[2026] JMCC Comm 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2024CD00271

BETWEEN	**CM RECYCLING COMPANY LIMITED**	**CLAIMANT**
AND	**SELNOR DEVELOPMENTS LIMITED**	**1st DEFENDANT**
	JASON MACTAVISH SMITH	**2nd DEFENDANT**

Contract – Agreement for sale of land – Cash sale – Notice making time of the essence – Whether period of 21 days reasonable – Whether service by email valid notwithstanding contractual deeming provision – Whether negotiation after expiry of notice operates as a waiver – Whether estoppel applicable – Whether contract lawfully rescinded - Whether relief from forfeiture to be granted.

Lemar Neale, Danielle Gordon, Nathaniel Webb instructed by Nea|Lex for the Claimant

Sundiata Gibbs, Annay Wheatle instructed by Hylton Powell for the 1st and 2nd Defendants

In Open Court

Heard: 15th, 16th, 18th June and 24th July 2026

Cor: Batts, J.

[1] On the first morning of trial the parties indicated they had agreed, but wished my permission, to have a stenographer take the notes of evidence. I permitted

it but indicated I would not be awaiting those notes before preparing my judgment. I received the transcript prior to finalization of this judgment. The parties also agreed several bundles of documents and these were tendered as exhibits 1 to 4(b).

[2] The facts and issues may be shortly stated because, given the formidable documentary evidence, there is not much disagreement as to what transpired. The issues to be determined concern the legal consequences, and factual inferences, which flow from the facts I now summarize.

[3] The Claimant as purchaser and the 2nd Defendant as vender entered into a written agreement for the sale of land, see exhibit 1 page 4. At the time of entry into the agreement the 2nd Defendant was not the registered owner of the land but held an option to purchase it, see exhibits 4(a) and 4(b). The grantee of that option, and registered owner of the land, was the 1st Defendant which is a registered company owned and controlled by the 2nd Defendant, see paragraph 2 of the witness statement of Jason MacTavish Smith dated the 27th March 2026. The contract for sale had several conditions which included, among other things, that covenants on title were to be modified and that the option should be exercised. The sale was expressly stated to be a cash transaction.

[4] On or about the 20th May 2022 the Claimant paid $50,057,500.00 to the 2nd Defendant, $13,000,000 of which represented the deposit of 10 percent of the purchase price, see exhibit 2 pages 3,5 and 7. The timeline for meeting the conditions in the agreement were not met but the Claimant took no step to make time of the essence or otherwise enforce the agreement. According to the Claimant's witness, in that period, they incurred expenses preparatory to completion, see paragraphs 18 and 19 of the witness statement of Hilroy McFarlane filed 27th March 2026. In or about October of 2022 the Defendants' attorney at law, Mr. Thomas Ramsay, contacted the Claimant's attorney at law, Mr. Jody White, to advise that the restrictive covenant had been modified and that steps to obtain splinter titles were being taken, see exhibit 1 pages 120-122. By letter dated 24th November 2023, sent by email on the same date, Mr. Ramsay advised Mr. White that the documents were lodged, the pre-check

subdivision plan was being revalidated at the Department of Surveys and, that splinter titles would shortly be issued, see exhibit 1 pages 123 to 125. By letter dated the 4th December 2023, receipt of which was acknowledged on the 12th December 2023, Mr. Ramsay sent to Mr. White the vendor's statement of account to close along with:

> *"Instrument of Transfer, in duplicate (already signed by our client) to be executed on behalf of your client and, thereafter, to be returned to us TOGETHER WITH your professional undertaking for the payment of the abovementioned balance".* [See exhibit 1 pages 126 to 127].

[5] There was no response in writing to the above communication. By letter dated 23rd January 2024, sent by email on the same date, Mr. Ramsay complained about the absence of a response in writing and stated that his client was ready willing and able to complete the transaction. He requested return of the instrument of transfer duly executed along with an undertaking to pay the balance. This prompted a reply, by email dated the 13th February 2024, from Mr White who indicated that his client was interested in purchasing another lot for $95 million and, was *"in the process of finalizing financing arrangements"* with respect to the contract entered into, see exhibit 1 page 139. This communication was followed by an email from Mr. White to Mr. Ramsay dated 19th February 2024 enclosing a letter from a bank indicating the Claimant was pre-approved for a mortgage loan but that it was not a letter of commitment, see exhibit 1 pages 140-141.

