[2015] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

APPLICATION 172/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**JENNIFER MESSADO**	**1ST APPLICANT**
AND	**LANZA TURNER BOWEN**	**2ND APPLICANT**
AND	**KEITH RECAS**	**1ST RESPONDENT**
AND	**NERISHA NATHAN**	**2ND RESPONDENT**

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones and Co for the applicants

John Graham and Miss Peta-Gaye Manderson instructed by John G Graham and Co for the respondents

9 February, 6 and 20 March 2015

MORRISON JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusions. I have nothing to add.

DUKHARAN JA

[2] I too have read the draft judgment of Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusions and have nothing to add.

SINCLAIR-HAYNES JA (AG)

[3] On 25 September 2014, Cole-Smith J struck out the applicants' defence and entered summary judgment for the respondents. She refused to grant the applicants leave to appeal. The applicants sought the permission of this court for leave to appeal her decision. On 9 February 2015, the court granted the application for leave to appeal and treated the hearing of the application as the hearing of the appeal. The applicants will hereafter be referred to as the appellants. On 6 March 2015 we dismissed the appeal and awarded costs to the respondents to be agreed or taxed. We promised to put our reasons in writing. This is a fulfillment of that promise.

Background

[4] On 23 February 2009, the respondents entered into an agreement with RJCA Development Limited (RJCA) to purchase property known as Apartment 32, Monte Cristo situated at 96 ¼ Old Hope Road, Kingston 6. Mr Richard Atherton was a director of RJCA. The appellants were the attorneys with carriage of sale and stakeholders.

[5] The respondents were required to pay the sum of $2,200,000.00 as deposit and a further sum of $6,600,000.00. Those sums were duly paid to the appellants, who performed the dual function of attorneys and stakeholders for the RJCA on the signing of the agreement for sale. By virtue of special condition clause 2 of the agreement for sale, the appellants and the vendor were to have the agreement for sale stamped from the deposit which was paid by the respondents.

Chronology of events

[6] On 19 March 2009 and on 26 March 2009, the respondents requested a stamped copy of the agreement of sale from the appellants. On 15 July 2009, their attorney informed the appellants that they, the respondents, were experiencing financial problems and consequently were unable to complete the sale. They again, requested a stamped copy of the agreement for sale.

[7] At that juncture the vendors were also not ready, willing or able to complete the sale because they were not in possession of the following:

(a) the duplicate certificate of title;

(b) the discharges of mortgage over the property;

(c) the stamped agreement for sale which was at the stamp office;

(d) the certificate of title which was in the possession of the Jamaica Mortgage Bank;

(e) registrable transfer; or

(f) withdrawal of a caveat lodged by Tewani Limited as a purchaser for value of the said property.

[8] Notwithstanding the vendor's inability to complete, on 30 July, two weeks after the respondents' request, Ms Carol Davis, on behalf of the vendor, served notice making time of the essence on the respondents and informed them that she had carriage of sale. The respondents were given until 28 August 2009 to complete the contract.

[9] On 25 August and again on 26 August 2009, the respondents' attorney requested a statement of account from Ms Carol Davis setting out the balance which was required to complete the sale. Ms Davis failed to provide same. Consequently, the respondents calculated the outstanding balance as $14,278,139.56 and, on 26 August 2009, their attorney tendered a manager's cheque for that amount to Ms Davis.

[10] On 31 August 2009, the respondents rescinded the sale and requested the return sum of $8,843,687.50, their deposit. Only the sum of $2,243,687.50 was returned. They were advised by Ms Davis that the sum of $2,243,687.50 had been forfeited. The sum forfeited was paid to Tewani Limited (Tewani).

Tewani Limited's involvement

[11] It is necessary to address Tewani's involvement in the matter. The respondents have alleged in their particulars of claim that the vendor entered in the said agreement knowing that the said apartment was sold to Tewani in 2007. Further, it is alleged, there was litigation between Tewani and RJCA and Jamaica Mortgage Bank Limited in which Tewani claimed that its agreement for sale with RJCA was binding and enforceable. In fact the appellants and the vendor, RJCA, in that suit asserted that Tewani stood in priority to the Mortgage Bank as it was the beneficial owner. It also contended that Tewani was entitled to be endorsed on the title as the registered proprietor. Further, the appellants represented Tewani in registering a caveat over the said property.

