JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	DOJAP INVESTMENTS LIMITED	PLAINTIFF/APPELLANT
AND	WORKERS TRUST & MERCHANT BANK LIMITED	DEFENDANT/RESPONDENT

Richard Mahfood Q.C. & Miss Jacqueline Hall instructed by Clough, Long & Co. for Appellant

R.N.A. Henriques Q.C. & David Batts instructed by Livingston, Alexander & Levy for Respondent

November 19 - 23, 26, 1990 & February 11, 1991

ROWE P.:

Premises known as 57-59 Half-Way-Tree Road and 19 Carlton Crescent, St. Andrew comprised of six parcels of land, each under the Registration of Titles Act, were put up for sale by public auction by the respondent, on October 5, 1989. Raymond Clough, Attorney-at-Law attended at the auction and bid in his own name the sum of $11,500,000.00 for these parcels which bid having exceeded the reserve price of $11,200,000.00 was accepted. Clough later nominated the appellant as the party into whose name the properties should be transferred.

In compliance with Clause 4 of the Conditions of Sale, on October 5, 1989, Clough paid the sum of $2,875,000.00 being 25% of the purchase price, as a deposit, and agreed to pay the remainder of the purchase price and half the costs of

transfer within fourteen days from the date of the sale. By letter dated October 23, 1989 the respondent rescinded the agreement for sale and forfeited the deposit, on the basis that the appellant had neither paid the balance of the purchase price nor provided an unconditional acceptable Banker's Undertaking, in lieu, by October 20, 1989. An offer of a Manager's cheque from Jamaica Citizens Bank in the sum of $9,012,579.82, representing the balance of the purchase money, costs, and interest at 12% from October 20-26 on October 26, to complete the purchase was rejected by the respondent on October 27 and the cheque was returned. Litigation followed.

Dispute centered around the interpretation of Clauses 4, 5, 6, 7, 8, 13, 15 of the Conditions of Sale. These I set out below:

> " .....
>
> 4. Immediately after the sale the purchaser shall pay to the Auctioneer at his Auction Rooms a deposit of TWENTY FIVE PERCENT of the amount of the purchase money of the property and sign the agreement endorsed hereon for the completion of the purchase according to these conditions. The purchaser shall pay the remainder of the purchase money together with the amount payable by the purchaser under paragraph 6 hereof within FOURTEEN (14) days from the date of the sale to the vendor's Attorney-at-Law SHIRLEY-ANN EATON of No. 153-155 East Street, Kingston. Immediately upon such payment the vendor pursuant to the provisions of Section 106 of the Registration of Titles Act will execute a transfer to the purchaser and lodge same for registration.
>
> 5. If from any cause whatsoever other than the wilful default of the vendor the purchase shall not be complete on or before the expiration of thirty (30) days from the date of the auction the purchaser shall pay interest at the rate of Twelve Dollars per centum per annum on the unpaid

" amount of the purchase money from the time hereby fixed for the payment of the same until the same shall be actually paid. This condition is without prejudice to any right or remedy reserved to the vendor by any other of these conditions.

6. The property is under the operation of the Registration of Titles Act and the title is as disclosed by the Certificate of Title issued in respect hereof. The vendor is selling as the and a draft transfer which shall be prepared by the vendor's Attorney-at-Law shall be submitted to the purchaser or his Attorney(s)-at-Law for perusal and approval and the costs of the same shall be in accordance with the scale of charge of the Jamaica Bar Association and such costs together with stamp duty and registration fee shall be borne by the vendor and the purchaser equally.

7. All requisitions and objections (if any) in respect of the title, description of the property or particulars or otherwise arising out of the sale and nor precluded by these conditions shall be delivered in writing to the vendor's Attorney-at-Law within SEVEN DAYS from the delivery of the draft transfer for perusal and approval. If no objections or requisitions be made within the period aforesaid the title and the terms and form of the draft transfer shall be deemed to have been accepted and approved.

8. If the purchaser shall make any objection requisition respecting the title to the property which the vendor or its Attorney-at-Law shall on the ground of expense or otherwise be unable or unwilling to answer satisfy or comply with the contract for sale of the property may be rescinded by the vendor (notwithstanding any attempt to remove or satisfy the same negotiation in respect thereof) unless the purchaser withdraws such objections or requisition within seven days after the delivery of a letter from the vendor's Attorney(s)-at-Law declining to answer such objection or requisition.

.....

"13. If the purchaser shall fail to observe or comply with any of the foregoing stipulation on his part his deposit shall be forfeited to the vendor who shall be at liberty (without tendering any transfer) to re-sell the property either by public auction or private contract at such time and in such manner and subject to such conditions as the vendor may think fit and any deficiency in price which may result on and all charges costs and expenses attending a re-sale or attempted re-sale, together or rendered useless by such default, shall be made good and paid by the defaulting purchaser at the present sale and be recoverable from him by the vendor as liquidated damages. Any increase of price on a re-sale shall belong to the vendor.

.....

15. Whenever under these conditions an act should be performed or a payment made at or within a stated period time shall be of essence of the contract."

In his Statement of Claim the appellant alleged that the respondent was in breach of its duty to act promptly in carrying out its obligations under the agreement and that it failed to submit the draft transfer and accurate statement of costs within a reasonable time so as to enable the appellant to fulfil his own obligations under Clause 4. Consequently the appellant alleged that its own acts between October 18 and 26 were a sufficient performance of the contract and the purported forfeiture was contrary to Clause 5 of the Conditions of Sale. Alternatively it alleged that by charging interest the respondent acted in breach of the Conditions of Sale. Paragraph 11 of the Statement of Claim was in these terms:

"Further or in the alternative, the Plaintiff avers that the Defendant by its conduct failed to carry out its obligations promptly and/or waived the application of Conditions 13 and/or 15 to Condition 4.

PARTICULARS

(a) .....

(b) The Defendant extended the date for payment of the remainder of the purchase monies, and/or

(c) The Defendant acknowledged the existence of the contracts of sales after the 19th day of October 1989 and/or

(d) The Defendant had evinced a clear intention of proceeding pursuant to Condition 5."

The final alternative claim was an averment that in the circumstances the forfeiture was harsh and unconscionable and that the appellant should be relieved therefrom.

Specific performance and a return of the amount paid for interest were two of the remedies sought, together with an injunction to prevent the respondent from dealing with the properties in any way pending the determination of the action. A further remedy sought was that:

" .....

(5) If the court finds that the Plaintiff has been in breach of the said Particulars and Conditions of Sales, relief from the alleged forfeiture on such terms as the Court deems fit;"

Apart from denials, the Defence, as pleaded, said in paragraph 13 that the agreement expressly provided for the payment of a deposit of 25% of the purchase price and the remainder thereof within fourteen days thereafter and that by

Clause 15 time was of the essence of the contract for any act that should be performed or payment made within a stated period. The Defence went on to say that Banker's Undertakings presented by the appellants were clearly unacceptable and that the appellant was so informed and that correspondence from the respondent clearly stated that it was not waiving any of its rights under the Conditions of Sale when it extended certain courtesies to the appellant.

Zacca C.J. identified eight questions which arose for his determination and disposed of them in this way:

> 1. The appellant could not complain of delay on the part of the respondent in forwarding the draft transfer and accurate statement of accounts because -
>
> (a) the appellant was under a duty to tender the balance of the purchase price and all monies due by the date specified in Condition 4;
>
> (b) that the appellant contributed to the delay by making proposals to the respondent contrary to his obligations under the contract;
>
> (c) the appellant was able to provide an Undertaking within the critical period of fourteen days, albeit an unacceptable one.

The learned Chief Justice referred to the judgment of Sir Nicholas Browne Wilkinson V.C. in Crane and Another v. Debono [1980] 3 All E.R. 485.

As to the second question the Chief Justice said there was no evidence that the respondent could not complete within fourteen days and furthermore that that issue was raised for the first time at trial. There was no ambiguity, in his view, between Clauses 4 and 5 as to the date of completion. Clause 4

provided for a completion date within fourteen days while Clause 5 provided for the payment of interest in certain circumstances. In his view Clause 5 did not provide for a completion date within thirty days of the date of the auction. He held that the letters of October 19, 1989 from the respondent to Jamaica Citizens Bank and Raymond Clough did not create an extension of the completion date to thirty days from October 5, 1989 but was a request for an Undertaking to be given within twenty-four hours.

The fifth, sixth and seventh questions were formulated in these terms:

> "5. By extending the completion date either to the 20th October, 1989 or to 30 days from the date of the auction, time was no longer of the essence and the defendant was obliged to serve a new notice making time of the essence.
>
> 6. In any event the balance of the purchase money was paid on the 26th October, 1989 and therefore paid within 30 days of the date of the auction.
>
> 7. By extending the completion date to the 20th October, 1989, time was no longer of the essence and the defendant not having served a new notice making time of the essence then the payment of the balance of the purchase money on the 26th October, 1989 effectively completed the sale."

After an exhaustive survey of the English, Canadian, Australian and New Zealand authorities the Chief Justice held that:

> "Where as in the instant case time having been made of the essence of the Contract, and the date for payment extended for 24 hours, the extension of time merely substituted the later date for the original date, so that time continued to be of the essence, though in respect of the later date."

Zacca C.J. went on to refuse specific performance and en turned his attention to a determination of whether the 25% deposit was in the nature of a true deposit or amounted to a penalty, in order to answer the appellant's contention that the respondent had no right of forfeiture.

The evidence before him came from two attorneys-at-law one representing each party to the auction. The respondent's attorney in speaking of the amount and purpose of the deposit said:

> "The deposit was 25 percent. It is fixed at 25 percent because:
>
> (i) there are attendant costs at auction sales which had to be paid immediately following the auction;
>
> (ii) it is a sum which is set to assure that persons do not bid frivolously at the auction.
>
> The deposit required at auction sales by other banks is similar to the 25 percent. ..... National Commercial Bank requires a deposit of 50%."

When cross-examined she admitted that the 25% was far in excess of the amount required for the payment of transfer tax stamp duty and registration fee. Auctioneer's fee would not exceed 5% and the other costs attendant on the auction were in the region of $3,000.00.

Mr. Clough, for the appellant said:

> " It is not in my experience in auction sales for a deposit of 25 percent to be required. I have seen 10 percent, 15 percent, 25 percent, 40 percent. It is not unusual to see a deposit of 25 percent required in auction sales. In an auction sale, there is additional auctioneer's costs and expenses. The auctioneer's commission is usually 5 percent if the property is sold, in addition to costs and expenses."

Upon this evidence and having regard to the authorities reviewed by him, Zacca C.J. held:

> "Having regard to the evidence of Mr. Clough and Miss Eaton as to the practice in Jamaica and having considered the cases cited, I am of the opinion that the deposit of 25 percent in the instant case is to be regarded as a true deposit and is not a penalty."

With that view of the law having regard to the evidence of Eaton and Clough, Attorneys-at-Law, Zacca C.J. refused to grant relief from the forfeiture.

This appeal seeks an order for specific performance and alternatively that the appellant be entitled to rescind the contract and obtain an order for the refund of the deposit. In the further alternative the appellant prays that if the Court finds that it is in breach of the Conditions of Sale that it be granted relief from the alleged forfeiture on such terms as the Court deems just. However, at the commencement of the hearing, the appellant informed the Court that it had purchased the properties the subject of the dispute from the Jamaica Citizens Bank for the sum of $11,500,000.00. As a consequence the appellant was not seeking the remedy of specific performance but on the basis that it would have been entitled to that remedy, it would in the alternative be entitled to rescind the agreements and claim a refund of the deposit.

I now turn to the issues as they were presented in argument. A defendant, it was said, would not be permitted by the Courts to take advantage of his own wrong. If therefore the respondent by its conduct, in breach of its obligations under the contract, caused or contributed to any delay which occurred, the respondent could not rely on that delay to rescind the contract. This argument was founded upon the appellant's interpretation of Clauses 6, 7, and 8 of the

Conditions of Sale. Under Clause 6 the vendor's attorney-at-law was obliged to prepare and submit a draft transfer for perusal and approval by the purchaser's attorney-at-law. It was said too, that this clause contained the further obligation on the vendor to tender an accurate completion statement together with the draft transfer. Clauses 7 and 8 provided for requisitions. The purchaser upon receipt of the draft transfer could within seven days thereof make requisitions or objections regarding the title and the vendor then had a further seven days after receipt of the requisition or objection to call off the sale or fulfil the demand.

The appellant submitted that by sending the draft transfer and Statement of Account on October 17, 1989, two days before the date set for completion, the respondent was in fundamental breach of its obligation under Clause 6 and could not rely on its own delay to rescind the contracts of sale. Appellant's Counsel submitted that the respondent was under a contractual obligation to prepare the draft transfer and a completion statement within a reasonable time having regard to all the circumstances and in any event more than seven days preceding the 19th October to enable the appellant to have sufficient time to do all that was necessary to complete the huge real estate transaction.

The auction sale and payment of the deposit occurred on October 5. On 9th October the auctioneer advised the respondent's attorney-at-law of the sale. On that same day Mr. Clough made oral representations to the respondent's attorney-at-law proposing that both parties agree to reverse the sales transactions made at the auction. These proposals were submitted to the respondent. Clough telephoned repeatedly enquiring if his proposal was acceptable. Then on October 17,

the draft transfer and Statement of Account were sent to Clough. The explanation given by Miss Eaton the respondent's attorney for non-action before October 17 was:

> "I did not send the draft transfer until the 17th October because Mr. Clough had been putting forward the same proposals and I was also awaiting instructions from my client concerning the proposals. This would not necessarily prevent me from sending the documents earlier if I wished to waste time."

The requirement for reasonable time within which to perform an act is dealt with in Chitty on Contracts 26th Ed. Vol. 1 p. 1505:

> "Where a party to a contract undertakes to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance (or merely uses indefinite words such as 'with all dispatch') the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case."

This principle is exemplified in a series of cases of which Hick v. Raymond [1893] A.C. 22 is a good example. Due to a strike in the port of London a ship could not complete the discharge of its cargo as it could not obtain alternative supply of labour. At page 32 Lord Watson said:

> "When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his

> "obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably."