[6] Mr Ramsay gave a sharp response, by email of the 21st February 2024, enclosing a letter of that date to Mr. White, see exhibit 1 page 142-144. The letter reminded Mr. White that the transaction was a cash transaction and was not subject to mortgage. Mr Ramsay also indicated that the unexpected delay in completion resulted in his client being "*gravely embarrassed*" as he was unable to fulfil certain financial commitments. Mr. Ramsay ended that letter by stating that a notice making time of the essence would have to be issued. Mr.

White's reply, although prompt, was rather laconic. I quote his email in full, see exhibit 1 page 145,

> *"Dear Senior Counsel,*
> *Acknowledge receipt of your email and the letter attached and I have scheduled a consultation with the client to discuss the matter. I will revert to you as soon as possible. As indicated in our previous correspondence the loan application is far advanced and we are expecting disbursement in short order.*
>
> *Kind Regards*
> *Jody White"*

[7] On the 28th February an email, with a soft copy of a letter dated 28th February 2024, was sent to Mr. White, see exhibit 1 pages 147-148. That letter invoked special condition 9 of the agreement, which required the payment of interest, and indicated that if an undertaking or payment was not received within 7 days a notice making time of the essence would be issued. The response from Mr. White, an email issued 28th February 2024 at 7:44pm, exhibit 1 page 147, was that he would be "*making arrangements for the client to provide a full some response."* By email dated 5th March 2024, Mr. Ramsay indicated he received instructions to issue a notice making time of the essence, exhibit 1 page 152.

[8] A Notice Making Time of the Essence, dated the 8th March 2024, was thereafter issued. The notice stated that 21 days was being allowed for the Claimant to pay the balance plus interest accrued and costs failing which the contract *"will be regarded as repudiated and the 10% deposit forfeited"*, see exhibit 1 pages 153 to 159. The Claimant in this action has taken issue with the service of the notice and whether the time given was reasonable. I will return to that later in this judgment.

[9] Subsequent to the issue of the Notice Making Time of the Essence there were conversations between Mr. White and Mr. Ramsay. It is the Claimant's case

that the parties thereby entered upon negotiations and that the effect in law was to waive or otherwise nullify the Notice Making Time of the Essence. The Defendants, on the other hand, argue that there were no negotiations and that the Notice Making Time of the Essence remained valid and effectual. These matters I return to later.

[10] Mr. White's written response to the Notice Making Time of the Essence was an email dated 26th April 2024 enclosing a letter (erroneously dated 19th April 2026) exhibit 3 pages 40 to 42. In that letter Mr. White challenged the legal validity of the Notice Making Time of the Essence and argued that time for completion had not yet arisen. He ended by stating that his client would be ready to complete on or before the 31st May 2024 and requested *"an extension until then".* On the 6th May 2024 Mr. White sent an email in which he reiterated his client's commitment to have the matter settled in the time frame indicated and that final word would be received from the bank on "*the loan application by the end of this week".* Mr. Ramsay's reply was dated the 13th May 2024, see exhibit 3 pages 43-46, by which he endeavored to terminate the contract. In doing so he, among other things, returned the money paid but retained 10% of the purchase price as the amount forfeited. That letter stated in part:

> *"That notwithstanding the several telephone conversations, between yourself and the writer hereof, after the service by registered mail on both your client and your firm, as aforesaid, (with a view to effecting an amicable settlement, bearing in mind the grave and embarrassing financial position in which the inexplicable delays in completing the transaction had placed our client),* ***in your letter referred to in the first paragraph above, you have requested an extension until the 31st May 2024*** *(which can only be described as an untenable request)."*

