time was an essential factor at all relevant times.

The cases of **Huin Steamship Co. Ltd v Tote and Lyle Ltd** [1936] 2 All ER 597 and **Dr. Frank Eribo Adekoye Jo Odinaige** [2010] EWHC 301 (TCC) were cited by Ms. Balli to support this position.

[32] Ms. Balli asked the Court to take critical note of the fact that the Notice was in substance and effect granting an extension of time to the Purchasers to secure a Letter of Commitment. This was a prerequisite to the agreement for sale going forward. She submitted that this particular point of distinction required special care when determining its effect. Unlike a typical Notice, the Vendors did not have to wait until the expiration of the time in the Notice before they could validly terminate the agreement for sale. By this Notice the Vendors were not asking the Purchasers to complete the sale at that time but to provide proof that they would have been in a position to pay the balance of the purchase price. The cases of **Stickney v Keeble** [1915] AC 386, **Louinder v Leis** [1982] HCA 28, **Jamshed Khodaran Irani v Burjorji Dhunjihai** 32 T.L.R 156, **Chintamanie Ajit v Joseph Mootoo Sammy** (1967) AC 255 and **Société Italo –Belge pour le Commerce et l’Industrie SA v Palm and Vegetable Oils (Malaysia)** [1982] 1 All ER 19 were cited to buttress this position.

[33] In all the circumstances, Ms. Balli submitted that the claim for specific performance must fail as the Purchasers were in breach of the contract and have not met the requirements to qualify for the remedy. The case of **Stickney v Keeble** [1915] AC

386 and page 889 of **Modern Law of Real Property** by Cheshire and Burns were cited in support of this position. Ms. Balli indicated that even if this court were minded to make an order for specific performance, the Court may be constrained from doing so as it is not to make orders in futility. She stated that from a practical standpoint, an order for specific performance in favour of the Purchasers due to their age and the lack of confirmation of their ability to pay the balance of the purchase price is unlikely to be effected and any remedy which they may have is limited to damages.

**[34]** The remainder of the submissions are summarized as follows: -

1. Special condition 9 allowed Mr. Stephenson to rescind the agreement for sale especially in circumstances where it remained clear that the Purchasers were unlikely to come up the commitment letter (**Financings Ltd v Baldock** [1963] 2 Q.B. 104, 115);
2. In addition to being expressly permitted by the terms of the agreement for sale, the Vendors could validly terminate the agreement for sale in the light of the governing anticipatory breach (paragraphs 25-020 of **Chitty on Contracts**, 38<sup>th</sup> Edition);
3. Alternatively, it is submitted that the Vendors were within their right to rescind the agreement for sale in the way they did because the Purchasers had committed a repudiatory breach (**Samarenko v Dawn Hill House Ltd** [2011] EWCA Civ. 1445 and **Mersey Steel and Iron Co v Naylor Benson & Co** (1884) 9 App Cas 434);
4. The Vendors were ready, willing and able to transfer good title to the Purchasers. They were at all times ready, able and willing to fulfil all their outstanding obligations under the contract in order to complete the sale (**Noble v Edwards** (1877) 5 Ch. D. 378 and

**Jennifer Messado & Anor v Recas Keith and anor** [2015] JMCA App 10)

5. The belief that the 3<sup>rd</sup> Defendant was an Attorney-at-Law was unreasonable having regard to the factual matrix of the case (**Bain v Fothergill** (1874) L.R. 7 H.L. 158);
6. The evidence shows that the lodgement of the caveat was unreasonable in the circumstances where an alternative remedy was available and the damage suffered was the inability of the Vendors to sell the land to subsequent purchasers because the caveat was lodged (**Leighton McKnight v Novelette McKnight and Jamaica Mortgage Bank** [2012] JMCA Civ 44 **CPR v District Registrar of Dauphin Land Titles Office** 4 DLR (2d) 519).
7. The Vendors are entitled to recover the difference between the value of the land which remains in their possession and the price they would have gotten had the contract been completed. The difference of value of the property is Five Million Dollars (\$5,000,000.00) and this should be awarded to the Vendors (**Johnson v Agnew** [1979] 1 All ER 896).

## ISSUES

**[35]** From the pleadings and the legal submissions by the parties, the issues joined can fairly be summarised to be: -

1. Whether the agreement for sale was breached by the Purchasers or the Vendors?
2. Whether the Purchasers are entitled to the equitable remedy of specific performance or damages in lieu?

3. Whether the Vendors are entitled to damages?

**LAW AND ANALYSIS**

[36] The resolution of the issues is substantially factual. There is no dispute that the agreement for sale herein is a valid agreement for the disposition of the property in question and that it governs the relationship of the parties. Therefore, the determination of the Claims is based on the interpretation of the agreement for sale and the activities surrounding the agreement by the contracting parties.