It was submitted that the principle in Hick v. Raymond (supra) as to reasonable time is peculiarly applicable to real estate transactions. Cross J. did apply the reasonableness principle in Re Longlands Farm etc. v. Superior Developments, Ltd. [1968] 3 All E.R. 552. That case concerned an agreement for sale subject to the purchaser obtaining planning permission. Three years passed and the purchaser had made no application for such permission. As to whether the condition should have been exercised within a reasonable time, Cross J. said at p. 555 of the Report:

> "..... the reasonableness of the time must be determined as at the date of the Contract and that what is reasonable must be judged by an objective test applicable to both parties, and does not simply mean what is reasonable from the point of view of the defendants."

Applying this principle to the instant case, the parties must have contemplated on October 5, 1989 that events prior to completion would have to be undertaken with utmost dispatch. With only fourteen days between the formation of the contract and the date fixed for completion, there could be no room for procrastination. At that time, given the terms of Clauses 7 and 8, the parties must have intended that the draft transfer and completion statement would have been delivered within a reasonable time and not later than seven days before 19th October. Although the parties were working with registered titles, which on the evidence were familiar to the attorneys on both sides the time frames provided in Clauses 7 and 8 cannot be treated as mere surplusage. I am prepared to hold that it was an implied

term of the contract that the respondent would within a reasonable time tender the draft transfer and Statement of Account to the appellant's attorney. The purchase price was considerable and the purchaser was entitled to know in good time how much money it would have to pay.

If therefore the respondent had unilaterally elected to refrain from providing the draft transfer and completion statement until October 17, it would, in my view, be in breach of its contractual obligation to provide such a draft transfer within a reasonable time. On the facts, however, it was the appellant who interfered with the procedure for completion. It was the appellant who put forward proposals for the consideration of the respondent to reverse the sale and adopt quite a different method to dispose of the property. These proposals were made on October 9 and re-inforced constantly through telephone calls over the succeeding days. That the proposals were only rejected on October 17 the date when the draft transfer was forwarded, is a circumstance to be weighed when the question of forfeiture is being considered but cannot affect the fact that the appellant waived his strict right to receive the draft transfer under the terms of the Conditions of Sale by reason of his proposals and in consequence the appellant cannot now be heard to complain of delay in that regard. I entirely agree with the comment of Zacca C.J. that:

> " The delay complained of by the plaintiff did not prevent the plaintiff from sending an undertaking to the defendant within the 14 days."

Mr. Mahfood submitted that by its conduct or representation, (on which the appellant relied) the respondent was in breach of its duty as vendor to co-operate with the appellant (as purchaser) in the completion of this huge real estate transaction,

and consequently the respondent cannot, in equity, and by reason of the equitable doctrines of waiver and estoppel rely on the short delay between the 20th to the 26th October as a ground for rescinding the contracts of sale, forfeiting the deposit and resisting the claim for specific performance.

Although there was no prior discussion between the appellant and the respondent as to whether the respondent would accept a banker's guarantee in lieu of cash for the balance of the purchase-money, the appellant's attorney on October 19, 1989 sent the engrossed transfer together with a letter from Jamaica Citizens Bank Limited which purported to be a Banker's Undertaking to pay the purchase price at a future date. Apart from the formal parts, the letter contained these provisions:

> "**RE: 19-21 CARLTON CRESCENT AND 57-59 HALF WAY TREE ROAD**
>
> This is to confirm that we are prepared to make a loan of J$10,000,000 to Do Jap Investments Limited (nominee of Mr. Raymond Clough) to enable Do Jap to complete the purchase of the above properties.
>
> We have been authorised to disburse the loan funds by paying $8,992,730.50, to you to be applied towards the purchase price of the properties and costs of transfer.
>
> Please note that our obligation to make the loan is subject to the satisfaction of certain conditions precedent (including the granting of certain securities to us) which will all have to be satisfied and complied with prior to any disbursement (including disbursement to you).
>
> Kindly let us have:
>
> (a) Executed Transfer impressed with stamp duty and transfer tax;

" (b) Your cheque to cover registration fees; and

(c) All relevant duplicate Certificate of Titles. (sic)

On our undertaking not to deal with same in any way prejudicial to your interest unless in a position to pay you the aforesaid sum of $8,992,730.50 and to return same to you on your request at any time prior to our paying to you the aforesaid sum."

The respondent's attorney replied the same day, writing both to the Jamaica Citizens Bank and to the appellant's attorney-at-law. To the Bank she wrote:

" I refer to your letter dated October 18, 1989 to advise that the contents therein do not fulfil the express terms and conditions of sale by which the Purchaser is legally bound.

Under the conditions of sale the Purchaser must pay the balance of purchase price and costs within Fourteen (14) days from the date of the sale ie the aforestated payment must be made on or before October 19, 1989.

An undertaking from you to pay the balance of purchase price and costs would have to specifically undertake to pay over the said balance on or before Thirty (30) days from the date of the auction which took place on October 5, 1989 as well as undertaking to pay interest at the rate of Twelve Dollars ($12.00) per centum per annum on the unpaid amount of the purchase price from the time fixed for payment ie as of October 19, 1989."

In the letter to the appellant's attorney the respondent's attorney repeated the above paragraphs from its letter to the Jamaica Citizens Bank and added two significant paragraphs:

" My clients have generously agreed to allow you a further twenty-four hours within which to comply with the above, but without prejudice to any right or remedy reserved to my clients under the conditions of sale.

> "The aforestated does not constitute a waiver of my client's right or remedy contained in the conditions of sale."

On October 20, 1989 within the twenty-four hour grace period, came a letter from the Jamaica Citizens Bank which said inter alia:

> "As requested by you, we further undertake to pay interest at the rate of 12% per annum on the aforesaid sum of $8,992,730.50 from October 19, 1989 to the date of payment which we verily believe will be on or before November 3, 1989. In all other respect we ratify and confirm ours to you of October 18, 1989 and in particular we re-affirmed that our obligation to make the loan to Do Jap Investment Limited is subject to the satisfaction of certain conditions precedent (including the granting of certain securities to us) which will all have to be satisfied and complied with prior to any disbursement (including disbursement to you)."

After the delivery of this letter of October 20 (a Friday) Mr. Clough attempted to reach Miss Eaton by telephone but failed to do so as she was out of office. On October 23 (a Monday) Miss Eaton, the respondent's attorney-at-law wrote to Mr. Clough saying:

> "I refer to your letter dated October 20, 1989 and advise that letter dated October 20, 1989 from the Jamaica Citizens Bank Limited is not acceptable to my clients given the conditions precedents on eventualities contained therein.
>
> My clients hereby advised that in keeping with Clause 13 of Particulars and Conditions of Sale, deposit paid by you is forfeited."

Mr. Clough fired back a letter of protest on October 24, to which Miss Eaton replied on October 25. Then on October 26 the appellant forwarded a cheque for the entire purchase price and interest, totalling $9,012,579.82, and demanded that transfer be effected in its favour. The respondent returned the cheque.

Mr. Mahfood submitted that the conduct of the respondent's attorney was at best, confusing. By her conduct he said, she led the appellant's attorney to believe that the only problem with the Undertaking given on October 19 was that it did not provide for interest. The demand for interest was a new term in the agreement and this led the appellant's attorney to believe that the contract would be completed if he agreed to the payment of interest. Having regard to the correspondence emanating from the respondent's attorney, it was, in his submission, inequitable and in breach of the respondent's duty to co-operate, for the respondent to rescind the contract and forfeit the deposit. In real estate transactions the vendor and purchaser have a duty to work together to achieve a common end and this he submitted the respondent failed to do by not making its position clear.

Chitty on Contract 26th Ed. Vol. 1 para. 911 expresses this duty of co-operation as one which is governed by the terms of the contract. The rule is stated there to be:

> " The court will readily imply a term in any contract that the parties shall co-operate to ensure the performance of their bargain. Thus 'where it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect'. However, the degree of co-operation required is

> " to be determined, not by what is reasonable, but by the obligations imposed - whether expressly or impliedly - upon each party by the agreement itself."

In MacKay v. Dick [1881] 6 A.C. 251, the vendor of a digging machine was entitled to have it tested on a properly prepared digging site to be provided by the purchaser, who having failed to provide a proper testing ground for the machine, could not reject it for non-performance. Lord Blackburn said at p. 263 of the Report:

> " ... as a general rule, ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

That principle has been consistently applied in the law of contract. In Sprague v. Booth [1909] A.C. 576 one party whose duty it was to produce certain bonds for the signature of another party, failed to produce the bonds and could not therefore complain that the other party had not signed them.

Phoebus Kyprianou v. Cyprus Textiles Ltd. [1958] 2 Lloyd's Reports 60 decided that buyers of Syrian cotton seed who were required to produce a certificate that the cotton seed was not intended for Israel were under a duty to co-operate with the seller to supply the information regarding the certificate at an early date, to enable the seller either to obtain the export licence within time or to exercise his option to ship from another port.

Of course the gravamen of Mr. Mahfood's submission under this ground of appeal was that the respondent was not entitled to rescind the contract on October 23. His reliance upon Quadrangle Development and Construction Co. Ltd. v. Jenner [1974] 1 All E.R. 729 was to re-inforce his submission that there is a duty of co-operation on both vendor and purchaser at the time of completion. In that case the purchasers served a notice on the vendors requiring completion within twenty-eight days and making time of the essence. In the event the purchasers were unable to complete and the vendors purported to rescind the contract and forfeit the deposit. The purchasers in an action for specific performance claimed that the notice was not binding on them since under Condition 22(2) of the National Conditions of Sale, service of the notice only made it a term of the contract that "the party to whom the notice is given" should complete the contract within twenty-eight days. As to this argument Russell L.J. said:

> "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."

The Court of Appeal in a very recent case, Delta Vale Properties Ltd. v. Mills and Others [1990] 2 All E.R. 176 held that a party who has given notice to complete, may give additional time for that purpose provided the second or subsequent notice was clear and unambiguous. There the contract of sale provided for completion on 15th May 1986. The plaintiffs failed to complete. On 20th May 1986 the vendors served a notice to complete within fifteen working days of the service

of that notice. The plaintiffs again failed to complete. On August 13, 1986 the vendors issued a second notice requiring completion within seven working days. The purchasers did not complete and the vendors purported to rescind the contract and to forfeit the deposit. The purchasers sued for specific performance. Their claim was dismissed on appeal. In the course of his judgment Slade L.J. made it clear that a party to a contract is perfectly at liberty to waive his rights under the contract. He said at page 181(g):

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

He continued at p. 182(b):

> "Counsel for the plaintiffs has referred us to authority which satisfies me that, as a matter of general principle, a notice of this nature which is served unilaterally by one party to a contract and, if valid, will subsequently affect and curtail the rights of the other party must, if it is to be valid, be clear and unambiguous, so that when it is received the recipient will know what he is required to do to comply with his contractual obligations."

How would a reasonable recipient reasonably read the letters of October 19 from the respondent's attorney concerning the Banker's Undertaking? The Undertaking sent together with the engrossed transfer was a worthless piece of paper. It did not bind the Jamaica Citizens Bank to do anything as of that date and it did not bind the appellant to provide any security to the Jamaica Citizens Bank so as to enable the bank to complete the loan. The Jamaica Citizens Bank made it abundantly

clear that it had not bound itself as at October 19 to make any disbursement to the respondent. When therefore the respondent replied asking that:

> " ..... an undertaking from you to pay the balance of the purchase price and costs would have to specifically undertake to pay over the said balance on or before Thirty (30) days from the date of the auction .....;"

a reasonable recipient must have understood that the Undertaking required must be unconditional. In lieu of immediate payment, the purchaser was offering an Undertaking to pay, consequently the respondent's attorney was reminding the appellant that it had an obligation to pay interest on the unpaid balance of purchase price. The Jamaica Citizens Bank ignored the request for a specific Undertaking and repeated in no uncertain terms that it had no binding obligation at that time to make the loan to the appellant or to make the disbursement to the respondent.

Miss Eaton might have written a one sentence letter:

> "I will not accept your conditional undertaking but I will let you have twenty-four hours within which to produce an acceptable banker's undertaking to pay me within thirty days of October 5."

But this was not necessary since the appellant's attorney knew that the Jamaica Citizens Bank had not granted a loan to the appellant and was not authorised to disburse immediately or at any fixed time to the respondent and Jamaica Citizens Bank was saying ad nauseam, remember we are not bound to pay you one farthing by reason only of this Undertaking.

I find that the respondent appreciated that it had a duty to co-operate with the appellant to ensure that there was a smooth completion of the contract. This, the respondent demonstrated by giving the appellant an opportunity to complete

by way of a Banker's Undertaking rather than by payment by cash or cheque on the due date. The twenty-four hour forbearance is further evidence of the respondent's desire to co-operate because this indulgence was gratuitously offered by the respondent and did not arise at the behest of the appellant. Clearly at the expiration of the period of twenty-four hours the appellant was not in a position to provide cash, cheque or an unconditional Banker's Undertaking. I do not, therefore, find any merit in this ground of complaint.

It was a principal ground of appeal that the learned Chief Justice misdireted himself on the facts and on the law in holding that the extension of time for twenty-four hours merely substituted the later date for the original date, so that time continued to be of the essence though in respect of the later date. Mr. Mahfood conceded that Barclay v. Messenger [1874] T.L.R. 437; 43 L.J. Ch. 449 is authority for the principle that where time is made of the essence of a contract, mere extension of time and nothing more, does not take away the time of the essence provision. I agree entirely with the decision of Zacca C.J. that Barclay v. Messenger (supra) has not been over-ruled and that the reasoning of the Master of the Rolls accords with principle and authority when he said:

> "It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time."