[11] There is no evidence that either an undertaking or the cash balance was tendered on or before the 31st May 2024. There was however an email dated 16th May 2024 captioned "*comfort letter*" in which Mr. White enclosed a letter dated 15th May 2024 from the bank indicating that *"upon execution of the relevant documents a letter of undertaking will be issued to your firm"*, see exhibit 3 pages 70-71. By letter dated 17th June 2024 addressed to Mr. Ramsay the bank stated that their client in the period "*January 2023 to August 2023*" had funds in excess of US$800,000 on deposit, see exhibit 3 page 72. By letter dated 30th April 2025 the bank wrote to Mr. Ramsay, "*further to our letter of undertaking dated July 16, 2024,"* and confirmed that JA$80 million was being held for the Claimant and "*is intended to facilitate the successful completion of the captioned transaction"*, see exhibit 3 page 83. The referenced letter of undertaking was not put in evidence.

[12] This claim was filed on the 11th July 2024. The Claimant seeks to specifically enforce the agreement for sale. Alternatively, the Claimant seeks damages for breach of contract. In the further alternative relief from forfeiture is claimed. The Defendants deny the Claimant is entitled to any relief claimed and contend that the contract was lawfully terminated. The resolution of these questions will turn on the following:

1. Whether Notice Making Time of the Essence was validly issued.
2. Whether the contract was lawfully terminated that is had the notice been waived or had it otherwise lapsed.
3. Whether the circumstances of this case are such that relief from forfeiture is appropriate.

[13] Viva voce evidence was given by each party as well as their respective lawyers who were all cross-examined. I will only reference that evidence to the extent that is necessary in this judgment. The parties also provided written submissions and authorities for which I am grateful. Having read all of the material I think the issues can be resolved in short order.

[14] It is clear to me that the Claimant at all material times was prepared to wait for the 2nd Defendant to satisfy the special conditions in the agreement for sale. It is also clear to me that the 2nd Defendant satisfied those conditions and was ready, willing and able to complete the transaction at the time the notice to complete was served. Much ado was made by the Claimant's representative of the fact that the notice to exercise the option to purchase, signed by the 2nd Defendant on the 4th May 2022, made no reference to one of the lots being sold, see exhibit 4(a). However, the option to purchase was exercised by the 2nd Defendant, when he signed an agreement to buy the lot from the 1st Defendant, see exhibit 1 page 92. This means that the 2nd Defendant became the beneficial owner of the land being sold to the Claimant. Furthermore, the 2nd Defendant's attorney had, since December of 2023, made it clear his client was able to complete. This was never challenged prior to the commencement of these proceedings. In any event the suggestion that the 2nd Defendant was unable to make good title, because an option to purchase from the 1st Defendant was not properly exercised, is rather artificial given that the 1st Defendant is owned and controlled by the 2nd Defendant. In fact, the 2nd Defendant signed all documents on behalf of both of them, see exhibit 4(a).

[15] I find also that the Notice Making Time of the Essence was lawfully issued. The sale was a cash sale and not subject to mortgage. Therefore, upon the failure to pay the balance or tender an undertaking, after the statement to close was tendered, the 2nd Defendant was entitled to set a date for compliance and to make time of the essence. The Claimant contends that the 21-day period, in the notice making time of the essence, was too short. It was also argued that, given the method of service and the contractual provisions, it was either not lawfully served or was effectively only a 7-day notice. This latter submission, I respectfully say, is consequent on a misreading of the relevant provision. The clause, special condition number (17), reads:

> *"Any notice required to be given or served upon either of the parties hereto shall be deemed to be sufficiently given to and effectually served upon the Purchaser if addressed to him at his address aforementioned and posted by*

prepaid registered post at any post office in Jamaica and also to his Attorney-at-Law, and upon the Vendor if addressed to the Vendor at his address aforementioned and posted by prepaid registered post at any Post Office in Jamaica, and also to his Attorney-at-Law. A notice shall be deemed to be served fourteen (14) days after the time of delivery to a reputable Special Courier." [Exhibit 1 page 30]