[12] Mrs Messado however, deponed that the respondents were well aware of Tewani's interest. They knew that the property was being sold through the RJCA for Tewani. Gordon Tewani, Director of Tewani Limited, purportedly gave a statement to the police to that effect. That statement however is not evidence.

The claim before the learned judge

[13] The respondents instituted proceedings in the Supreme Court against the appellants, RJCA Developments Limited and Richard Atherton on 23 September 2009, for the following reliefs:

> "(a) A Declaration that the Claimants lawfully rescinded the Agreement for Sale on or about the 31st August, 2009.
>
> (b) An injunction restraining the First and Second Defendants from paying the sum of $2,243,687.50 to Third Defendant or any other person.
>
> (c) An Order that the First and Second Defendants pay into the Court the sum of $2,243,687.50 pending the trial of this action.
>
> (d) Repayment of the sum of $2,243,687.50 by the First and Second Defendants, monies paid for a consideration which has wholly failed.
>
> (e) Alternatively, repayment of the sum of $2,243,687.50 by the Third Defendants to the Claimants.
>
> (f) Damages against the Third and Fourth Defendants for fraudulent conversion of the sum of $2,243,687.50.
>
> (g) Interest on the sum of $8,843,687.50 at the rate of 15% per annum for the period 10th February, 2009 to September 10, 2009.

(h) Interest on the sum of $2,243,687.50 at the rate of 15% per annum for the period 10th September, 2009 to the date of payment.

(i) Costs."

The defence

[14] In their amended defence, the appellants and RJCA averred that the agreement for sale did not provide for payment by way of cheque as section 4 of the agreement required that they should have obtained a mortgage. They averred that pursuant to the agreement, the respondents should have provided a letter of commitment within 45 days of the execution of the agreement which should have been delivered to the appellants within 14 days of the expiration of the 45 days.

[15] They averred that the respondents were aware that the duplicate certificate of title was with the Jamaica Mortgage Bank because mortgages were endorsed on the title. The arrangement, pursuant to the agreement, was that the title would have been released upon receipt of a letter of commitment. The respondents breached the agreement by not obtaining a mortgage commitment. Further, Tewani was aware of the agreement with the respondents. There was an agreement between Tewani and RJCA that Tewani would permit the sale to the respondents to proceed and the purchase price was to be paid to Tewani. The agreement was therefore terminated and Tewani was then entitled to be registered as proprietor pursuant to its agreement with the vendor.

[16] They averred that the respondents having breached the contract were therefore not entitled to rescind. The vendor accepted the respondents' repudiation of the agreement and terminated the same.

[17] It was also their defence that the letters dated 9 and 10 September 2009, which RJCA sent to the respondents, afforded them the opportunity to provide the commitment letter or to make the contract into a cash sale. The respondents were however not willing to proceed. The vendor was however, ready willing and able to proceed.

[18] In the circumstances it was the respondents, they assert, who were in breach of the contract. The vendor was entitled to forfeit the deposit and pay same to Tewani who was entitled to the sale money pursuant to agreements between the RJCA and Tewani. Regarding the stamping of the agreement for sale from the deposit, the appellants asserted that there was no agreement to stamp the said agreement as asserted by the respondents. They averred further that the monies were paid to the appellants in their capacities as attorneys-at-law.

[19] As clearly indicated, Cole-Smith J struck out the defence and entered summary judgment for the respondents. Although the learned judge did not deliver a written judgment, her reasoning appears to have been that the appellants had no real chance of succeeding on their defence.