This principle, Mr. Mahfood says, is not determinative of the issue in the instant case. He argued as follows. It is a cardinal rule of construction that an agreement should be read as a whole and full effect given if possible, to all its terms. When this is done, it becomes clear that time was not of the essence with regard to the requirement that the balance of the purchase-money should be paid within

fourteen days of the auction sale. This was evidenced, he said, by the fact that notwithstanding the magnitude of the transaction, the respondent did not produce the draft transfer etc. until October 17. Conditions 7 and 8 of the Sale Agreement include periods of time of seven days each. In order to give effect to these periods, he submitted, the draft transfer would have to be exchanged on October 5, a fact clearly not contemplated by the respondent.

At para. 6.03 Lewison on the Interpretation of Contracts states the rule thus:

> "In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus."

The same principle is stated in Vol. 12 of the 4th Edition of Halsbury's Laws at para. 1502:

> "**Rejection of words etc.** Since an instrument is to be construed according to the intention of the parties as appearing from the whole of its contents, it follows that that intention must not be defeated by too strict an adherence to the actual words, and any corrections may be made which a perusal of the document shows to be necessary."

Clause 7 of the Conditions of Sale, it is to be recalled, provided that all requisitions etc. as to title "shall be delivered in writing to the vendor's attorney-at-law within Seven Days from the delivery of the draft transfer for perusal and approval." Clause 8 gives a further period of seven days for the purchaser to withdraw any requisition or objection and enables the vendor at the expiration of that further period to call off the sale in certain circumstances. I have already said that the contract must be construed at the time at which

it was made and that it was possible on October 5 for the parties to comply with both Clauses 7 and 8 within fourteen days thereof.

Clause 5 clearly envisaged that there could be a delay beyond the fourteen day period for the payment of the purchase price and for the payment of interest in those circumstances. This could occur if the parties or either of them acted under either Clause 7 or Clause 8 in a tardy manner and the other side was prepared to waive strict adherence to the time frame provided therein. Similarly Clause 5 could apply if either party unilaterally waived his right to insist upon performance under Clause 4 and made no other stipulation for interest. It cannot be inferred, in my view, from an interpretation of the provisions of Clauses 4, 5, 7, 8, that more than one completion date was envisaged under these contracts of sale. Acordingly, I agree with Zacca C.J. that Clause 5 did not provide an alternative completion date to that stipulated for in Clause 4 of which time was made of the essence in Clause 15. I am fortified in my view by the final sentence in Clause 5 that the indulgencies permitted under that clause were without prejudice to any right or remedy reserved to the vendor by any other of the Conditions of Sale.

Mr. Mahfood sought to distinguish the Barclay v. Messenger (supra) line of cases which he said were possible because the extensions of time were made simpliciter and nothing more was added.

The contracts of sale in Webb v. Hughes [1870] Equity Cases 281 contained provisions which bear a similarity to Clauses 4, 5, 7, 8, of the instant agreement. The saving clause in Clause 5 was not, however, present, nor was there a clause similar to Clause 15 specifically making time of the essence. Requisitions were made under the terms of the contract

and there was a dispute as to title. The date fixed for completion passed and the parties continued to negotiate. Sir R. Malins V.C. said of that contract:

> "In my opinion, the agreement in this case did not make time the essence of the contract, because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; ... But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract."

These observations are useful to show that if parties treat the contract as subsisting after the date for completion has passed and continue their negotiations without reference to that factor, then time ceases to be essential and a notice making time of the essence must thereafter be given. In this case, the respondent sharply reminded the appellant that it was treating time as of the essence but would permit a grace period of twenty-four hours without prejudice to its rights under the contract. There was a scramble to comply within the stipulated time, but to no avail. It would be a mis-use of words to say that a demand for payment of interest provided that a suitable Undertaking was posted within twenty-four hours amounted to a continuation of negotiations to secure completion. In Webb v. Hughes (supra) the haggling was over the sufficiency of the title and the time for completion passed almost un-noticed. Those essential differences of fact place that decision outside of the ambit of the present appeal.

Arvier v. Watson [1888] 14 V.L.R. 771 is an example of a case where the vendor clearly waived his right to completion on the contract date and opted instead for the payment of the penal interest of 10% fixed by the contract upon failure to complete. The Court held that the vendor could not afterwards rescind the contract for non-payment without giving fresh notice making time of the essence.

I concur in the view expressed by Zacca C.J. that the effect of the letter of October 19 to the appellant's attorney was to postpone the completion date by twenty-four hours, that it was a simple extension of time not clouded by any element of negotiation and did not amount to a waiver except as expressly stated therein i.e. for twenty-four hours. As the appellant did not complete within that stipulated time, I find no merit in this ground of appeal.

In summary therefore, I am persuaded that time was of the essence of the contract on October 20, 1989, that that day was the final day for completion, that the respondent was not in breach of any of its contractual obligations on that day, that the appellant failed to complete and accordingly the respondent had a right to rescind the contract which it did by letter of October 23, 1989. That act of rescission brought the contract to an end and the further efforts of the appellant to complete, ending in its tender of the cheque on October 26 could not in law resurrect the contract.

Clause 13 of the contract enabled the vendor to forfeit the deposit in the event that the purchaser failed to complete in accordance with the contract. The respondent invoked that provision and forfeited the sum of $2,875,000.00 paid as a deposit upon the acceptance of Clough's bid at the auction sale on October 5, 1989. Zacca C.J. found, that having regard to the evidence of Mr. Clough and Miss Eaton as to the practice

in Jamaica and upon his appreciation of the cases cited to him, the deposit of 25% was to be regarded as a true deposit in the instant case, that it was not a penalty and consequently upon its forfeiture relief from forfeiture was not available to the appellant.

Mr. Mahfood submitted that a deposit of 25% cannot satisfy the objective standard of reasonableness consistently applied by the Courts and should be treated as a penalty if, on the facts, it is harsh and unconscionable. A right to forfeit as a deposit as much as 25% of the purchase price would in his view confer on the vendor an unmerited windfall, an unjust enrichment, and meet out severe punishment upon the purchaser, which is not the function and purpose of the "true deposit".

In dealing with the distinction between "deposits" and "penalties", Mr. Mahfood submitted that there is a clearly discernible tension in the legal precedents which springs from the artificial distinction drawn by the law between "deposits" and "penalties". Both he said, serve the same purpose, viz., to guarantee performance by a threat. Actual loss in this case to the respondent would be in the order of $3,000.00 if the sale went off, yet the deposit of $2,875,000.00 was demanded, a clear indication, he said, that such a huge sum was not necessary to guarantee performance.

Youmard in his treatise on the Sale of Land at p. 420 describes the nature of a deposit:

> "A deposit is an initial payment made by the purchaser under the contract as 'a guarantee that the contract shall be performed'; and if the sale goes off by reason of the default of the purchaser the vendor is entitled to retain it unless the contract provides that it is to be repaid to the purchaser."

But he continued:

> "The mere fact that a payment under a contract is called 'a deposit' does not of itself exclude the jurisdiction of the court to relieve a purchaser, in appropriate circumstances, from forfeiture of the amount so paid. If the contract provides for the payment of an unreasonably large sum under the guise of a deposit, the court may go behind the language of the contract and consider the true nature of such a stipulation, and if it concludes that the amount of the deposit is out of all proportion to the damage which the vendor is likely to suffer by reason of the purchaser's breach of contract and that, having regard to all the circumstances of the case, it would be unconscionable for the vendor to retain it, relief will be given."

To arrive at what is reasonable a Court must apply an objective test and not an arbitrary test as would satisfy the individual judge. Consequently one must turn to the writings of learned authors and to decided cases to discover if guidance, as to the outer limits as to what is considered a reasonable deposit lie therein. Farrand - Contract and Conveyancing - 4th Ed. at p. 203-204 says of the deposit:

> "ESTATE agents expect every purchaser to do his duty by paying a deposit. We have all got the message. But is there a duty? The very first term of an open contract for the sale of land, as stated by the late great T. Cyprian Williams, is that:
>
> > 'No part of the purchase money shall be payable as a deposit or otherwise until the proper time for completion of the purchase'.
>
> ..... Yet notwithstanding this negative implication, there will almost invariably be found in any formal contract a positive provision for the payment of a deposit of 10 percent of the purchase price .... This is rarely, if ever, queried on behalf of purchasers. Whether it should be, would largely turn, of course, on the advantage to vendors of requiring a deposit."

The author deals with rules relating to forfeiture of the 10% deposit and at page 204 he continues:

> "All this springs directly from the primary purpose of requiring a deposit and is hardly to be doubted. Yet the present writer in all conscience must confess his difficulty in seeing how equity came to tolerate this. Why, in other words, was it not relieved against as a 'penalty'? After all, deposits and penalties do have precisely the same purpose, namely to secure performance through fear of loss .... And there are other similarities, for example, as with a penalty but not as with liquidated damages, the vendor may sue the purchaser for any loss he actually suffers beyond the deposit ..... Thus one may reflect on the true test of a penalty, namely, any sum which is not a genuine pre-estimate of damage .....; the traditional 10 percent on a sale of land represents pure practice and is never even a perfunctory pre-estimate."

In the view of this author the 10% deposit, hallowed by practice in real estate transactions, has nothing in principle to recommend its continuation, but to the writer's dismay, purchasers are unlikely to challenge the requirement of a deposit of 10% of the purchase price.

Bateman's Law of Auction, deals with Deposit in Chapter VI. The author says:

> "It is the almost universal custom at auction sales to require part of the purchase-money to be paid down as a guarantee for the fulfilment of the contract, and also, if the contract is completed, as part payment of the purchase-money. ..... This sum, which varies from 5 to 25 percent (in the case of land usually 10 percent) of the purchase-money, is called the deposit, ..."

This passage indicates that there is no difference between the usual deposit in sales of land whether the sale be by private treaty or at auction.

Beach Club Enterprises Ltd. v. Horizon Management Ltd. Cayman Islands Civil Appeal No. 2/80, was decided by Judges of this Court sitting as the Court of Appeal of the Cayman Islands. Carberry J.A. stated as an uncontroversial proposition of law that:

> "
> .....
>
> (c) Parties often stipulate that a given sum, (usually 10%) is to be a 'deposit' and then go on to expressly provide what is to happen to it."

Then having considered a number of decided cases he concluded:

> "In any event it could not be successfully contended that forfeiture of a sum rather less than the customary 10% deposit constitutes a sum which it is unconscionable for the vendor to retain."

Carey J.A. following, said:

> "It should be pointed out at once that the amount involved was approximately 1/10 of the purchase price, a figure which usually represents the deposit in sale of land transactions."

Later he said:

> "The deposit of 10% of the purchase price is, as already noticed, usual and normal. The damage which a vendor suffers in the normal course of events on non-completion is the loss of his bargain, the full purchase price has not been paid. The 10% which as a deposit becomes automatically forfeited, has always been accepted as reasonable in the trade. That acceptance the court could hardly fail to recognize and give effect to. For the same reasons, it can hardly be said with any degree of candour that an amount of 10% of the purchase price which is the amount customarily paid in sale of land transactions would be unconscionable for the vendor to retain."

That case establishes that the Jamaican Courts recognize that a 10% deposit in sale of land transactions is normal and reasonable and may be forfeited for non-performance by the purchaser if the contract so stipulates.

Linggi Plantations Ltd. v. Jagatheesan [1972] 1 M.L.J. 89, a decision of the Privy Council, approved the forfeiture of a deposit of 10% of the purchase price notwithstanding that it represented a considerable sum of money and bore no relationship to the damage which the vendor would or might suffer through loss of his bargain.

In the course of his judgment Lord Hailsham L.C. said:

> "It needs to be pointed out that the law relating to forfeiture of deposits has always been treated as entirely distinct and separate from the learning introduced into English law by the distinction between liquidated damages based on a genuine pre-estimate of the loss likely to be suffered in the event of a breach and a penalty where equity came to the rescue of the obligee on a bond or other contractual provision imposing a penalty under a contract where the penalty exceeded the actual damage. The latter combination of rules derives from the Chancellor's jurisdiction in equity to relieve an obligee from the hardships of the common law. But the law relating to deposits, as Fry L.J. pointed out in Howe v. Smith, has a much longer pedigree, being imported from the civil law at least as early as Bracton, and, assuming the deposit or earnest to be reasonable, forfeiture of a deposit was not normally the subject of equitable relief."

The Lord Chancellor left open the question of the circumstances in which equity might grant relief in respect of forfeiture of deposits properly so called.

He said:

> "No doubt, as Cotton L.J. says in Howe v. Smith at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See Stockloser v. Johnson. It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before that noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage."

As the deposit in the Linggi case (supra) was one of 10% it was treated as a "true deposit" and relief against forfeiture refused.

Stockloser v. Johnson [1954] 2 W.L.R. 439 referred to by Lord Hailsham in Linggi (supra) was decided by the English Court of Appeal on facts quite different from those in the instant case. Nevertheless the opinions of Somervell L.J. and Denning L.J. are of persuasive value in disposing of this case. Payment of the purchase price for certain quarrying plant and machinery was to be on an instalment basis with a provision that should the purchaser make default in any instalment for a period exceeding twenty-eight days the vendor should be entitled to rescind the contract, forfeit the instalments already made and re-take possession of the

plant and machinery. The purchaser having made default in payment of an instalment, the vendor rescinded the contract and forfeited the instalments paid.

At page 444 of the Report Somervell L.J. said:

> "My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances."

Denning L.J. expressedly agreed with the opinion of Somervell L.J. as quoted above. He said at page 449:

> "I reject, therefore, the arguments of counsel at each extreme. It seems to me that the cases show the law to be this: (1) When there is no forfeiture clause: If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see Palmer v. Temple [1839] 9 Ad. & El. 508; Mayson v. Clouet [1924] A.C. 980; 40 T.L.R. 678; Dies v. British and International Co. [1939] 1 K.B. 724; Williams on Vendor and Purchaser, 4th Ed., p. 1006.

> "(2) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in Steedman v. Drinkle [1916] 1 A.C. 275 where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.
>
> "The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J. has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money."