This is a deeming provision. It indicates that, if sent by post or courier, service will be deemed to have occurred. The provision relieves the 2nd Defendant of a burden to prove actual service if either method of service is used. The clause does not say service in that manner is exclusive or mandatory. Therefore, when the 2nd Defendant's attorney chose to send the notice by email and by hand he was entitled so to do. It is admitted that these methods were successful and the notice was received, see exhibit 1 pages 160 to 161, and the oral evidence of Mr Jody White. I find on a balance of probabilities that the Notice Making Time of the Essence came to the attention of the Claimant and/or its legal representative on or about the 8th March 2024 and therefore 21 days' notice was received.

[16] The challenge to the reasonableness of the notice given was rather bizarre since the 2nd Defendant notified the Claimant of its readiness to complete in December 2023. Until the recission of the agreement on 13th May 2024 the balance purchase price had not been tendered. Therefore, the Claimant had not made good use of a 5-month period to tender the balance and close the transaction. There is no doubt in my mind that the 21 days given in the Notice Making Time of the Essence was reasonable and that the Claimant had had more than reasonable time to complete what was agreed upon expressly as a cash sale.

[17] The next, and more difficult question, is whether the Notice Making Time of the Essence had been waived, allowed to lapse, or abandoned. The Claimant says this was the effect of negotiations which occurred between the parties' legal

representatives after the time fixed for completion in the notice had passed. It was urged that the failure of the 2nd Defendant to extend the date fixed in the notice to a specific date amounted to waiver. The Claimant says that in these circumstances a waiver, of time being of the essence, occurred as a matter of law. Although there was no express agreement to waive the breach the conduct of the 2nd Defendant, by continuing negotiations, resulted in a waiver. Reliance is placed on **Chitty on Contracts 21st Edition Volume 1 at paragraph 24-007**. A waiver by estoppel occurs if the party not in breach has so conducted himself as to lead the party in default to believe that he will not exercise his right to terminate. It is an application of the principle in ***Hughes v Metropolitan Railway Company (1877)2 App. Cas.439.*** The Claimant also relied on ***Selwyn v Garfit (1887) 38 Ch. Div 273*** for the principle that where time is made of the essence, and at the end of the period nothing is done by the innocent party, time is no longer of the essence. It can only be made so again by a further notice making time of the essence. This can only be avoided, Mr. Neale submitted, if time once being made of the essence is extended to a particular date. Doing nothing after time expires, or continuing to negotiate, causes the innocent party to lose the right to rescind. Other cases cited in support of those submissions were ***Smith v Salmon SCCA 67/2004, Luck v White (1973) 26 P & CR 89, Webb v Hughes (1870) LR 10 Eq 281, Lloyd McGregor & Mary McGregor v Cecil Bird C.L. 1995/M256*** unreported judgment delivered on the 19th October 1995, and ***Hakimzay Ltd v Swailes [2016] EGLR 1, [2015]EWHC B14(Ch).***

[18] Having considered all the authorities, and the submissions of Messrs. Neale and Gibbs on this issue, I am satisfied that there was no waiver of the Notice Making Time of the Essence neither was there an estoppel created by the conduct of the 2nd Defendant, or his legal representative. For the reasons outlined below the authorities cited do not assist on the facts at bar.

[19] ***Selwyn*'s** case concerned the interpretation of some rather peculiar terms in a mortgage. Essentially the power of sale could not arise until 3 months after there had been a default in payment of sums due 6 months after the mortgage was executed. A notice calling for payment within 6 months was therefore

invalid and the sale thereafter was null and void. This was because on the facts the purchaser was held to be aware of the defect in the notice. On the further question, whether the mortgagor had waived his right to the full period of notice by remaining silent while the mortgagee sold the property to the purchaser, Lord Justice Bowen said, page 284:

> ***"Might a bona fide purchaser infer that in fact there had been waiver of such notice? What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice."***

In that case it was decided that because the mortgagor had sold his reversion, and therefore no longer had the power to exercise his equity of redemption. when the mortgagee exercised power of sale he had no power to waive the notice. The sale was therefore set aside. In ***Selwyn*** the court indicated that silence or inaction did not constitute a waiver but may in certain circumstances be used as evidence of waiver.