The appeal

[20] The appellants argued four grounds of appeal as follows:

> "(i) The honourable judge erred insofar as she found that the law which governs Notices to Complete and Notice Making Time of the Essence is not applicable to the instant case where the Stakeholders are being sued;
>
> (ii) The honourable judge erred insofar as she failed to accept that the law is that where the Vendor, being the 3rd Defendant, cannot complete then any Notice Making time of the Essence it issues is invalid;
>
> (iii) The honourable judge erred insofar as she found that the appellants' defence that the Claimants were the persons who wrongly repudiated the contract which entitled the Vendor to forfeit the deposit had no real prospect of succeeding;
>
> (iv) The honourable judge erred insofar as she found that Claimants established on their case that they lawfully rescinded the Agreement for Sale on or about August 31, 2009."

[21] Both the appellants and respondents relied on rule 15.2 of the Civil Procedure Rules (CPR). The appellants contended that they had a real chance of succeeding on their defence while the respondents contended otherwise. Rule 15.2 reads:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

[22] In advancing his contention that the appellants have a real prospect of success, Mr Jones has invited the court to have regard to the appellants' notice of appeal. The relevant portions are set out hereunder.

[23] The following findings of fact and law are challenged:

> **"(a) Findings of fact**:
>
> i. The honourable judge erred insofar as the honorable judge found that the 3rd Defendant could not complete the sale because the 3rd Defendant had sold the property to another person
>
> ii. The honorable judge erred insofar as the honourable judge determined that the Claimants are entitled to a refund of the deposit paid from the Defendants.
>
> **(b) Findings of Law**
>
> i. The honourable judge erred in finding that the Claimants met the test for summary judgment and therefore the 1st and 2nd Defendants had no reasonable prospect of defending the claim.
>
> ii. The honourable judge erred insofar as she found that the principles of law which says that a party who is not ready and willing to complete cannot issue a valid Notice Making Time of the Essence were irrelevant to the case at hand.
>
> iii. The honourable judge erred insofar as she found that the question of whether the Vendors or Purchaser committed a repudiatory breach of sale was not a triable issue.
>
> iv. The honourable judge erred insofar as she found that the Respondents could rely on the

> Notice Making Time of the Essence to terminate the agreement for sale."

Submissions and analysis

Ground (i)

> **The honourable judge erred insofar as she found that the law which governs notices to complete and notice making time of the essence is not applicable to the instant case where the stakeholders are being sued.**

[24] Mr Jones contended that the appellants were entitled to rely on the fact that the notice making time of the essence was invalid and all the consequences which flowed there from were also ineffective. He referred the court to the case **Manzanilla Limited v Corton Property and Investments Limited and others** Official Transcripts (1990-1997) delivered 14 November 1996.

[25] Mr Graham contended that the agreement for sale expressly referred to the appellants as stakeholders to refute the appellants claim in their amended defence that the monies were paid to them as attorneys-at-law. He submitted that the appellants as stakeholders were responsible to the respondents for the return of the deposit and not the vendors.

[26] He noted that the agreement was prepared by the vendor's attorneys-at-law who were in partnership with the appellants. The appellants, he submitted, were obliged to hold the deposit and further payment pursuant to the agreement for sale as stakeholders. It was an obligation which they imposed upon themselves, he submitted. He relied on the case of **Barrington v Lee** [1972] 1 QB 326; 337 for that proposition.

[27] He also referred the court to the case of **Hastingwood Property Ltd v Saunders Bearman Anselm (a firm)** [1991] Ch 114 and the work of the learned author of Williams' Contract for Sale of Land and Title to Land, fourth edition, pages 89 to 91 as authorities for that proposition.

[28] He submitted that the mere averment of the appellants that the deposit was received in their capacity as the vendors' attorney-at-law ought not to derogate from the express terms of the agreement for sale. He relied on the cases of **Finkielkaut v Monohan** [1949] 2 Ch. D 234, **Quadrangle Development and Construction Co Ltd v Jenner** [1974] 1 All ER 729 and the unreported case of **JTM Construction & Equipment Ltd v Circle B Farms Ltd** Claim No 2007 HCV 05110, delivered on 29 June 2009.