The evidence shows that Bankers in Jamaica have been describing payments ranging from 20% - 50% of the purchase price as "deposits" in real estate transactions which sums are liable to forfeiture on default by the purchaser. There is clearly no warrant for such an arbitrary departure from a settled practice hallowed by time and approved without dissent in numerous decisions of the Courts. In my view to permit forfeiture of deposits in excess of 10% would unjustly enrich vendors, be unconscionable and be undue punishment for purchasers. Equity should intervene to grant relief from such unconscionable demands.

I would apply the dictum of Somervell L.J. in Stockloser v. Johnson (supra) that equity can intervene to grant relief from the forfeiture of a so-called deposit "if it can be shown that the retention [thereof] is unconscionable in all the circumstances". I would apply the dicum of Denning L.J. in the same case that equity may grant relief if the forfeiture clause is of a penal nature in the sense that the sum forfeited is out of all proportion to the damage and that it was unconscionable for the seller to retain the money. Viscount Hailsham L.C. in the Linggi case (supra) was at pains to say that the amount of money forfeited was not by itself the sole determining factor, recognizing that a contract may be for tens of millions of dollars or pounds sterling as the case may be and that 10% of such sums would be quite considerable amounts. The touchstone of reasonableness of the deposit in sale of land transactions is the percentage of the purchase price which the deposit represents, not the quantum, not the relationship which it bears to liquidated damages.

It would be unlawful, contrary to public policy and utterly unconscionable for a vendor to fix a forfeitable deposit based upon the amount which by law that vendor would be required to pay if the contract is concluded. [On a failure of such a contract due to the purchaser's default the sum representing transfer tax would fall into the pockets of the vendor and unjustly enrich him. Equity could never countenance such an arbitrary and unjust situation.]

In the instant case, I would rely on the additional fact that when the respondent forwarded the draft transfer to the appellant, the appellant had only two days in which to complete, as a factor to be taken into consideration in favour of the appellant for equitable relief. He missed his contractual date but unlike purchasers in the cases reviewed,

this purchaser showed that he had an overwhelming desire to complete.

In the circumstances I hold that the respondent was entitled to forfeit a sum equivalent to 10% of the purchase price. I hold further that the appellant is entitled to relief from forfeiture of the balance of the 25% of the purchase price paid as a deposit. I would therefore allow the appeal in part by varying the judgment of the Court below and order relief from forfeiture as indicated above.

Having regard to the partial success of the appellant I would order that the appellant be entitled to one half of its costs both here and in the Court below to be agreed or taxed.

FORTE, J.A.:

Having read in draft the judgments of Rowe P, and Downer J.A. I agree with the conclusions therein and in particular with the reasoning of Rowe P. As both judgments have dealt in detail with the issues raised, there is no need for my duplicating the thoroughness of my learned brothers, and so I add just a few words.

The appeal should be resolved by the answer to the following questions.

1. Was time the essence of the contract?

2. Was the letter from the respondent's attorney to the appellant's attorney, merely granting an extension of time for twenty four hours or was it a proposal arising out of new negotiations, thereby waiving the condition of time being of the essence?

3. Was the respondent in breach of contract because its attorney did not send the draft title to the appellant's attorney until the 17th i.e. only two days before the date set for completion? If the answer is 'yes' then what effect would that have in relation to time being of the essence as regards Clause 4?

4. Is a deposit of 25% of the purchase price a true deposit and therefore liable to forfeiture?

1. IS TIME OF THE ESSENCE

The contract on the face of it purports to make time of the essence by the provisions of Clause 15 which reads as follows:

> "Whenever under these conditions an act should be performed or a payment made at or within a stated period, time shall be of essence of the contract."

The act which should have been performed, the non-performance of which the respondent rescinded the contract is required by Clause 4 as follows:

> "4. Immediately after the sale the purchaser shall pay to the Auctioneer at his Auction Rooms a deposit of twenty five percent of the amount of the purchase money of the property and sign the agreement endorsed hereon for the completion of the purchase according to these conditions. The purchaser shall pay the remainder of the purchase money together with the amount payable by the purchaser under paragraph 6 hereof within fourteen (14) days from the date of the sale to the vendor's Attorney-at-law Shirley-Ann Eaton of No. 153-155 East Street, Kingston. Immediately upon such payment the vendor pursuant to the provisions of Section 106 of the Registration of Titles Act will execute a transfer to the purchaser and lodge same for registration."

Where, as in the instant case, the contract expressly provides that time is of the essence, then effect must be given to that provision. In **Stickney v. Keeble** [1915] A.C. 386 at page 415, **Lord Parker** of Waddington stated thus:

> ".... equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, ...".
> (emphasis mine)

The appellant, however, contended that that provision i.e. of Clause 15, cannot be referable to provisions of Clause 4 i.e. the payment of the remainder of the purchase money within fourteen days because of the ambiguity created by Clause 5 which states as follows:

> "5. If from any cause whatsoever other than the wilful default of the vendor the purchase shall not be complete on or before the expiration of thirty (30) days from the date of the auction the purchaser shall pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of the purchase money from the time hereby fixed for the payment of the same until the same shall be actually paid. This condition is without prejudice to any right or remedy reserved to the vendor by any of these conditions."

For this proposition, the appellant inter alia relies on the case of **Patrick v. Milner** (1877) 25 Weekly Report 790 where the provisions of the contract under review were in similar terms to Clause 4 and 5 but which had those terms in one single clause and was void of a clause specifically making time the essence of the contract. In those circumstances the Court concluded per **Grove J.**, that:

> "The very clause which appoints the 17th as the day of completion, subsequently not by a new paragraph, but by part of the same sentence contemplates delay beyond the 17th so that by necessary implication the contract was not to be completed on the 17th."

That case is markedly distinguished from the instant case where there is a specific provision expressly stating the intention of the parties that time is of the essence, whereas in the **Milner case**, the intention of the parties had to be construed from the terms of the clause in the contract fixing the time for completion, and which contained within the same clause, the alternative arrangement in the absence of completion

on the agreed date. In my view Clause 5 does nothing more than provide for the payment of interest, in the event that the contract is not completed on the given date for any reason, not the fault of the vendor, provided that a breach of Clause 4 is waived by the vendor. This is clearly demonstrated as the intention of the parties by the last sentence in Clause 5 which reads "This condition is without prejudice to any right or remedy reserved to the vendor by any other of these conditions."

The appellant having also contended that on construction of the contract as a whole, and in particular the provisions of Clauses 5, 7 and 8, the provision of Clause 15, making time of the essence cannot be applicable to Clause 4, I am content to concur with the reasoning of Rowe P, and to dismiss this contention as having no merit.

2. EXTENSION OF TIME OR NEW NEGOTIATION WAIVING TIME BEING OF THE ESSENCE

In short, I concur with the reasoning and conclusion of Rowe P, and except specifically to say that the granting of twenty-four hours within which to provide an unconditional undertaking was nothing more than an extension of the time which preserved the time essence clause, I have nothing to add.

3. WAS RESPONDENT IN BREACH

Clause 6 required the respondent to send to the purchaser a draft transfer, after which by Clause 7 the purchaser had 7 days within which to make requisitions. Thereafter Clause 8 gave to the vendor a further 7 days to respond. In that event a total of 14 days may have been required to meet these provisions and given the provisions of Clause 4, making the completion date 14 days after the agreement, it follows that the draft transfer had to be sent so as to come within that time frame. It has been conceded on both sides that when under a contract, an act is to be performed, and no time is stated within which that act

is to be performed, then it must be done within a reasonable time; a reasonable time of course ought to be determined according to the circumstances of the case. In this case, therefore, the draft transfer ought to have been sent at a time well within the 14 days. It was, however, sent two days before the completion date.

Rowe P, has set out the reasons given for this delay, and I agree that that is a consideration in determining a "reasonable time." Where a party as in this case, does an act, which delays the performance of a contractual duty by the other party, then that party cannot complain. Ironically the appellant projects that argument in its contention that its failure to complete within time was caused by the delay in the transmission of the draft transfer to them, but opposes it in respect to the cause of the delay in sending it.

In any event the purchaser's attorney having received the draft transfer, vetted it, had it signed by the purchaser and returned it to the vendor's attorney, with approval, prior to the date of completion without any complaint. It is my opinion, that in those circumstances the purchaser waived any breach that may have been committed by the vendor in that respect.

The learned author of Voumard Sale of Land at page 303 states:

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

With these words, I agree, and in my view the conduct of the purchaser in his dealing with the draft transfer shows clearly that he did not intend, to rely on the conditions of Clause 6. 7 and 8 in that regard in so far as Clause 15 would apply thereto.

It follows therefore that on the date for completion, the respondent was not in any effective breach of any of the conditions and was ready and able to complete. The appellant was therefore not entitled on that day to rescind the contract, and on its failure to complete, the venders were entitled to rescind.

In relation to the appellant's failure to complete on the appointed date, I wish also to expressly reject the appellant's contention that there was a failure on the part of the respondent to co-operate, as in the circumstances, the respondent owed no duty to the appellant to assist it in securing the funds necessary to meet its obligations under the contract. In any event, the respondent did in fact co-operate when per its Attorney agreed to accept an undertaking in lieu of payment, and further by extending the time for payment by twenty-four hours. In my view the respondent acted well within its rights under the contract, when it refused to accept the "undertaking" which was obviously of no value, and decided to rescind the contract.

4. <u>IS A DEPOSIT OF 25% A TRUE DEPOSIT</u>

The question in determining whether the appellant should be given equitable relief in respect to the return of the deposit depends on whether 25% of the purchase price can be accepted as a true deposit in a real estate transaction.

Both Rowe P, and Downer J.A. have reviewed the relevant authorities which approve a 10% deposit as acceptable in these transactions. Though this is inconsistent with the evidence in this case given by the Attorneys who acted for both parties in

the transaction, and upon which Zacca C.J. relied, and though it is conceivable that a deposit in excess of 10% may also be acceptable in the circumstances of a particular case, I am of the view that a 25% deposit is in any case unconscionable and provides a windfall for the vendor if forfeited. I therefore agree with my learned brothers, that in the circumstances of this particular case, an amount in excess of 10% is in the nature of a penalty, and therefore equity can come to the aid of the purchaser in granting a refund of that excess.

I would therefore allow the appeal and restore to the appellant its portion of the deposit which is in excess of 10% of the agreed purchase price.

DOWNER, J.A.

The issue to be decided in this appeal is whether the appellant DoJap Investments Ltd. - DoJap - was entitled to recover $2,875,000 or any part thereof from the Workers Trust & Merchant Bank Ltd. - The Bank. DoJap paid this sum to The Bank pursuant to a written contract which governed an auction sale and it represented 25% of the purchase price which was $11,500,000. DoJap had sought to purchase six parcels of valuable commercial property but the contract was terminated by The Bank, and they retained the properties and forfeited the deposit.

Before Zacca, C.J. in the Supreme Court, the principal relief sought by DoJap was specific performance. On appeal however, DoJap seeks relief from forfeiture as they purchased the properties subsequent to the auction. DoJap has claimed that they have suffered an injustice and for redress they rely on the presumption against unjust enrichment which is deeply entrenched in our law. See **Fibrosa v. Fairbairn** [1942] 2 All E.R. 122 for restitution at common law and **Sinclair v. Brougham** [1914 - 1915] All E.R.Reprint p. 622 for restitution in equity. Specifically, they claim rescission of the contract and a claim for return of the deposit on the basis that it was really a part-payment and that the contract was wrongly terminated by The Bank. In the alternative, they contend that even if the contract was rightly terminated, The Bank ought properly to keep only 10% of the purchase price which the law recognizes as a true deposit. The submission on behalf of The Bank rests on the sanctity of a written contract which provides for forfeiture of a deposit. It is an even better known principle to the common law. Be it noted that Mr. Henriques for The Bank, accepted the fact that DoJap subsequently purchased

the properties in issue from Jamaica Citizens Bank, but objected to the contract being put in as evidence, and Mr. Mahfood agreed to that stance. Although in the judgment, the following undertaking was recorded -

> "3. Undertaking by the Defendant that the properties would not be dealt with or disposed of pending Appeal....",

since Jamaica Citizens Bank Limited had the first mortgage, this undertaking could only bind the respondent. To come to the correct decision in this case, initial consideration must be given to the pleadings and then the facts have to be considered.

How the case was pleaded

DoJap instituted proceedings in the Supreme Court by Originating Summons pursuant to Section 7 of the Vendors and Purchasers Act. Because evidence would be important in the proceedings, it was ordered that the originating summons was to be treated as if it were begun by writ of summons and it was further ordered that a statement of claim, be filed and served.

In the statement of claim, paragraph 2 sets out the salient conditions of the contract. The rights of the parties would depend on the true construction of those terms, while the following paragraph alleges that there were implied terms. Paragraph 6 alleged that the implied terms were breached and that draft transfers were not forwarded to the appellant until 18th October, 1989. Also there was the complaint that the first legal mortgage was not discharged so as to enable the sale to be completed.

Paragraph 7 mentions that undertakings were offered to The Bank which were rejected and there is the serious complaint that on the 23rd October, 1989 the appellant purported to forfeit the deposit of $2,875,000 on the basis that DoJap had failed to pay within 24 hours of the 19th October or to secure

satisfactory undertakings.

The following paragraphs are so important that it is necessary to set them out -

> "8. By letter dated the 24th day of October, 1989 the Plaintiff protested that the purported forfeiture was contrary to Condition 5 and that it was always ready, willing and able to complete the said sales. Under cover of letter dated the 26th day of October, 1989, the Plaintiff tendered to the Defendant a manager's cheque for the sum of $9,012,579.82, being the unpaid amount of the purchase monies, the costs and interest at 12% as of the 20th day of October, 1989, in accordance with the said Condition 5 but the Defendant in breach of the said Particulars and Conditions of Sales under cover of letter dated the 27th day of October, 1989, returned the said cheque to the Plaintiff.
>
> 9. The Plaintiff avers that by sending the said manager's cheque to the Defendant it had fulfilled its obligations under the said Condition 5."