[20] In the case before me the 2nd Defendant's attorneys were pressing for completion and for payment. There was no inaction which could constitute a waiver. Nor was there anything said, done or written which could reasonably have lead the Claimant to believe that the Notice Making Time of the Essence was no longer in force or to be relied upon. Indeed, all indications were to the contrary. The Claimant and/or his legal representative were aware that the 2nd Defendant expected a cash payment, see Mr. Ramsay's letter of the 21st February 2024 (exhibit 1 page 143-144) expressing incredulity that a loan from a bank was being considered when the sale was one for cash. There was neither inaction or delay, subsequent to the issue of the notice making time of the essence, which amounted to a waiver or evidence of waiver.

[21] ***Smith v Salmon*** is relied on for dicta at pages 12-13 of the judgment of the Lord President Harrison:

> ***"If time is made the essence of a contract and the date has passed and the parties continue***

> ***negotiating for the completion of the purchase, time is no longer of the essence of the contract – Webb v Hughes [1870] LR 10 Eq. 281.***
>
> ***Where time is made of the essence and there is default, the party not in default may or may not rescind. Conduct consistent with the continued existence of the contract is an election not to rescind — Carr v Berriman Property Ltd[1953] 89 CLR 327. See also Buck/and v Farmer et al[1978] 3 All ER 929 and Luck v White [1973] 26 P v CR 89."***

Lord President Harrison agreed with the trial judge that a Notice Making Time of the Essence had been waived. This is not surprising as, on the facts, the notice was served in "*June 1986*" without a specific date inserted but threatening rescission within "*14 days*". Thereafter nothing was done to terminate and a letter dated 23rd January 1987 sending "*original transfer and original agreements for sale"* was accepted and the transfer signed. This demonstrated that the time of the essence notice had been waived. The purchaser, be it noted, eventually paid the entire purchase price. The quoted words must be read in the context of the factual situation.

[22] ***Luck v White*** is a case taken from the Solicitor's Journal which is annotated and not reported in full. The extract from Goulding J's judgment, on which Mr. Neale relies, is as follows:

> ***"The mere fact that notice had been given and had not been complied with, did not mean that time was of the essence of any appointment for completion that might result from further negotiation. Authority was against that view. If a party in the right allowed a defaulting party to try to remedy the default after an essential date had passed, he could not then call the bargain off, without first warning the defaulting party by fixing a new time limit, reasonable in the circumstances."***

In that case the original date for completion of the sale was the 14th May 1971. The date was not met as the purchaser's bank made requisitions of the title preparatory to the grant of a mortgage. A notice was issued making time of the essence and fixed the 6th September 1971 for completion. Payment was not made by that date but after correspondence from the purchaser's bank a new date for completion of the agreement was agreed upon being the 16th November 1971. Completion did not occur and the vendor wished to treat the agreement as at an end. Goulding J disagreed and granted the purchaser an order for specific performance. It is significant that on the 16th November 1971 the mortgage had been approved and the purchaser was in a position to pay but there was a dispute as to the amount of interest which was to be paid for the delay in completion. The judge correctly pointed out that in the ordinary situation a dispute about interest would not, without more, justify renunciation of an agreement for sale. It is clear from these facts that the parties, after notice to complete expired, decided to keep the contract alive and therefore the time of the essence notice had been waived.