[37] There is absolutely no doubt that there was a breach of the contract, that is, the agreement for sale. The fundamental question is, who committed the breach of the contract. An important first step in answering this question is to determine whether the rescission of the contract by the Vendors was valid in the circumstances and the consequences ensuing therefrom. The focal point of the resolution of this question will hinge on this Court's interpretation of the validity and essence of the Notice issued by the Vendors.

[38] The parties seemed to be ad idem that there was a failure to provide the Letter of Commitment as required by Special Condition 6 of the Agreement for Sale and that an extension of time was provided by the Vendors to facilitate the compliance. Despite this extension, the contract was rescinded just six (6) days after its grant. I do not think it just to set out only Special Condition 6 of the agreement for sale in isolation from the rest of the agreement. On a closer examination of the agreement for sale, there are other equally valid conditions which I believe are crucial to the resolution of these Claims. These conditions are as follows: -

[39] Special Condition 6 of the Agreement for Sale stated: -

*"...In the event of the Purchasers not obtaining a written commitment for such a loan and further payments within the period stipulated either party shall be entitled to rescind this Agreement by Notice in writing within Fourteen (14) days; failing which, this Agreement shall remain absolute and binding on the parties hereto..."*

[40] Special Condition 9 stated: -

*“No forbearance, delay or indulgence by the Vendor in enforcing any of the terms and conditions of this Agreement or the granting of time by the Vendors to Purchasers shall prejudice, affect or restrict the rights and powers of the Vendors hereunder nor shall any waiver by the Vendors or any breach hereof operate as a waiver by the Vendor of any subsequent or any continuing breach hereof.”*

[41] Special Condition 10 stated: -

*“The parties agree that in the event of failure by the Purchasers to pay any sums on the dates due for payment, The Vendors shall be entitled to serve a Notice making Time of the Essence of the Agreement and upon expiry of **twenty-one (21)** days from the date of service of such notice if the Purchasers fails to complete the Vendor shall be entitled to rescind this Agreement and forfeit the deposit paid hereunder. Thereafter the Vendor shall be entitled to resell the property and shall not be liable to account to the Purchasers for any part of the proceeds of such re-sale notwithstanding that the Purchasers shall have executed the transfer of the said property.”*

[42] Additionally, as an important part of the proceedings is a document headed “NOTICE TO COMPLETE AND MAKING TIME OF THE ESSENCE” dated the 22<sup>nd</sup> day of January 2013. The substance of this Notice is contained in paragraph 5 and it reads: -

*“The vendors require you to provide the Letter of Undertaking from a bank or financial institution or payment of the outstanding balance no later than **February 15, 2013**, as to which time it is of the essence failing which the Vendors wills cancel the sale under Special Condition 10 of the Agreement for Sale and will forfeit the five percent (5%) deposit which you have paid and/or seek such other relief for compensation as the Vendors may be entitled to by law.”*

[43] Learned Counsel for the Vendors indicated that the Notice was in substance granting an extension of time to provide the Letter of Commitment and not a typical notice to complete, thereby entitling the Vendors to rescind before the expiration date.

[44] In analysing this position, I am guided by the case of **J.T.M Construction & Equipment Ltd v Circle B Farms Ltd** (unreported), Supreme Court, Jamaica, Claim No. 2007HCV05110, judgment delivered on the 29<sup>th</sup> day of June 2009. In this case, the Honourable Mrs. Justice Marva McDonald-Bishop (as she then was) analysed the circumstances surrounding the breach of an Agreement for sale. At paragraphs 36 and 37 she stated: -

*“It is a well established rule of conveyancing law that where completion is delayed, the innocent party, if he wishes to be rid of the contract, must first serve a notice requiring completion by a specified date and indicating that if the defaulting party fails to do so then he will treat the non-performance of it as a repudiation of the contract.*

*Also, it is settled on long established authorities that to be a valid notice to complete the notice must be served. It is stated that in practice most notices are served pursuant to an expressed term in the agreement.”*

[45] On the facts of this case it is clear that the Notice was sent pursuant to Special Condition 10 of the Agreement for Sale. The terms of the Notice were unequivocal in that it highlighted the non-compliance by the Purchasers, required compliance by a specified date and indicated that failure to do so by that date will result in the repudiation of the agreement for sale. The Vendors sought to invoke Special Condition 10 and as a result, this notice was in every essence, a notice to complete.