[29] By virtue of the agreement for sale, the appellants operated in the dual role of stakeholders and attorneys. The schedule to the agreement of sale made it quite plain that the appellants were stakeholders at least in respect of the down payment. The schedule reads:

> "(1) An initial deposit of two million two hundred thousand dollars ($2,200,000.00) payable upon signing hereof to the vendor's Attorney-at-law as **stakeholder**.
>
> (2) A further payment of six million six hundred thousand dollars ($6,600.000.00) shall be paid to the vendor's attorney-at-law as stake holders." (Emphasis mine)

[30] It is important at the outset to delineate the role of the appellants as stake holders. As stakeholders, it was their mandate to hold the deposit until the completion of the sale or rescission of the same. Lord Denning's statement in **Barrington v Lee** at page 338 E-F succinctly and clearly states that the stakeholder is the party responsible to repay the deposit. He said:

> "In my opinion the plaintiff is not entitled to sue Mr Lee for the deposit, for these reasons:
>
> (1) The estate agent received it "as stakeholder" which means that it was he who contracted to repay it, and not the vendor…"

[31] Mr Edward Nugee QC sitting as the Deputy High Court Judge in the **Hastingwood** case considered the following passage from the judgment of Pollock B in **Collins v Stimson** (1883) 11 QBD 142, 144 where he said:

> "In the present case the deposit was paid not to the vendor but to an auctioneer, and the law, as is well known, is that an auctioneer to whom a deposit is paid under such circumstances receives it as the agent of both parties, and cannot part with it without the sanction of both of them."

[32] Mr Nugee QC in commenting on that statement opined:

> "The passage from the judgement of Pollock B, which I have quoted above must, in my judgment, be read as stating the position of the auctioneer at a time when it is not known whether the contract will be completed or not. At that time it is correct to say that the auctioneer cannot part with a deposit without the sanction of both vendor and purchaser. Once it is known that the contract has gone off, however, and the deposit is forfeited to the vendor, the auctioneer is at liberty to pay it over to the vendor; and I can see nothing in Pollock B.'s judgment which lends support to the view that

> the auctioneer has to obtain the further sanction of the purchaser in that situation before he can make the payment. In so far as the sanction of the purchaser is required at all in that situation, it is given when the purchaser pays the deposit to the auctioneer on the express or implied condition that it will be paid to the vendor if the purchaser, through no fault of the vendor, is unable to complete the purchase."

[33] The following excerpts from Lord Tenterden CJ and Parke J's decision in **Harington v Hoggart** (1830) 1 B & Ad 577 are also helpful. They said:

> "A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his duty to keep it in his own hands."

[34] At page 588 Parke J said:

> "It appears to me that the situation of an auctioneer is this: he receives a sum of money, which is to be paid in one event to the vendor, that is to the vendor, that is, provided the purchase is completed; and in the other, if it is not completed, to the vendee: he holds the money, in the meantime, as stakeholder; and he is bound to keep it, and pay it over, upon either of those events, immediately."

The appellants' duty to hold the deposit and to return same upon the termination of the contract was independent of the notice making time the essence.

[35] An important factor in the instant case is that the appellants were also attorneys for the vendor although it was Ms Davis who acted in respect of the notice making time of the essence and forfeiture of the deposit. That fact notwithstanding, as attorneys and stakeholders they knew or ought to have known that the said notice was invalid. They were entrusted with the responsibility of keeping the deposit until the sale was

terminated or the matter determined. That was as Mr Graham submitted an obligation which they chose, as RJCA's attorneys, to impose on themselves. The appellants would therefore have breached their duty as stakeholders by parting with money if the deposit was wrongly forfeited.

Ground (ii)

> **The honourable judge erred insofar as she failed to accept that the law is that where the vendor, being the third defendant, cannot complete then any notice making time of the essence it issues is invalid.**

[36] Mr Jones submitted that the notice which Ms Davis issued on behalf of RJCA making time of the essence was invalid for the reasons which were outlined above.