To these averments, The Bank replied as follows -

> "7. The Defendant denies that the forfeiture was contrary to Condition 5 or that the Plaintiff was ready and willing to complete the said sale as alleged in paragraph 8 of the Statement of Claim or at all and the Defendant further says that when the Plaintiff purported to tender a Manager's Cheque for the balance of the purchase price on the 26th day of October, 1989 the said agreement no longer existed as same had been terminated on the 23rd day of October, 1989 by virtue of the expressed provisions of the said Particulars and Conditions of Sale."

By this reply The Bank justified its rescission of the contract and in effect claimed that the terms of the contract provided for forfeiture. These averments of DoJap and the Bank raise the vital issue of whether in the circumstances of this case, it was open to The Bank to terminate the contract and forfeit the deposit.

Zacca, C.J. found against DoJap and this is one of the principal issues on appeal.

The next important claim is in paragraph 12 and it is pleaded in the alternative. It reads as follows -

> "12. Further or in the alternative, the Plaintiff avers that in the premises it is harsh and unconscionable for the Defendant to purport to act under Condition 13 and claims to be relieved from the alleged forfeiture.
>
> PARTICULARS
>
> (a) The Plaintiff repeats the Particulars listed in the preceding paragraphs; and/or
>
> (b) The Plaintiff has always been ready, willing and able to complete the said sales; and/or
>
> (c) The Plaintiff has tendered to the Defendant the remainder of the purchase monies, costs with interest thereon."

Here is how The Bank joined issue with DoJap in paragraph 11 of their defence -

> "11. The Defendant further denies that it was harsh and unconscionable for the Defendant to act under Condition 13 as alleged in paragraph 12 of the Statement of Claim or at all or that the Plaintiff is entitled to relief from forfeiture."

The essence of the defence is that at the commencement of the contract there was no evidence that The Bank was guilty of fraud, sharp practice or unconscionable conduct so as to warrant the intervention of equity. It seems to me that the substance of this claim is that, even if the contract was rightly rescinded by The Bank, then DoJap contends that The Bank was not entitled to forfeit the deposit paid.

Since the equitable claim is based on the exercise of a concurrent jurisdiction, it was appropriate to claim restitution in the alternative on the basis of quasi-contract. This is covered by paragraph 12(5) which reads -

> "12(5) If the Court finds that the Plaintiff has been in breach of the said Particulars and Condition of Sales, relief from the alleged forfeiture on such terms as the Court deems fit."

The phrase 'relief from the alleged forfeiture on such terms as the court deems fit' must include common law terms since there is an earlier specific reference to relief in equity in paragraph 12. Further, the allegation of forfeiture suggests that The Bank has funds to the defendant's use which it has purported to forfeit.

To demonstrate The Bank's reliance on the sanctity of written contracts to justify the forfeiture or the deposit, it is useful to note paragraphs 13 and 14 of their defence where these averments are set out with clarity and precision. They read as follows -

> "13. Further the said agreement expressly provided at clause 4 therof (sic) that the purchaser should be paid a deposit of 25% and of the remainder of the purchase price within fourteen days thereafter and that by clause 15, time was of the essence of the contract for any act that should be performed or payment made within a stated period.
>
> 14. That the Plaintiff in breach of the said clause 4 of the Particulars of sale failed, neglected and/or refused to pay the balance of the purchase price and as a consequence thereof clause 13 of the agreement provided that the said deposit should be forfeited and that the Defendant acted lawfully and in accordance with the expressed provisions of the said agreement."

Paragraph 17 closes on the same emphatic note. It reads -

> "17. The Defendant says that at all material times it acted lawfully and in accordance with the expressed provisions of the said Particulars and Conditions of Sale and that the Plaintiff's alleged cause of action is misconceived and the Plaintiff is not entitled to the relief claimed or to any other relief."

From these averments, four principal issues arise. Firstly, the contract must be construed to determine the rights of the parties. Secondly, it must be determined whether DoJap was in breach of the contract. If it was not open to The Bank to terminate the contract, then The Bank would be obliged to admit specific performance and apply the deposit to part-pay the purchase price. Thirdly, if DoJap were in breach, whether that breach gave The Bank an unqualified right to forfeit the deposit. Fourthly, if the right to forfeit was qualified by the intervention of common law or equitable principles, was DoJap entitled to any amount of the deposit? These are the issues which must be borne in mind when considering the facts of the case and further they must be resolved to determine whether the order of Zacca, C.J. in favour of The Bank who forfeited the whole deposit ought to be upheld.

Findings of Fact

The Bank, on October 5, 1989 sold six parcels of commercial property by auction to Mr. Raymond Clough an Attorney-at-Law or his nominee. The mortgagor was Dona Clar Properties Ltd. who was in default to The Bank. Jamaica Citizens Bank had a prior mortgage on the properties. Mr. Donald Panton was a director of Dona Clar Properties Ltd. and the majority shareholder in DoJap. DoJap sought to acquire the property for $11,500,000 and paid a deposit of 25% of the price which amounted to $2,875,000.

The auction was governed by a written contract and its terms must be analysed to determine its full force and effect. Clause 4 of the contract required payment of the balance within 14 days of the auction and on the 18th day of October, Miss Shirley Ann Eaton, the Attorney-at-Law

for The Bank, forwarded draft transfers and a statement of costs to Mr. Clough who was DoJap's Attorney-at-Law. It should be pointed out that it is common ground that since the auction, Mr. Clough had been putting proposals concerning the property to Miss Eaton. However, the important fact to note is that on October 19, 1989 Mr. Clough executed the transfer and sent it along with a letter of undertaking from Jamaica Citizens Bank to The Bank. Further, he requested that all subsequent correspondence should be carbon copied to their bankers who was Jamaica Citizens Bank.

On the same day October 19, Miss Eaton despatched two letters - one to Mr. Clough and the other to DoJap's bankers. As for the letter to the bankers, she wrote -

> "Under the conditions of sale the Purchaser must pay the balance of purchase price and costs within Fourteen (14) days from the date of the sale i.e. the aforestated payment must be made on or before October 19, 1989."

The following paragraph reads as follows -

> "An undertaking from you to pay the balance of purchase price and costs would have to specifically undertake to pay over the said balance on or before Thirty (30) days from the date of the auction which tookplace on October 5, 1989 as well as undertaking to pay interest at the rate of Twelve Dollars ($12.00) per centum per annum on the unpaid amount of the purchase price from the time fixed for payment i.e. as of October 19, 1989."

The letter to Mr. Clough was even more important. After stating that payment ought to have been made fourteen days of the 5th of October the letter continues -

> "Further, any acceptable undertaking to pay over the balance of purchase price and costs would have to specifically undertake to pay over the said balance on or before thirty (30) days from the date of the auction and undertake to pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of

> "the purchase money from the time fixed for payment, that is, the 19th October, 1989.
>
> My clients have generously agreed to allow you a further twenty-four hours within which to comply with the above, but without prejudice to any right or remedy reserved to my clients under the conditions of sale.
>
> The aforestated does not constitute a waiver of my clients' right or remedy contained in the conditions of sale."

The initial undertaking by DoJap's banker was rejected because The Bank contended they had made it clear that they would only accept an unqualified undertaking which was enforceable in law against DoJap's bankers. The undertakings of the letters of October 18 and October 20 had the same conditions and DoJap and their bankers ought to have realised that. It was against that background that Miss Eaton wrote to Mr. Clough on 23rd October reiterating that the undertakings were unsatisfactory and closing the letter thus -

> "My clients hereby advise that in keeping with Clause 13 of Particulars and Conditions of Sale, deposit paid by you is forfeited."

DoJap's bankers were also informed that the latest undertaking was unsatisfactory.

The parties continued to correspond and the alternative averments of DoJap is based on these exchanges. On the 26th October after Miss Eaton purported to forfeit the deposit, Mr. Clough wrote to Miss Eaton as follows -

> "We refer to our letter dated the 24th October, 1989.
>
> Enclosed find:-
>
> > Letter dated the 26th October, 1989 from Jamaica Citizens Bank Ltd. enclosing cheque for the balance purchase moneys, costs and interest in accordance with the your statement (sic) received by us on the 19th October, 1989.

> "In accordance with the Conditions/ Contract of Sale we have completed the purchase of the above premises and ask that you immediately effect transfer herein.
>
> Interest as of the 20th October, 1989 to today at the rate of 12% in accordance with Clause 5, Conditions of Sale, have been added to the balance purchase moneys of $8,625,000.00."

Miss Eaton refused to accept the cheque and it is instructive to quote her in full -

> "Reference is made to your letter dated 26th October, 1989 to the Workers Trust & Merchant Bank limited which was delivered under cover of letter dated 26th October, 1989 from Mr. Raymond Clough, Attorney-at-Law of Clough, Long & Co. I return herewith Jamaica Citizens Bank Cheque No. 0100062 dated 26th October, 1989 in the amount of $9,012,579.82.
>
> Please acknowledge receipt of cheque by signing and returning the attached copy letter."

In the light of these essential facts, it is appropriate to examine the contract which governed the auction. Before examining the contractual terms however, it must be said that even if forfeiture was justified in law, it seems unusual for a bank to insist on the exact terms of a contract when DoJap was only a few days late in making a full payment.

Since Clause 4 of the contract is fundamental to this case, it is necessary to examine it. It reads -

> "4. Immediately after the sale the purchaser shall pay to the Auctioneer at his Auction Rooms a deposit of TWENTY FIVE PERCENT of the amount of the purchase money of the property and sign the agreement endorsed hereon for the completion of the purchase according to these conditions. The purchaser shall pay the remainder of the purchase money together with the amount payable by the purchaser under paragraph 5 hereof within FOURTEEN (14) days from the date of the sale to the vendor's Attorney-at-Law SHIRLEY-ANN EATON----- of No. 153-155 East Street, Kingston.

> "Immediately upon such payment the vendor pursuant to the provisions of Section 106 of the Registration of Titles Act will execute a transfer to the purchaser and lodge same for registration."

The balance of the purchase price was not paid on the 19th October and the conditional undertaking from DoJap's bankers was not accepted. In those circumstances, The Bank relied on Clause 13 of the contract to forfeit the deposit after 24 hours had elapsed as they had notified Mr. Clough in Miss Eaton's letter of 19th October (supra).

DoJap contended that on the true construction of Clause 5 there was an alternative date for payment so that DoJap had thirty days after the auction within which to pay the balance. To assess this submission it is necessary to examine Clause 5. It reads -

> "5. If from any cause whatsoever other than the wilful default of the vendor the purchase shall not be complete on or before the expiration of thirty (30) days from the date of the auction the purchaser shall pay interest at the rate of Twelve Dollars per centum per annum on the unpaid amount of the purchase money from the time hereby fixed for the payment of the same until the same shall be actually paid. This condition is without prejudice to any right or remedy reserved to the vendor by any other of these conditions."

Agreements for sale ought to be construed against the background of the law of contract so as to give to every clause force and effect. It is to be expected that, if the purchaser delays completion of the contract, then the vendor may meet this contingency by making provisions for interest as he is being kept out of funds. So this clause sets the rate of interest and the time from which it is payable if for any cause whatsoever, the purchaser delays completion.

Two other features are to be noted. The general law of contract provides the purchaser with relief for wilful and other defaults by the vendor and so they were not made part of Clause 5. The other aspect to note is that the vendor expressly preserved "any right or remedy reserved to the vendor by any other of these conditions."

The right of remedy exercised in this case was the forfeiture of the large payment of $2,075,000 when purchaser breached Clause 4. Be it noted however, that the traditional deposit recognised by the courts is 10% of the purchase price and any excess over 10% must be regarded as part-payment by the common law, with the remedy of restitution in quasi-contract. Equity on the other hand, regards the excess as in the nature of a penalty and liable to relief from forfeiture.

As previously noted, this clause requires the purchaser to pay the remainder of the purchase price and such costs as are stipulated in Clause 6 of the contract within fourteen days of the auction. These costs are "those in accordance with the scale of charge of the Jamaica Bar Association and such costs together with stamp duty and registration fee shall be borne by the vendor and purchaser equally." It is now pertinent to recite Clause 13 -

> "13. If the purchaser shall fail to observe or comply with any of the foregoing stipulation on his part his deposit shall be forfeited to the vendor who shall be at liberty (without tendering any transfer) to re-sell the property either by public auction or private contract at such time and in such manner and subject to such conditions as the vendor may think fit and any deficiency in price which may result on and all charges costs and expenses attending a re-sale or attempted re-sale, together or rendered useless by such default, shall be made good and paid by the defaulting

> "purchaser at the present sale and be recoverable from him by the vendor as liquidated damages. Any increase of price on a re-sale shall belong to the vendor."

So properly construed, the contract does not provide for two periods of payment as Mr. Mahfood argued and payment ought to have been made within fourteen days of the auction. If there was a failure to do that, the vendor was at liberty to forfeit the deposit. On the other hand, if the vendor was ready to complete the sale, and he had not exercised his right to forfeit under Clause 13, then the purchaser who has caused the delay must pay interest pursuant to Clause 5. Clauses 4 and 5 pertain to different matters.

A clause which deals with the rights of the purchaser is Clause 8. It is in marked contrast to Clause 5 which deals with the obligations of the purchaser if there is delay on his part to which the vendor has acceded. Clause 8 reads -

> "8. If the purchaser shall make any objection requisition respecting the title to the property which the vendor or its Attorney-at-Law shall on the ground of expense or otherwise be unable or unwilling to answer satisfy or comply with the contract for sale of the property may be rescinded by the vendor (notwithstanding any attempt to remove or satisfy the same negotiation in respect thereof) unless the purchaser withdraws such objections or requisition within seven days after the delivery of a letter from the vendor's Attorney(s)-at-Law declining to answer such objection or requisition."

This clause gives the purchaser the right to compel the vendor to rescind in defined circumstances. Mr. Mahfood was highly critical of the conduct of Miss Eaton for not complying with the provision of Clause 6 which in part reads -

> " and a draft transfer which shall be prepared by the vendor's Attorney-at-Law shall be submitted to the purchaser or his Attorney(s)-at-Law for perusal

> " and approval and the costs of the same shall be in accordance with the scale of charge of the Jamaica Bar Association and such costs together with stamp duty and registration fee shall be borne by the vendor and the purchaser equally."