[23] **Webb v Hughes,** another of the cases cited by counsel for the Claimant, is a locus classicus. It is the authority establishing that time is not automatically of the essence in the sale of land. Failure to complete on the date named for completion did not automatically bring the contract to an end. That was a claim by the vendor for specific performance and by the purchaser for return of his deposit on the basis that the vendor failed to show good title on the date fixed for completion. The question was whether time for completion was of the essence and it was decided that it was not because the contract provided for interest if payment was late. In the words of the Vice-Chancellor Sir R. Malins at page 286 of the report:

> ***"But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown. What, then would have been a reasonable time? What was the Defendant's position on the 7th April? The solicitors had been negotiating from the 26th of February for completion of the***

> ***contract, and on the 7th of April the purchaser does not give the vendor even twenty-four hours' notice of his intention but sends a notice of his immediate abandonment of the contract. If instead of that, he had given notice that if the vendor did not perfect his title within a reasonable time, then he would abandon his purchase and would require a return of his deposit, that would have been sufficient, but he had no right, under the circumstances, to give notice of immediate abandonment."***

In the case at bar there were no continued "*negotiations*" after the Notice Making Time of the Essence was served. I accept the evidence of Mr. Thomas Ramsay that the conversations and correspondence consisted of the purchasers' legal representative promising to pay and asking the vendor's attorney to stay his hand and not terminate. It was all about a hope or expectation that the obligation, to pay or give an undertaking to pay, would be fulfilled. I accept his evidence that in telephone conversation he stated that the extension requested would not be granted. There was in the circumstances nothing inequitable about the termination of the contract when payment was not made, time having been clearly made of the essence and the date fixed for payment having passed. No promise of an extension of time was made nor, in the circumstances, could one be inferred.

[24] ***Charles Rickards Ltd v Oppenheim [1950] 1 AllER 420*****,** a case cited by the Defendants' counsel, is to the same effect. If, although time is made of the essence, the innocent party leads the party in breach to believe that he would not insist on the stipulation as to time he could not later rely on the stipulation, per Lord Justice Denning (as he then was) at page 423E:

> ***"It is a kind of estoppel. By his conduct he made a promise not to insist on his strict legal rights. That promise was intended to be binding, intended to be acted on, and was, in fact, acted on. He cannot afterwards go back on it."***

It suffices to say that, after the Notice Making Time of the Essence was served, Mr. Ramsay made no promise to the purchaser or it's attorney and no such promise, real or imagined, was acted on.

[25] ***McGregor et al v Cecil Bird*** was another case cited, see paragraph 18 above. The court was considering an application for an injunction until the trial of the claim for specific performance. The learned judge refused injunctive relief as there was no serious issue to be tried. The fact was that immediately after the time fixed for completion, which had been of the essence, the sale was terminated. The issue was framed by the learned judge Harrison J (Ag) as follows:

> ***"But, is there any evidence in the present case suggesting that the conduct of the caveatee was such that it communicated to the caveators that he was not insisting on a punctual completion? If so, did this conduct encourage the caveators in the belief that there was a waiver in the requirement for time to be of the essence?"***

When I ask myself that question, in the matter before me, it is manifest that nothing Mr. Ramsay said or did, after the Notice Making Time of the Essence was served, encouraged the purchaser to believe that either punctual payment, or the time being of the essence, was waived.

[26] ***Hakimzay Ltd v Swailes*** is also relied upon by the Claimant. It is a first instance decision by Judge Keyser QC, sitting as a High Court judge to hear an application for summary judgment. The Defendant (vendor) resisted the purchaser's claim for specific performance on the basis that the contract had been validly rescinded. The facts were that on the completion date, 3rd April 2014, the vendor was unable to give vacant possession in accordance with the terms of the agreement. The purchaser's attorneys gave a notice to complete making time of the essence being 29th April 2014. The parties negotiated in writing for an extension of time and the purchaser's attorney counter-proposed for a reduction in the purchase price in return. The 29th April came and went and the purchaser did not rescind the agreement. The proposal was rejected

on the 30th April as the vendor's attorney was of the view that the increase in value of the property was sufficient compensation. On the 1st May and again on the 2nd May the vendor's attorney indicated that the property was now vacant and they were ready to complete. The response of the purchaser was that he wished to attend to complete but that completion would only take place if there was an agreed price reduction. On the 7th May a notice rescinding the agreement was served on the purchaser. It relied on the purchaser's notice to complete. The purchaser argued that the contract was still alive. The judge correctly decided that the vendor was not entitled to serve a notice of recission (see paragraph 27 of the judgment). Summary judgment was given for the purchaser and specific performance ordered. The case is clearly distinguishable from that which is before me.