[37] He submitted that an invalid notice making time of the essence where the vendor is incapable of completing cannot operate to make time of the essence. In the circumstances, the notice making time of the essence was invalid. The appellants were therefore entitled to rely on the fact that the notice was ineffective. He contended that the invalidity of the notice was crucial to the appellants' defence. The appellants were entitled to raise that fact as a ground to justify forfeiting the deposit. In support of his argument, he relied on the Trinidadian Privy Council case of **Joyce Chaitlal and Ganga Persad Chaitlal (in substitution for Kanhai Mahase, deceased) et al v Chanderlal Ramlal** PC App No 36/2001 delivered 5 February 2003; **Manzanilla Limited v Corton Property and Investments Limited** and **Lee & Another v Olancastle Ltd** Official Transcripts (1980-1989) delivered 8 July 1987.

[38] It was Mr Graham's submission that both the RJCA and the respondents were bound by the notice. For that proposition he relied on the case of **Finkielkaut v Monohan**. He contended that RJCA was not able to complete the sale transaction when the respondents tendered the balance of the purchase price. RJCA was therefore in breach of the contract which entitled the respondents to rescind.

[39] Although the court does not have the benefit of the learned judge's reasons, Mr Jones' reliance on the **Chaitlal** and **Lee** cases for the proposition that the notice was ineffective is, in the view of the court, misconceived. The decision in neither case enabled a party who was in default and gave notice making time the essence to forfeit the purchaser's deposit.

[40] The facts in both the **Chaitlal** and **Lee** cases are distinguishable from the instant case. In **Chaitlal** the vendor had not provided the purchaser (Ramlal) with the necessary information about the title. The Board considered the issue whether the vendor was entitled to give the respondent notice making time of the essence in light of his inability to provide the respondent with an abstract or document of title. It was held that in those circumstances the purchaser was under no obligation to complete. In delivering the decision of the Board, Sir Martin Nourse said at para 28-29:

> "The related but distinct ground is that the party serving the notice purporting to make time of the essence must himself be ready, able and willing to complete at the date when the notice is served. This is an express requirement of the conditions commonly incorporated in contracts for sale of land in this country, but does no more than express what

would in any event be implied by law; see **Halsbury's Law of England**, 4th edition, vol 42 (1999 reissue), para 121, note 7 and the cases there cited. It is evident that the requirement cannot be satisfied where the party serving the notice is himself in default. In the present case, on 4th April 1974, Mr Mahase was in default through not having supplied Mr Ramlal with the appropriate information as to title.

For these reasons, their Lordships are of the opinion that the letter of 4th April 1974, whatever its terms may have been, could not have made time of the essence of the contract. Nor was there anything in the subsequent correspondence to make it so…"

[41] Mr Graham directed the court's attention to the English Court of Appeal case of **Quadrangle Development and Construction Co Ltd v Jenner** at page 732 where Russell LJ said:

"Under the language of the clause, the party giving the notice must be ready and willing at the time of giving the notice to fulfil his own outstanding obligations under the contract. I should have thought it not really difficult to infer that the same party must continue to be ready and willing at any time during the period to fulfil his part of the contract. Counsel for the vendor in this connection drew our attention to the passage in Mackay v Dick [(1881) 6 App, Cas 251 at 263] where Lord Blackburn used this phrase of general application which counsel particularly applied - I think rightly - to the present case:

'I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually 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.'

> **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.**" (emphasis supplied)

[42] Russell LJ examined Danckwerts J's decision in the case **Finkielkraut v Monoham** in which a vendor who had given notice making time of the essence was unable to complete. He pointed out that time was made essential in respect of both the recipient of the notice and the giver. Danckwerts J made it plain that:

> "… the vendor cannot be heard to say that time was not essential on Apr. 14, 1948… if [the notice] binds the person to whom it was given, I cannot see why the person who has elected to give such a notice is not also bound."