She sent the draft transfer and the bill of costs to Mr. Clough on October 18 so DoJap had only one day to take advantage of its rights under Clause 8. As was pointed out by Mr. Henriques, it was registered titles which were in issue. Further, it was common ground that immediately after the auction, Mr. Clough commenced making proposals to Miss Eaton which had to be referred to her Board for consideration. In any event, the draft transfer was returned to The Bank without any complaint by Mr. Clough, who was an experienced conveyancer.

The other stricture of counsel for DoJap was that The Bank had a duty to co-operate with the purchaser and part of this duty was to make sure Clauses 7 and 8 had effect. The Bank must have realized, it was stressed, that for such a large commercial transaction financing would take time. To test this, it is appropriate to refer to Clause 7 which reads as follows -

> "7. All requisitions and objections (if any) in respect of the title, description of the property or particulars or otherwise arising out of the sale and not precluded by these conditions shall be delivered in writing to the vendor's Attorney-at-Law within SEVEN DAYS from the delivery of the draft transfer for perusal and approval. If no objections or requisitions be made within the period aforesaid the title and the terms and form of the draft transfer shall be deemed to have been accepted and approved."

Clause 8 has already been referred to. Clause 7 deals with the time within which Mr. Clough ought to have made requisitions and objections in respect of title and right of rescission if satisfactory answers were not forthcoming.

It cannot be inferred from these conditions that there was a duty on the vendor to co-operate with the purchaser on matters of securing the monies for the balance of the purchase price or securing an unqualified undertaking from Jamaica Citizens Bank. What was reasonable was that the vendor would anticipate that DoJap would have made satisfactory arrangements to finance the transaction. In this regard, it must be borne in mind, that Mr. Panton was a director of Dona Clar Properties Ltd. the mortgagor in default, the managing director and majority shareholder in DoJap and the managing director of a company Vehicles and Supplies Ltd. which carried on business at the property. Mr. Panton and his Attorney-at-Law, Mr. Clough must have realised the importance of settling accounts on time. Also there were law suits between Dona Clar Properties Ltd. and Vehicles and Supplies Ltd. against The Bank, which may have made concessions between the parties unlikely. To add to the close connection of all these entities, at the auction, Mr. Clough was bidding on behalf of DoJap and Vehicles and Supplies Ltd.

The other point taken on behalf of DoJap as regards the contract, was that Clause 15 of the contract was not applicable to the circumstances of this case. What does Clause 15 say? It reads -

> "15. Whenever under these conditions an act should be performed or payment made at or within a stated period time shall be of essence of the contract."

It has already been noted that Clause 4 required the balance of the purchase price to be paid within fourteen days of the [illegible] and that Clause 5 deals with the payment of interest if the vendor agrees to grant an extension. It is true that in her letter of 19th October, Miss Eaton granted DoJap a further twenty-four hours within which to comply with the

contract. The specific mention of twenty-four hours reasserted that time was of the essence. Moreover, at the close of her letter, Miss Eaton repeated that the extension of twenty-four hours or the alternative of an unqualified undertaking did "not constitute a waiver of my client's right(s) or remedy(ies) contained in the conditions of sale."

As a matter of construction, my conclusion is at one with that of Zacca, C.J.. After construing the contract and examining numerous authorities, he wrote at p. 46 of the record -

> " For all the reasons stated above, I would hold that the final date for completion was the 20th October, 1989. The plaintiff failed to complete by that date and the defendant was entitled as they did to rescind the agreement for sale."

We were told by counsel that the six parcels of property were sold by Jamaica Citizens Bank to DoJap and the inference is that the respondent Bank has disposed of its interest in the property. Consequently, specific performance was not sought on appeal. DoJap however, has sought rescission of the contract, and the return of the full amount paid at the auction. Once it has been decided that The Bank was within its right to terminate the contract, rescission could never have been an appropriate remedy. The basis of the termination being that The Bank had a right to forfeit the deposit because they acted pursuant to Clause 13 of the contract. Moreover, Mr. Henriques is correct in stating that there was no pleading or evidence of fraud or unconscionable conduct which induced DoJap to enter into the contract so as to invoke the principles of equity. Consequently, the judgment for The Bank given below will not be disturbed on this ground.

The principal ground for restitution of the full deposit has failed, but there is an alternative claim in common law and equity for 15% of the purchase price on the legal basis that 10% could rightly be regarded as a true deposit which could be forfeited once DoJap had failed to pay the balance on time. It is sufficient to say at this stage that it is a substantial claim for $1,725,000.

Are there authorities which support the construction of the contract relied on by The Bank?

Perhaps it is best to examine the authorities relating to "time is of the essence" as this was crucial in deciding that DoJap was in default by not paying the balance of the purchase price on time in accordance with the contract. Perhaps the earliest and clearest expression of the principle which ought to govern extention of time granted by the vendor, was made by Sir George Jessel M.R. in **Barclay v. Messenger** [1874] 43 L.J. Ch. 449. He said at p. 456 -

> " If a man says a contract is to depend upon a payment of money by a certain day and the party entitled to receive the money says, 'I will extend your time, I will give you a week or a month,' why that should put the party in a better position than if it had been originally put in the contract I cannot conceive. It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time."

It must be emphasized that when construing a document while general principles of construction are applicable to similar situations, a decision which seeks to apply a principle must take into account particular facts and circumstances. It is the principle which governs the development of the law and care must be exercised so as to prevent decisions on special

facts being regarded as law which should be followed as binding precedents. Also in some cases, other principles of the law are applicable, so as to make the application of the original principle inappropriate. This is especially so when equitable principles apply, for the decision of the court will be based upon the exercise of judicial discretion.

The principle expounded by Sir George Jessel M.R. was reiterated by Viscount Haldane in **Steadman v. Drinkle** [1915] A.C. 275 at 280 where he said when considering the results of **Kilmer v. British Columbia Orchard Lands** [1913] A.C. 319 -

> "As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed."

His Lordship also explained why the Board was "of opinion that the stipulation as to time had ceased to be applicable."

To understand the principle of law implied in Viscount Haldane's opinion which sanctioned specific performance in that case, recourse must be made to the submissions of Buckmaster K.C. and Walter Burt at p. 320 [1913] A.C. 320 of **Kilmer.** It reads -

> ".....Even if the forfeiture clause was intended to be operative according to the letter it was too late for the respondents to rely upon it and try to enforce it, for they had already

> "negotiated one extension of the time of payment and agreed to it, thereby leading the appellant to believe that their strict rights would not be enforced. As they had submitted to postpone the day of enforcing payment they were no longer entitled to say that time was of the essence of the contract. The rigid date having been altered they were not entitled to say that the substituted date was rigid to the extent of being unalterable."

Counsel continued his submissions and then the reporter's note is -

> "See Hughes v. Metropolitan Ry. Co. (1877) 2 App. Cas. 439,"

which was the authority for counsel's submission. It is manifest that the principle of equitable estoppel was before their Lordships' Board. It was also part of the reasoning of the trial judge. In referring to his decision which was approved, Lord Moulton in **Kilmer** said at p. 322 -

> " The trial judge rested his decision mainly on the view that the conduct of the plaintiff company was oppressive, harsh, and vindictive, and such as to lull the defendant to sleep and justify him in assuming that he would, notwithstanding the terms of the contract, have some indulgence in making his payments.
>
> Their Lordships agree to the result at which the learned trial judge arrived, though not exactly upon the same grounds." (Emphasis supplied)

It must be stressed that the trial judge dismissed the action in respect of the claim for forfeiture and granted specific performance. Here is how Lord Moulton reading the opinion of the Board prepared by Lord Macnaghten puts it at pp. 324-325 -

> " What happened was this: The first instalment of $2000 was duly paid on the execution of the agreement. The second instalment of $5000 with interest as provided by the agreement was not paid on the day fixed for payment. The date of payment, which by the terms of the agreement was to be on or before

> "June 14, 1910, was extended to July 7, 1910. On July 8 Kilmer wrote to the secretary explaining the circumstances which prevented his making the payment on the 7th, but promising to pay without fail on Tuesday, the 12th. On the 9th the secretary of the company sent a telegram saying the deal was off, and on the 1st of August following the respondent company brought this action to enforce their rights according to the strict letter of the agreement. This was met by a counter-claim asking for specific performance, and the money which ought to have been paid on July 7 was paid into Court and remains in Court to the credit of the action."

Bearing in mind that there were two issues before the Board and that reasons were given in relation to forfeiture, the question must be asked on what basis was specific performance granted since in the contract time was of the essence for payment? Lord Moulton's words at 324 of the report suggests the answer. They read -

> " Other points were raised in the course of the argument, but their Lordships do not think it necessary to refer to them."

The legal basis must have been the application of the principle of equitable estoppel referred to in counsel's speech and referred to by the trial judge. Also important was the fact that money which ought to have been paid on July 7 which date was extended was paid into court to the credit of the action. Additionally, the purchaser was let into possession from the beginning. On this explanation, time was not of the essence and specific performance was the appropriate remedy.

Kitto J., in **Tropical Traders Ltd. v. Foodman** 111 C.L R. 41 helpfully referred to the facts and circumstances adverted to in a subsidiary report which showed that time has ceased to be applicable. Here are his words and explanations

at p. 54 -

> ".....That is the explanation of the case which was adopted in later cases in the Privy Council: Steadman v. Drinkle (1916) 1 A.C. 275, at pp.279, 280; Brickles v. Snell (1916) 2 A.C. 599, at p. 604: 'The stipulation as to time being of the essence of the contract did not apply as the facts stood.' The authorised report does not reveal what the material facts were, but the report in the Law Journal (1913) 8 L.J.P.C. 77 is more informative. Three days before an instalment became payable the purchaser requested the vendors to draw upon him for the amount of the instalment and interest at five days after sight. This was done and the purchaser accepted the bill. Thirteen days after the contract date for payment of the instalment the purchaser requested the vendors to hold the bill for ten days, and they agreed to do so. The purchaser, believing that this gave him three days' grace after the end of the ten days, made no arrangements to meet the bill, and on the day after the expiration of the ten days he wrote to the vendors that the bill would be paid on a day four days later still. The vendors then called the deal off. But by that time (as appears from the report of the counsel's argument) the bill was outstanding in the hands of the vendors' bankers; and the cases of Davis v. Reilly (1898) 1 Q.B. 1 and In re a Debtor: Ex parte the Debtor (1908) 1 K.B. 344 were cited to the Privy Council, presumably as showing that at the time of the purported determination of the contract there was subsisting and binding upon the vendors an agreement, implied from the making and acceptance of the bill, that the debt should not be enforced while the bill was in the hands of a third party. It is hardly surprising that Lord Moulton treated the provision that time should be of the essence as irrelevant to the determination of the appeal, and considered only the equitable jurisdiction to relieve against forfeiture of the purchase moneys paid and (though he did not discuss this separately) to decree specific performance notwithstanding a rescission which was valid according to the terms of the contract."

There is an abundance of authority reiterating the principle as expounded in **Barclay v. Messenger** (supra) referred to by Zacca C.J., in his thorough analysis of the issue. They are

Bernard v. Williams [1926] T.L.R. 437 at 436, per Talbert J., **Wilson v. McGee** [1955] N. Z.L.R. 241 at 244 per Adams J, **Buckland v. Farmer & Moody** [1979] 1 W.L.R. 221 per Buckley L.J. at p. 231 and **Luck v. White** 26 P.C.R. 89 per Goulding J, at p. 95.

When it is recalled that in her letter of 19th October, 1989 Miss Eaton expressly stated -

> "My clients have generously agreed to allow you a further twenty-four hours within which to comply with the above, but without prejudice to any right or remedy reserved to my clients under the conditions of sale,"

it is clear that the authorities, support the construction that time continued to be of the essence and since DoJap failed to pay or secure an unqualified undertaking by the 20th of October, The Bank was entitled to rescind the contract and specific performance was rightly refused in the court below.

Another area where authority is useful in deciding whether it is correct to regard DoJap as being in breach rather than The Bank as urged by Mr. Mahfood is illustrated in the case of **Carne v. DeBono** [1988] 3 All E.R. 485. One aspect of the complaint in this case was that The Bank was in breach of its duty co-operate so as to make the contract workable. It was explained that the draft transfer for the perusal and approval was sent one day before the fourteen day period for payment had elapsed and this hampered DoJap from raising the funds to pay on time. In the light of these breaches, The Bank, it was contended, could not rely on its breach, as it was The Bank's stance which caused DoJap to be in default. Here is how Sir Nicholas Browne Wilkinson V.C. treated a somewhat similar complaint in **Carne v. DeBono** [1988] 2 All E.R. 485 at 489 -

> " Sympathise though I do with the purchaser, I do not think his general submission can be right either. Although it is a customary step in conveyancing procedure that completion statements should be sent and agreed so that the parties should be clear well in advance of the date of completion what their respective obligations are, so far as I am aware, that is merely a matter of practice and not of law. So far as the authorities drawn to our attention are concerned, there is no legal obligation on a solicitor to provide a completion statement.
>
> In those circumstances, what was the purchaser to do when faced with an erroneous completion statement? The Master held that it was his duty to tender the correct amount of the purchase money and that as the purchaser had done nothing and had not tendered the purchase price, he was in breach. The Master reached that conclusion in reliance on a statement by Megarry J in **Schindler v. Pigault** [1975] 30 P. & CR. 328. In that case, time had been made of the essence for completion on 5 November. The contract had not been completed on that day. An action by the purchaser claiming that he had rescinded the contract and for return of his deposit was successful."