[46] Having determined that the notice was in fact a notice to complete making time of the essence, I now turn my focus on what is the effect of this Notice. I echo the dictum of McDonald-Bishop, J at paragraphs 50 and 51 of **J.T.M Construction & Equipment Ltd v Circle B Farms Ltd** (supra) where she stated: -

*“It is thus well accepted in conveyancing law that where the completion is delayed, the innocent party will normally be anxious to take action long before delay becomes protracted. If he wishes to be rid of the contract, he must first serve a notice requiring completion by a specified date, failing which he will treat the non-performance as a repudiation of the contract, **the new date so fixed is then of the essence and the court will not assist the party served with the notice or the party serving it if he fails to complete by the new date:** (see **Stickney v Keeble** [1917] A.C. 386 and **Brickles v Snell** [1916] 2 A.C. 599)*

...As D.G. Barnsley in **Barnsley’s Conveyancing Law and Practice** (3<sup>rd</sup> edn. p. 376) explains:

***“The purpose of giving such a notice is to put an end to the defaulter’s right to seek specific performance, so leaving the server free to rescind at law without fear of equitable intervention.”** [my emphasis]*

[47] Having considered this guidance, I am of the view that in effect, the Notice issued automatically extended the time for compliance stipulated by Special Condition 6 of the agreement for sale failing which the Vendors would have a right to rescind.

It is clear on the facts that the Vendors repudiated the contract before the expiration of the new compliance date, thereby averting the opportunity from the Purchasers to remedy the breach within the stipulated time. What is now left to be determined is the validity of this Notice and whether the right to rescind arose when the Vendor sought to exercise this right.

- [48] The law relating to the validity of a notice to complete has been well argued throughout the courts. The most significant requirement relating to the case at Bar is that the server of the notice, must himself be ready and willing to complete at the time of service. The noteworthy case of **Quadrangle Development and Construction Co Ltd v Jenner** [1974] 1 All ER made this clear. At page 732 Russell LJ said: -

*“Under the language of the clause, the party giving the notice must be ready and willing at the time of giving the notice to fulfil his own outstanding obligations under the contract. I should have thought it not really difficult to infer that the same party must continue to be ready and willing at any time during the period to fulfil his part of the contract...”*

***It seems to me that if by the notice the giver of the notice brings into existence a term in respect of which time should be of the essence that the recipient of the notice should complete, it is implicit in that the term equally binds the giver of the notice because completion, despite strenuous argument to the contrary by counsel for the purchasers, is in my judgment an activity in which two parties necessarily co-operate. Completion by one cannot be effected without the co-operation of the other.”** [my emphasis]*

- [49] I endorse the findings at paragraph 44 of the case of **Jennifer Messado and Lanza Turner Bowen v Keith Recas and Nerisha Nathan** [2015] JMCA App 10 where The Honourable Judge of Appeal Mrs. Sinclair-Haynes (Ag) (as she then was) in delivering the judgment of the Court stated: -

*“The principle gleaned from those cases is that a party serving a notice making time of the essence cannot himself be in default. The party urging the completion of the contract by issuing a notice making time of the essence must himself be ready, willing and able to complete. It also is palpable that the party in default cannot himself rely on such notice if the other party performs an act in reliance on his invalid notice.*

*A party who serves notice and is unable to complete cannot be immune from consequences while imposing same on the other party, more so a party who was ready, willing, and able to complete. Such notice, on Mr Jones’ submission, must*

*therefore have been ineffective as against both parties as the invalidity of the notice vitiated all transactions consequent on the notice.”*

- [50]** At the date of the service of the Notice herein, there is evidence to suggest that the Vendor was not in a position to complete the sale. It was expressly indicated in the notice that the Vendor, Mr. Stephenson, was ready to complete the sale but there is evidence to suggest otherwise.
- [51]** Firstly, the agreement for sale was subject to the Purchaser's obtaining a mortgage and securing a Letter of Commitment. The mortgage company required certain conditions to be fulfilled in order to facilitate the issuance of the commitment letter. The documentary evidence showed that at least five (5) of these conditions were to be met by the Vendor. This was communicated to the Vendors, albeit that was communicated at a point where the compliance date was in the offing.
- [52]** The documentary evidence showed that the Vendor was a bit recalcitrant in fulfilling these conditions, resulting in the forestall of the production of the commitment letter. The Court takes judicial notice of conveyancing practice whereby the mortgage company, particularly the NHT, will require rectification of any discrepancies relating to boundaries or any other irregularities in title before it will commit to providing financing.
- [53]** In my view, it is not for me to determine whether the NHT's requirement to have the boundary regularized is trivial. What the evidence shows is that the Purchasers persistently required the Vendors, particularly Mr. Stephenson, to comply with this requirement and they indicated that compliance with same was material to the processing of their loan application. The evidence also revealed Mr. Stephenson's unwilling and stubborn attitude towards facilitating that requirement.
- [54]** Learned Counsel for the Vendors in her submissions stated that in the general scheme of things, where there is such an irregularity, that is boundary irregularity, it is usually within the purview of the vendor to repair same unless a different agreement is reached, as occurred in the instant case. Respectfully, I cannot agree that the Purchasers assumed responsibility to fix this irregularity prior to the

rescission of the contract. The evidence illustrates that it is after the cancellation of the agreement by Mr. Stephenson that the Purchasers, in an effort to save the contract and mitigate the austerity of the Vendors, proposed that they would assume this responsibility. Instead of embracing this proposal, the Vendors decided to repudiate the contract nonetheless.