[27] There are other cases in the Claimant's bundle of authorities and, having reviewed them all, I find that there is no principle of law which renders invalid or void a notice making time of the essence merely because, after the notice is served, the parties speak to each other or "*negotiate"* toward an amicable resolution. This would really be absurd and would mean that men of commerce might refrain from engaging in dialogue, with a view to completing bargains they have entered into, for fear that any exchange of communication after a time of the essence notice is served would render the notice invalid. It would mean, for example, that mere discussion of a request by the party in breach to "hold off on recission" would preclude recission of the contract without service of a further notice making time of the essence. That could not be so.

[28] The true principle is that conduct by the innocent party, after time is made of the essence, which leads the other party reasonably to believe that the new date for completion will no longer be insisted upon, or that the time fixed for completion will not be strictly applied, will constitute a waiver and will lead to an estoppel. Inaction, as well as words or conduct, after the time has expired can be evidence to support a waiver or estoppel. The legal position is, I believe, best summarized by the Eastern Caribbean Court of Appeal in ***Michael Joseph v Indra Hariprashad Charles et al SLUHCVAP2023/0028*** **unreported judgment delivered 4th May 2026**, (an authority cited by the Defendants'

counsel) in the judgment of Ellis JA, with whom the other judges of appeal concurred. The following extract from her judgment I respectfully adopt:

> ***"[135] Failure to abide by a time clause where time is of the essence amounts to a breach of contract which is no different from breach of any other fundamental term. The party not in default may elect to treat the contract as terminated by the breach and he can choose to pursue normal contractual remedies. Alternatively, the party not in default may treat the contract as still subsisting. This amounts to a waiver of time being of the essence.***
>
> ***[136] Waiver is the abandonment of a right: Banning v Wright [1972] 2 All ER 987. Waiver operates to prevent a party from insisting upon their strict rights where it would be unjust to allow them to enforce them, having regard to the dealings which have taken place between the parties. It can arise where the innocent party voluntarily or on request, represents to the other party that they will not enforce a provision, and the other party acts in reliance on that representation. This is known as waiver by estoppel. It may also occur where the innocent party, on the occurrence of a repudiatory breach, elects to treat the contract as continuing but does not abandon their right to claim damages for the loss suffered as a result of the breach. This is an example of waiver by election.***
>
> ***[137] In both cases, there must be an unequivocal representation of the waiver communicated to the party in breach. Aikens LJ in Tele2 International Card Co SA v Post Office Ltd [2009] EWCA Civ 9 would have explained the requirements in the following terms:***
>
> > ***"(1) [I]f a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether to or not to do so. Its decision is, in law, an election.***

(2) It is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself.

(3) The innocent party has to make a decision, because if it does not do so then 'the time may come when the law takes the decision out of [its] hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it.'

(4) Where, with knowledge of the relevant facts, the party that has the right to terminate the contract acts in a manner which is consistent only with it having chosen one or other of two alternative and inconsistent courses of action open to it (i.e. to terminate or affirm the contract), then it will be held to have made its election accordingly.

(5) An election can be communicated to the other party by words or conduct. However, in cases where it is alleged that a party has elected not to exercise a right, such as a right to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party 'has so communicated [its] election to the other party in clear and unequivocal terms."

> ***[138] Aikens LJ also went on to clarify that whether a party has elected to terminate or to affirm a contract is a question of fact.***
>
> ***…***
>
> ***[145] Although delay (silence or inaction) can amount to a waiver, at common law, it does not automatically mean a waiver of rights. Whether a delay amounts to a waiver will depend on the terms of the contract in question and the circumstances of the case. In Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 2387 (TCC) at paragraphs 418 –419 the judge commented that although a delay in exercising a right to terminate of two and a half years may well have been sufficient to amount to a waiver, on the facts of the case that right had not been waived.***
>
> ***[146] Indeed, this is a notoriously difficult case to prove with courts making it clear that mere silence or inaction can contribute to a waiver by conduct only if it is combined with other actions or a pattern of behaviour that clearly shows an intent to give up a known right. Courts continue to look for unequivocal acts or a course of dealing and not mere quiet inaction…"***