Another helpful observation is that of Megarry J, in **Schindler v. Pigault** [1975] 30 P. & CR. p. 328 at 333 & 334 -

> ".....If a vendor were actively to dissuade the purchaser's prospective mortgagee from making a loan to the purchaser, and the purchaser was thereby delayed in completing by reason of difficulty in finding another mortgagee, I think it would be wrong to allow the vendor to rely on the purchaser's delay. There are, of course, some purchasers who have the purchase money available, and do not need a mortgage or sub-sale to finance the purchase. But there are many other purchasers, and it would be a singularly unworldly vendor who would be genuinely surprised to learn that a purchaser of whom he knew little or nothing was proposing to raise some or all of the purchase money from another. In the present case the purchaser initially proposed to raise much of the money by mortgage, and I cannot see that the replacement of this proposal by the proposed sub-sale made any material difference. Of course,

> "if a purchaser required the vendor to afford access to a horde of possible sub-purchasers, hawking the property round to the highest bidder, very different questions might arise; but here, from first to last, there has been only one prospective sub-purchaser."

These authorities dispose of the contention that The Bank should have co-operated with DoJap to secure a mortgage.

As for the complaint that The Bank was in breach of its general common law duty to co-operate, the authority of **Macay v. Dick** [1881] A.C. App. Cas. 251, **Sprague v. Booth** [1909] A.C. 576, **Phoebus Kyprianou. v. Cyprus Textiles Ltd.** [1958] 2 Lloyd's Rep. 60, and **Klienert v. Abosso Fold Mining Co. Ltd.** [1913] 58 L.C.J. P.C. 45 were cited in support. Since the Jamaica Citizens Bank was involved as it was prepared to give an undertaking to pay the balance to The Bank if DoJap satisfied certain conditions, the authority of **Mona Oil equipment & Supply Co. Ltd. v. Rhodesia Railways Ltd.** [1946] 2 All E.R. 1014 cited by counsel for The Bank, was conclusive. In that case Devlin J, at p. 1016 - 1017 cited the following passage by Lord Wright's speech in **Luxor Eastbourne Ltd. v. Cooper** [1941] 1 All E.R. 60 -

> " When a defendant is charged by a plaintiff with having prevented the plaintiff from fulfilling a condition on which his right to payment depends, it must, in my opinion, be shown that the defendant's act which prevented was wrongful. The wrong would be generally a breach of the contract. Thus, in **Mackay v. Dick** [1881] 6 App. Cas. 251; 12 Digest 431, 3494, the maker of an exacavating machine was required by the contract to send the machine for the purpose of being tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for it if it there, in working, satisfied the test. This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities,

> "they had failed to do so. Hence their default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyer's default. Thus, when it is said in the present case that the appellants prevented the respondents from completing the contract, it must be shown that the appellants broke some term of the contract between them and the respondents. The appellants cannot be held liable on the ground of prevention where all that happened was that they did, or omitted to do, something which, as between themselves or the respondents, they were free to do or to omit to do. I question if there is any exception to this principle, but I am clear that there is no exception material to this case."

The relevance to the instant case is that in no way it could be said that The Bank's action prevented DoJap from paying the balance of the purchase money or receiving an unqualified undertaking from Jamaica Citizens Bank by October 20.

Regarding the allegation in paragraph 6 of the Statement of Claim that the first legal mortgages were not discharged, on appeal the relevant supplementary ground reads -

> " The learned Chief Justice erred in requiring the Plaintiff/Appellant to prove that if it had completed the agreement, the mortgage would not have been discharged. The burden of proof was on the Defendant/Respondent to prove that it was in a position to complete by the 20th October, 1989."

The reality was that The Bank was not under a contractual duty to execute the transfer as Mr. Clough in his letter of 19th October, requested of Miss Eaton, until he had paid the balance of the purchase price or supplied an unqualified undertaking from Jamaica Citizens Bank. Mr. Clough gave a detailed explanation of the system of undertakings resorted to by banks in this jurisdiction with regard to the discharge of

prior mortgages. It is only if the contract had been completed and there was a failure to convey a clear title that there would have been an issue. This matter is covered by Clause 4 of the contract which to repeat for emphasis reads in part -

> ".....immediately upon such payment the vendor pursuant to the provisions of Section 106 of the Registration of Titles Act will execute a transfer to the purchaser and lodge same for registration."

In his letter of the 19th October, Mr. Clough made no requisitions and objections to the title. Moreover, he executed the draft transfer. It is against this background that Zacca C.J. expressed surprise that this issue was raised at the trial.

On an examination of the authorities, the results coincide with the construction of the contract namely, that DoJap was in breach by failing to pay the balance of the purchase price on October 20 and that The Bank was entitled to terminate the contract and forfeit a reasonable deposit. There was an entitlement to forfeit because it was provided for in the contract and both parties intended that there would be a deposit at the auction to bind the agreement. Any excess over the traditional 10% however, was eligible for relief from forfeiture or be returned as restitution to DoJap pursuant to the claim in quasi-contract on the basis of total failure of consideration.

Submissions that the whole deposit was a part-payment was argued by Mr. Mahfood. He relied on Re Dagenham (Thomas) Dock Co. Exparte Halse (1873) 8 Ch. App. L.R. 1022, Kilmer's case, Steadman v. Drinkle (1916) 1 A.C. 275 and Cornwall v. Henan (1900) 2 Ch. 298. A feature in these cases was that the purchaser was put in possession and that the purchase price was to be paid in instalments. The courts therefore properly referred to these instalments as part-payment and so liable to relief from forfeiture.

In this case, there was a true deposit of 10% of the purchase price with an additional 15% of the purchase price. The common law regards this additional amount as a part-payment and as there was a total failure of consideration, it would be recovered by the appellant in quasi-contract. Equity on the other hand, exercised a concurrent jurisdiction over the additional amount by regarding it as in the nature of penalty and will provide relief by way of restitution.

Are there rules of equity which enable DoJap to recover One million Seven Hundred & Twenty-Five Thousand Dollars?

The basic pleadings which covers the relief from forfeiture with respect to 15% of the purchase price has already been adverted to. The original grounds of appeal prepared and filed on 21st March, 1990 before the findings were delivered and the order of the court made on 8th February, 1990 specifically refer to a prayer for restitution. This is how it was initially averred -

> "(a) The learned Chief Justice misdirected himself on the law as to, inter alia:-
>
> .....
>
> (ii) Relief from forfeiture; and/or
>
> (iii) The distinction between a true deposit and a deposit in the nature of a penalty;.....
>
> .....
>
> (c) The Learned Chief Justice applied the wrong principles in refusing the Plaintiff/Appellant the remedy of Specific Performance or return of the Deposit by way of relief from Forfeiture, having regard to the evidence before him, in particular:-
>
> .....
>
> (iv) that the balance of the Purchase Price was tendered within 30 days of the date of the Auction Sale and/or within 3 days of the date of the letter of the 23rd day of October, 1989."

In the supplementary grounds of appeal relief was prayed for in grounds 23 - 25. They read thus -

> "23. Alternatively, if the Defendant/Respondent was entitled to terminate the contract and forfeit the deposit, the Palintiff/Respondent should be granted equitable relief against forfeiture as it would be unconscionable in the circumstances for the Defendant/Respondent to retain the deposit.
>
> 24. Further and or alternatively, the finding of the Learned Chief Justice that the deposit of TWENTY FIVE PERCENT of the amount of the purchase money was a true deposit is unreasonable and is not supported by the evidence.
>
> 25. The Learned Chief Justice erred in failing to apply a standard of "reasonableness" in concluding that the aforesaid deposit of TWENTY FIVE PERCENT was a true deposit which the Defendant/Respondent was entitled to retain."

It should be noted that in the Supreme Court, as regards restitution of part of the deposit at the auction, Mr. Grant for DoJap specifically contended that the court "may grant relief of all of the deposit or a percentage of the deposit" (see p. 137 of the record) and this issue was put to both counsel in this court.

Implicit in the submissions before the court below and on appeal, is that the definition of deposit is a matter of law. Zacca C.J. however, treated it as a matter of fact. At p. 57 of the record he said -

> " Having regard to the evidence of Mr. Clough and Miss Eaton as to the practice in Jamaica and having considered the cases cited, I am of the opinion that the deposit of 25 per cent in the instant case is to be regarded as a true deposit and is not a penalty.
>
> Where the deposit is a true deposit then relief from forfeiture will not be granted.
>
> I, therefore, hold that the deposit of 25 per cent was a true deposit and refused to grant relief from forfeiture."

It is therefore necessary to examine how the authorities cited to him defined deposits to establish whether his finding was correct. In **Wallis v. Smith** [1882] 21 Ch. 243 Jessel M.R. expressed it thus -

> " I come now to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases, the judges have held that this rule (that is the rule relating to relief against penalty) does not apply, and that the bargain of the parties is to be carried out."

This definition was implicitly accepted by the Court of Appeal in **Howe v. Smith** [1884] 27 Ch. 89 a case which has been described by the Privy Council as "the source of all modern learning on the matter of deposits."

The essential feature to grasp is that a payment recognized by law to be a deposit may be forfeited if the purchaser is in breach of contract and such a payment is sometimes called a reasonable deposit. An instance where forfeiture of the deposit was upheld by the court was **Howe v. Smith** (supra). Here is how Cotton L.J. puts the matter at p. 94 -

> ".....What is a deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit."

Fry L.J. was of the same mind for he said at p. 101 -

> " Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it should be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into and creates by the fear of the forfeiture a motive in the payer to perform the rest of the contract."

It should be noted that the deposit in this case was £500, the purchase being £15,500 and the principle expressed, is based on the reasoning that the court will not assist the purchaser in default to recover a deposit, for that would enable him to "take advantage of his own default to recover his deposit from the vendor."

This approach was approved of in the House of Lords in **Soper v. Arnold** (1889) 14 App. C. 429 where the headnote reads -

> " Held, affirming the decision of the Court of Appeal (37 Ch. D. 96), that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit."

Lord Macnaghten had this to say at p. 435 -

> ".....Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes - if the purchase is carried out it goes against the purchase money - but its primary purpose is this, it is a guarantee that the purchaser means business, and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

The deposit in this instance was £610 the purchase price being £6,100. It is clear that because a reasonable deposit is a guarantee that the purchaser will conclude the contract within the time agreed, as failure to, on his part may mean forfeiture.

In Stockloser v. Johnson [1954] 1 All E.R. 630 Denning L.J. as he then was, made some valuable comments on the nature of deposit and the scope of an action for recovery. He stressed three features. Firstly, that equity could intervene so that the deposit is recovered in instances of extortion, oppression or anything of that sort. Secondly, he acknowledged the difference between a penalty and deposit and thirdly, he recognized that the basis of restitution was unjust enrichment at the expense of the plaintiff. When he addressed the issue of the usual 10% deposit for property transactions, Denning L.J. said at p. 450 -

> " Again suppose that a vendor of property, in lieu of the usual ten percent deposit stipulates for an initial payment of 50 per cent of the price as a deposit and a part payment and later, when the purchaser fails to complete, the vendor resells the property at a profit and, in addition, claims to forfeit the fifty per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages.
>
> These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates not because of the plaintiff's default, but because it is, in the particular case, unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense."

The importance of this passage is that it demonstrates that there are remedies provided by equity to prevent the forfeiture of any amount which exceeds the traditional 10% in the case of land transactions. As regards the specific issue in this case namely that there is an equity of restitution for 15% of the purchase price, the approach of Romer L.J. does not seem to differ from his learned brethren. At p. 458 he said -

> ".....and no relief of any other nature can properly be given in the absence of some special circumstance such as fraud, sharp practice or other unconscionable conduct of the vendor to a purchaser after the vendor has rescinded the contract."

Sommerville's L.J. view was similar to that of Denning L.J..

It seems that Lord Oliver when Oliver J, in **Windsor Securities Ltd. v. Loreldal and Lester** approved of the approach in **Stockloser v. Johnson** with regards to an equity of restitution arising in circumstances where the deposit would have been unreasonable or unconscionable. The deposit forfeited in this instance was £235,000 and amounted to 10% of the purchase price. Here was his approach as reported in **The Times** 10th September, 1975 -

> "There was nothing in the present case to show that the forfeiture was unreasonable or in the nature of a penalty. His Lordship was not even sure that a case could be made out at the trial that the plaintiffs were capable of making a large profit out of the forfeiture, but even without that he was not persuaded that it was a case where in the established circumstances equity would interfere. There would therefore be a declaration that the deposit had been forfeited and an order that it be released to the plaintiff."

To my mind His Lordship on these principles would have found a deposit of 25% of the purchase price unreasonable and in the

nature of a penalty so as to invite the intervention of equity. Since equity exercises a concurrent jurisdiction, His Lordship would be bound to consider relief in quasi-contract also. Further, Lord Diplock in **Scaptrade** [1983] 2 A.C. 694, [1983] 2 All E.R. 763 referred to the principle expressed in **Stockloser v. Johnson** (supra) without any adverse comment although he pointed out that assuming the principle was correct, that it did not apply to time charters.

Certainty is of prime importance in contracts for the sale of land and conveyancing and if the traditional 10% deposit is to be altered it must be based on extensive conveyancing practice and sound reasons before it will be accepted by this Court. What advice would counsel give clients if there was a variable figure instead of a fixed maximum liable to be forfeited where there was default on the purchaser's part? In this regard, in auction sales Bateman — The law of Auction is instructive, at p. 210 the author states -

> " It is the almost universal custom at auction sales to require a part of the purchase money to be paid down as a guarantee for the fulfilment of the contract, and also if the contract is completed, as part payment of the purchase money. The purchaser cannot elect to forfeit his deposit and avoid the Contract.
>
> This sum which varies from 5 to 25 per cent (in the case of land usually 10 per cent) of the purchase money, is called the deposit."

There are two features to note about this useful passage in Bateman. Firstly, it recognizes and states the universal custom at auctions to require a deposit and it makes reference to the legal definition of a deposit. Secondly, it gives the range of what is permissible to qualify as a deposit generally and it sets the upper limit as 25% of the purchase price while for land it is usually 10%. The emphasis on "usually 10%" for land is

to be noted for in **Patrick v. Miller & Sales** (1877) 25 W.R. 537 it was 20% but there was no decision on forfeiture. So to require a deposit of 25% for land - must have legal consequences in case the contract falls through. It must still be regarded as a deposit for the parties intended a deposit but only the usual 10% may be forfeited. Equity will intervene so as to prevent the seller from retaining the excess. Since the property has been disposed of by The Bank as there were prior mortgages, the problem posed by this appeal as to whether the deposit or any part thereof must be returned, must be solved on the basis of principle, implied from the authorities.