[55] The Vendors having entered into the agreement fully conscious of the fact that it was subject to the Purchasers obtaining a Letter of Commitment should have been more accommodating to disposing of this stumbling block to facilitate the Purchasers' obligation under the agreement.

[56] There is a well-established maxim that "*no man shall take advantage of his own wrong*". I am in no way declaring that it is incumbent upon a vendor to assist a purchaser in obtaining a letter of commitment. Each case is decided on its own merits and in the circumstances, the efforts of the Purchasers to fulfil their obligation under Special Condition 6 were thwarted by the Vendors' reluctance to meet their contractual obligations by remedying the irregularity. Aside from this non-compliance, there is no evidence to suggest that the Vendors attempted to resolve any of the other requirements of the NHT that were within their purview.

[57] I therefore cannot find that the Vendor was in a position to complete. The Notice was therefore invalid. In the case of **Njamunyu v Nyaga** [1983] KLR 282, it was observed that: -

*"... before an agreement such as this can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract"*

[58] The Vendors therefore failed to serve a valid Notice to Complete making time of the essence of the contract as per Special Condition 10. The right to rescind therefore did not arise at the time the Vendor exercised it.

[59] In my view, even if I am wrong on this, the Vendors did not exercise their right to rescind in good faith. I am guided by paragraph 106 of **Halsbury's Laws of England**, 4<sup>th</sup> Edition (Reissue) where the author stated: -

*"The vendor must exercise the right of recession reasonably and in good faith, and not arbitrarily or capriciously...If the requisition is one which the vendor may reasonably be expected to comply with, he cannot resort to his power to rescind."*

[60] The manner in which the Agreement for Sale was rescinded by the Vendors indicated that it was done out of ill will and spite, and not from a position that they believed that the Purchasers would not have been able to rectify the default.

[61] The parties focused on others issues, mainly, the 3<sup>rd</sup> Defendant's alleged misrepresentation to the Purchasers that she was an Attorney-at-Law. I do not find it necessary and hence will not state a position on any of those issues because on my interpretation of the agreement and on the facts of the case, the Vendors breached the agreement for sale by rescinding the contract before their right to terminate was triggered.

[62] In relation to the Claim as to whether or not the caveat was wrongfully lodged it is settled that the **Registration of Titles Act** (hereinafter referred to as the Act) creates a statutory regime for the notification of claims to interests in land. This involves the lodging of caveats. The caveat in this matter was lodged pursuant to Section 139 of the Act.

[63] Section 143 provides that persons who lodge caveats with the Registrar "*without reasonable cause*" shall be liable to any person who thereby sustains damage. The Vendors have thrown empty assertions to the Court and failed to provide any proof of the damage suffered as a result of the caveat being lodged. Furthermore, in the light of my findings above, I cannot say that the Purchasers lodged the caveat without reasonable cause, given that the Vendors right to rescind did not arise at the time at which they exercised same.

[64] It is common ground that the agreement can no longer be specifically performed and hence the only remaining issue is the quantum of damages to which the

Purchasers may be entitled. The parties also agreed that the measure of damages would be the difference between the value of the land which remains in their possession and the price he would have got had the contract been completed. The difference of value of the property is Five Million Dollars (\$5,000,000.00) and I am prepared to award this sum.

**[65]** The award of interest is discretionary. The object of interest is to compensate the party fully for the loss sustained and not to punish the offender. As a result, caution must be exercised to avoid overcompensation. In this case, all monies paid by the Purchasers were refunded and I am of the view that the measure of damages is adequate to fully compensate the Purchasers herein.

#### **ORDERS AND DISPOSITION**

**[66]** In relation to CLAIM NO. 2013 HCV 02311: -

1. Judgment for the Claimants.
2. Damages for breach of contract awarded in the sum of Five Million Dollars (\$5,000,000.00) (no interest).
3. Costs to the Claimants to be taxed if not agreed.

**[67]** In relation to CLAIM NO. 2013 HCV 03577: -

1. Judgment for the Defendants.
2. No order as to costs.