[29] I have taken the time to carefully review the authorities, on the question of waiver and the effect of negotiations, out of respect for the carefully articulated and well prepared submissions of Mr. Neale. However, the submissions fail because firstly, there is no legal principle which results as a matter of law in time no longer being of the essence merely because the parties speak to each other or "*negotiate*". Secondly, it is the nature of any discussion, or negotiation, and the factual matrix in which they occur, which will determine the legal consequence and whether time of the essence is waived or a party is estopped

or precluded from relying upon the notice making time of the essence. Thirdly, and perhaps most importantly, in this case I find that once notice was served making time of the essence all parties knew that the 2nd Defendant had a right to rescind once payment was not made on the date fixed for payment. The Claimant's attorney was very well aware of this and therefore asked the 2nd Defendant's attorney not to terminate as arrangements were being finalized with the bank. The response when it came was unambiguous as the 2nd Defendant did not wish the agreement converted into anything other than the cash sale it was. There was never any belief that the time fixed was no longer of the essence.

[30] In Jamaica we have a phrase that *"when you sorry fi mawga dawg, mawga dawg tun round bite you".* In delaying rescission, in the hope that the purchase price would be forthcoming, Mr Ramsay must have empathized with the purchaser's attorney. The money was, however, not paid nor was an undertaking given. Mr Ramsay therefore terminated the contract. The law will not allow Mr Ramsay to be bitten in this case. There was at no time a representation, express or implied, that the notice making time of the essence was no longer valid or effectual. On the contrary the Claimant's attorney was at all material times aware, or ought reasonably to have been aware, that the time fixed remained of the essence and that the 2nd Defendant had a right to terminate. There was neither waiver nor estoppel.

[31] The other issue therefore is the question of relief from forfeiture. It is urged upon me that in all the circumstances of this case I should grant relief from the forfeiture of the deposit and/or from the forfeiture of the contract. Mr. Neale urged that the 2nd Defendant had benefitted by the increase in value of the property and refers to the fact that one of the three lots has since been sold for two-thirds of the price of all three in the agreement for sale, see the following exchange in the cross examination of Mr Jason Smith:

> *"Q: Your agreement with the Daswanis to sell Lot 5, what was the purchase price? What was the sale price?*

A: *It was 92 or 94 million*

Q: *And you would agree with me that was close to what you were basically selling the three lots to Mr. McFarlane – sorry CM for?*

A: *About two thirds"*

Mr Neale argued also that the steps to obtain subdivision approval had been of benefit to the 2nd Defendant and therefore relief should be granted. I do not agree these circumstances justify relief. The 2nd Defendant, although initially holding 50% of the intended purchase price, by its letter of recission returned all but 10%, see exhibit 1 pages 164-167. Ten percent is the normal deposit and has been recognized by the Judicial Committee as the appropriate earnest to bind, see ***Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573*****.** The agreement was for a cash sale and in December 2023, when the 2nd Defendant indicated it was ready willing and able to complete, the Claimant was unable to do so. The Claimant failed to do so for 5 months thereafter and the 2nd Defendant rescinded the contract. There is in the circumstances no warrant for a court of equity to grant relief. The Claimant's witness, Mr. Hilroy McFarlane, when giving oral evidence stated that at all times the Claimant had access to the cash to close but did not do so on the advice of its bankers. This evidence runs counter to the statements of case and the witness statements filed but is supported by correspondence from the bank, see paragraph 11 above. I find that Mr. McFarlane is being truthful but that fact hurts, rather than assists, the claim for relief. It suggests a deliberate breach of the obligation to pay by the date specified rather than one forced upon it by unforeseen circumstances.

[32] In the result and for all the reasons stated above the claim is dismissed and judgment entered for the 1st and 2nd Defendants. Costs will go to the Defendants to be taxed if not agreed.

David Batts
Puisne Judge.