This right to forfeit this usual 10% deposit was recognized by this Court **Beach Club Enterprises Ltd. v. Horrizon Management Ltd.** Cayman Islands Civil Appeal No. 2/80 (Robinson P., Carberry and Carey) JJ.A. and this amount ought still to be regarded by the courts as a reasonable amount to be "paid to the vendor as a guarantee that the contract should be performed." In this case it is the very substantial amount of $1,500,000 which could have been properly forfeited. Had The Bank taken the first step and sought a declaracion that the deposit was rightly forfeited, this is the amount the Court ought properly to have sanctioned.

It is relevant to cite the authority of **Linggi Plantations Ltd. v. Jagatheesan** (1972) 1 M.L.J. 89 where Lord Hailsham said at p. 93 -

> " It follows therefore, that, once it is decided that the construction of the contract is such that the sum of $377,500 was paid as a true deposit, that is, on the same terms as the deposit, in **Howe v. Smith**, and was thus to be liable to forfeiture under the contract in case of failure, by the purchaser to complete, section 75 of the Contracts (Malay State) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not

> "damage is proved. There is in their Lordships' judgment no difference in this context between the expression "deposit" and the expression "earnest money." In this context they are two words for the same thing, although in common modern English usage "earnest money" has a slightly archaic ring. As Fry, L.J. said in **Howe v. Smith** at page 101:
>
> ' It (i.e. the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.'"

It must be noted that His Lordship spoke of a true deposit in the context of the traditional 10% deposit for the sale of land. Lord Radcliffe also has some pertinent comments to make on this issue. In **Bridge v. Campbell Discount Ltd.** [1962] 1 All E.R. 385 he said at p. 396 -

> "I know, of course, that to travel to another branch of equity's relief jurisdiction, the precise reason why a deposit made on a sale of land is not recoverable if the bargain goes off by the purchaser's default is that it is treated as a guarantee (see **Howe v. Smith)** but, nevertheless, every penalty even a penal bond, is in some sense a guarantee for the dual performance of the contract, and I do not see any sufficient reason why, in the right setting, a sum of money may not be treated as a penalty, even though it arises from an obligation that is essentially a guarantee."

This is the basis for treating 15% of the purchase price as in the nature of a penalty as only the true deposit of 10% was rightly forfeited.

However, even in the United Kingdom where there are express statutory provisions, section 49(2) of The Law of Property Act, an action for recovering a deposit may fail. See Farrand - Contract and Conveyance 4th edition, p. 204 where the authorities

state -

> ".....Nevertheless, it would still be over optimistic to expect an equitable attack to succeed against the traditional 10 per cent. Thus such an attack failed dismally in **Windsor Securities v. Loredal and Lester** [1975] The Times 10, September despite the circumstances that the sum forfeited totalled £235,000 and that a potential profit of £150,000 on resale was alleged."

If an attack against the traditional 10% would fail then this case suggests that if there is a 25% deposit then the attempt to have the whole deposit returned would fail. A reasonable deposit of 10% of the purchase price must be regarded as correctly forfeited for the parties contracted for the forfeiture of a deposit. This is evidenced in Clause 13 of the contract referred to and quoted previously. Equity, however, will assist DoJap to recover the excess of a true deposit because it would be unconscionable for The Bank to be unjustly enriched by so large an amount at the expense of DoJap when the law has already provided for forfeiture of a reasonable deposit. This is certainly the "right setting" envisaged by Lord Radcliffe. Also equity looks at the conduct of DoJap in tendering the manager's cheque covering the remainder of the purchase price and interest shortly after the termination of the contract. This was a feature in this case and it facilitates the court in exercising its discretion to relieve DoJap of that part of the deposit forfeited by The Bank which is in the nature of a penalty.

Even where they had written contracts for excessive rewards salvors could only recover reasonable remuneration and this was fixed by the courts. See The Medina [1876] 1 P.D. 272 and The Port Caledonian and The Anna [1903] p. 184. Apportionment of the deposit into the 10% of the purchase price which is rightly forfeited and 15% which is recoverable by way of

restitution is just and permissible. Such a decision reconciles the principle of the sanctity of contracts and the presumption against unjust enrichment which is recognized by the courts. Clause 13 contemplates that any damages suffered by the vendor which was not covered by the deposit on a sale of the property could be recovered by an action for liquidated damages. Such a course is therefore open to The Bank.

In summary equity regards 15% of the purchase price in this case as in the nature of a penalty and since the vendor could not recover it in an action by parity of reasoning it ought not to be retained by the vendor. As the retention of this excessive amount was unconscionable and unreasonable, equity insists that it ought to be returned to the purchaser.

The common law remedy of Restitution or Quasi-Contract

The common law also exercised jurisdiction over 15% of the purchase price by which the respondent Bank was unjustly enriched at the expense of DoJap. It is, therefore, necessary to explain the common law approach to this matter. When the respondent Bank terminated the contract on 23rd October, 1989, there could have been no further claim by the appellant DoJap in pursuance of the contract. It was necessary to recall however, that on October 20, DoJap tendered $9,012,579.62 which, had it been accepted, would have been in full settlement of the purchase price.

As the contract was terminated against that background, it could be said fairly that the whole deposit was retained by The Bank as well as the property which was the consideration. Such a circumstance is regarded in law as a total failure of consideration as the contract was never performed or as Lord Mansfield said of such a claim ".....it lies from money paid by mistake; or upon a consideration which happens to fail":

Moses v. MacFarlan. Admittedly, the breach was by the appellant but that matters not in a claim based on quasi-contract. Such a claim is independent of any claim under the contract although it comes into being at the moment a valid contract has been terminated. From the Chancery standpoint, an equity of restitution comes into being and so a concurrent jurisdiction can be exercised. The pleadings to support this common law claim were general even during the 18th and 19th century when exact pleadings were mandatory. The Courts were content to act on general pleadings if the evidence could support the claim. In **Moses v. MacFarlan** [1760]2 Burrows 1005 or [1558 - 1774] All E.R. Reprint 581, Lord Mansfield puts it thus -

> "One great benefit which arises to suitors from the nature of this action, is that the plaintiff need not state the special circumstance from which he concludes ex aequo et bono the money received by that defendant ought to be deemed as belonging to him. He may declare generally that the money was received to his use and make out his case at the trial."

The thrust of the claim in quasi-contract is that the reasonable deposit permitted by law to be forfeited was 10% of the purchase price. Thus the remaining 15% is regarded as a part-payment where there was a total failure of consideration and was retained unjustly by the respondent Bank at the expense of the appellant. Lord Denman's words in **Palmer v. Temple** 9 Ad. E. 508 cited by Fry L.J. in **Howe v. Smith** (supra) at p.100 are apt to describe the situation in the instant case as regards 15% of the pruchase price. They read thus -

> "....but he (The bank) cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser."

That it is appropriate to apportion the deposit is evidenced by the following words of Fry L.J. in **Howe v. Smith** at p. 102. He said -

> "That earnest and part-payment are two distinct things is apparent from the 17th section of the Statute of Frauds which deals with them as separate acts, each of which is sufficient to give validity to a parol contract."

A circumstance which goes to prove that the money was unjustly retained, was that there was an offer to pay the full balance of the purchase price three days after the contract was terminated and it was refused although the property was then still in possession of The Bank. The law of quasi-contract is well illustrated in the case of **Wilkinson v. Lloyd** [1845] 7 Q.B. 27. The following summary from **The Law of Contract** 7th Edition Cheshire Fifoot sets out the facts and decision. At p. 586 it reads -

> "The plaintiff agreed to buy from the defendant certain shares in a private company operating under a deed of settlement. It was necessary, under the terms of this deed, for each shareholder to be approved by the directors of the company. The plaintiff received a transfer of the shares from the defendant and paid for them. Meanwhile, before this payment and without the plaintiff's knowledge the directors had passed a resolution refusing to allow any transfer of shares by the defendant, as he had instituted certain legal proceedings against the company. The transfer to the plaintiff was therefore not approved by the directors. The shares depreciated in value."

The authors then continued thus -

> "It was held that the defendant was bound to procure the assent of the directors and to take all necessary steps to invest the plaintiff with the property in the shares, that his failure to do so went to the root of the contract and that the plaintiff could recover."

Similarly, 15% of the purchase price should be returned to the plaintiff as it was a term implied by law that this amount ought to go towards the purchase price if the contract was completed. It was also an implied condition that the money should be returned if there was a total failure of consideration and the contract was terminated. Such an approach is now appropriate as the restrictions on indebitatus assumpsit, the form of action formerly used to institute such proceedings has been abolished. The particular restriction was that only in instances where the failure was due to the defendant's fault was restitution permissible. Any defence, therefore, to such a plea must now be justified on some recognized principle. This is so as the forms of action have now been abolished and judicial decisions must be based on principle or precedent. That the matter ought now be decided on principle was advanced in Fibrosa v. Fairbairn (supra) at p. 146 by Lord Porter -

> "It is true that in the majority of cases the consideration fails because one party or the other fails to carry out his contract; but it is the failure of consideration and not the breach of contract which enables money paid in advance to be recovered."

Lord Wright was of the same view. At p. 135 in stating the general principle governing the cause of action he said -

> "it is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit. That is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

On the specific matter that principle ought to govern the action rather than the technical requirement of the forms of action,

His Lordship at p. 138 said -

> "Impossibility of performance or frustration is only a particular type of circumstance in which a party who is disabled from performing his contract is entitled to say that the contract is terminated as to the future, and in which repayment of money paid on account of performance may be demanded."

The flexibility of the common law which has been compared to a maze rather than a motorway affords yet another approach which may assist the appellant. Lord Hailsham in **Linggi Plantations Ltd. v. Jagatheesan** (supra) makes reference to it in a passage at p. 94. It reads -

> "It is also no doubt possible that in a particular contract the parties use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty by purporting to render forfeit something which is in truth part payment."

In applying this dictum to the instant case, it is appropriate to say that although the parties used the language of deposit to describe the payment of $2,287,000 made at the auction, it was, in substance, a deposit with the addition of a part-payment.

When The Bank exercised its right to terminate the contract, the reasonable deposit of 10% of the purchase price was forfeited and the contract was at an end. The remaining 15% was in reality a part-payment held to the use of DoJap. The 15% retained by The Bank became, in the words of the Privy Council, "the imposition of a penalty." The phraseology is important for The Bank does not seek to recover a penalty as the money is in its hands. It is DoJap who seeks to recover a part-payment which was forfeited hence the phrase "imposition of a penalty."

The next stage of the analysis is to examine the course of part-payments when a contract is rescinded. Earlier in the opinion of The Board at p. 91 the distinction between part-payments and deposits was stated thus -

> "In particular Lord Dunedin in **Mason v. Clouet** [1924] A.C. 980 establishes the fundamental difference between part-payments which are recoverable in certain circumstances and deposits which are not."

So the issue is, are the circumstances appropriate for recovery of the part-payment in this case? I think they are. It is appropriate to refer to another passage in the judgment of Denning L.J. in **Stockloser v. Johnson** (supra) at p. 448. The relevant passage reads -

> "It seems to me that the cases show the law to be this: (1) When there is no forfeiture clause: If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see **Palmer v. Temple** [1839] 9 Ad. & El. 508; **Mason v. Clouet** [1924] A.C. 980; **Dies v. British and International Co.** [1939] 1 K.B. 724; Williams on **Vendor and Purchaser**, 4th ed., p. 1005."

Since the forfeiture clause in this case is to be applied to reasonable deposits of 10% of the purchase price there was in effect no forfeiture clause in relation to the additional 15%. It was a situation not dissimilar to **Dies** (supra) a case where there was a clause pertaining to the money paid over if there was frustration, but not if there was a breach. The upshot of all this is that it is acknowledged, albeit impliedly, in **Linggi** (supra) and **Stockloser** (supra) that the common law action in

quasi-contract to recover a part-payment where there has been a total failure of consideration and the proceedings in equity to recover a payment in the nature of a penalty, are just alternative means of rectifying unjust enrichment. Perhaps it should be noted that in **Dies** instalments regarded as part-payments were recovered on the basis of a rule in contract law. Stable J., refused to accept the alternative plea in quasi-contract on the ground that, there was a total failure of consideration. He ruled that it was a mere failure by the claimant. Such a ruling would not now get any support as it runs counter to what seven members of the House of Lords decided in **Fibrosa**.

Conclusion

It is appropriate that the technical rules of equity and the justice of the common law by providing for restitution since the range of deposits are controlled, have produced a remedy for DoJap in this case. The forfeiture by the Workers Trust and Merchant Bank Ltd. of the entire deposit of $2,875,000 or 25% of the purchase price was inequitable. It was all the more so since DoJap tendered the full balance of the purchase price and interest of $9,012,579.82 within a few days of the closing date. To vendors of land the law says that you may forfeit 10% of the purchase price if the contract so provides, but no more.

Because the tender was refused DoJap had to purchase the properties from Jamaica Citizens Bank who held the first mortgage. DoJap may find some comfort in the old proverb which states that half a loaf is better than none. In the language of percentages, DoJap has recovered 60% or $1,725,000 of what they claimed which is better than 50% which ought to have provided proverbial satisfaction. The Bank is entitled to

retain $1,150,000, 10% of the purchase price and this satisfies the law's insistence on the sanctity of contracts. For the agreement did sanction forfeiture of the deposit, but the law protects purchasers by defining the percentage of the purchase price liable for forfeiture when a buyer regrettably fails to complete his bargain on time.

DoJap claimed no interest below or on appeal. Had they done so an award of 12% from the date of service of the statement of claim would have been appropriate. That being so, I agree with the order proposed by Rowe P.