[43] Buckley LJ was of like mind as his brother Russell LJ. At page 733 he said:

> "The notice is not described as a notice requiring completion of the obligations of the party to whom the notice is addressed under the contract, but a notice requiring completion of the contract. **The condition specifically requires that at the time when the notice is given the giver of the notice shall be ready and willing to fulfil his outstanding obligations, and in my judgment the condition clearly proceeds on the footing that the giver of the notice will be ready and willing to perform his obligations at any time within the 28 day limit within which the other party is to be bound to complete the contract**. For those reasons and those elaborated by Russell LJ in the judgment which he has delivered, I am of the opinion that when notice is given to

> complete in this form it has the effect of making time of the essence of the contract as a whole and in respect of both parties to the contract, and on that ground in my judgment the learned judge reached the right conclusion and this appeal fails." (emphasis supplied)

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

[45] A party who serves notice and is unable to complete cannot be immune from consequences while imposing same on the other party, more so a party who was ready, willing, and able to complete. Such notice, on Mr Jones' submission, must therefore have been ineffective as against both parties as the invalidity of the notice vitiated all transactions consequent on the notice.

[46] The respondents acted on the appellants' invalid notice by rescinding the agreement. The purported rescission was also equally invalid. It followed therefore that the agreement still subsisted at the time of the purported forfeiture. RJCA, in the circumstances was estopped from alleging breach on the part of the respondents and was therefore not entitled to forfeit the respondents' deposit or part thereof. This ground cannot be sustained.

[47] Grounds (iii) and (iv) will be considered together as the issues to be determined overlap.

Ground (iii)

> **The honourable judge erred insofar as she found that the applicant's defence that the claimant's were the persons who wrongly repudiated the contract which entitled the vendor to forfeit the deposit had no real prospect of succeeding.**

Ground (iv)

> **The honourable judge erred insofar as she found that the respondents established on their case that they lawfully rescinded the agreement for sale on or about 31 August, 2009.**

[48] Mr Jones holds steadfastly to the view that it was the respondents who wrongfully repudiated the contract thus entitling the appellants to forfeit the deposit. According to him, the defence completely exonerates the appellants from any liability in relation to paying over the money to the vendor. He submitted that the respondents could only terminate the agreement for sale if the vendor had committed a repudiatory breach of the contract and there was no evidence of any repudiatory breach and neither was any pleaded. The only step which the vendor took was to issue the notice making time of the essence.

[49] It was his submission that the vendor was not in a position to complete and the respondent terminated the contract. He argued that, the basis on which the respondents terminated the contract was the invalidity of the notice and the vendor's failure to respond… According to him those reasons are unsustainable. He relied on the

case of **Smith v Hamilton and Another** [1951] Ch 174; the Court of Appeal of Northern Ireland case **Bernard Fitzpatrick, Naomi Fitzpatrick, John G M^{c}IIwaine, Claire A M^{c}IIwaine v Sarcon** (No 177) Limited [2012] NICA 58; 2012 WL 6774719 and **JTM Construction & Equipment Ltd v Circle B Farms Limited**.

[50] He submitted that the respondents' evidence was that the agreement provided for completion within 90 days. The agreement for sale was dated 23 February 2009. The date of completion should therefore have been 24 May 2009. He argued that at that time neither the respondents nor the vendor was ready to complete. The respondents were only ready to complete on 26 August 2009 when they sent the cheque. It was therefore the respondents who terminated the agreement on 31 August 2009.

[51] He submitted that they experienced no protracted delay which would allow them to treat the contract as repudiated. He submitted that the learned judge failed to fully consider the appellants' defence and apply the law in respect of notices making time of the essence. The appellants' defence to the claim that it was the respondents who wrongfully terminated the agreement for sale thereby entitling the vendor to forfeit the deposit has a real prospect of succeeding. The appellants' defence ought not to have been struck out nor should summary judgment have been entered.

[52] It was Mr Graham's contention that the appellants do not have any realistic prospect of succeeding. He submitted that the agreement for sale contemplated that the payment of all monies which were payable by the respondents was in exchange for

the duplicate certificate of title together with the registrable instrument of transfer in favour of the respondents. RJCA was not able to deliver.

[53] He contended that compliance with the provisions of the Transfer Tax and Stamp Duty Acts was necessary to complete the transaction. He submitted that RJCA has not answered the respondents' assertions because it was unable to do so for the aforesaid reasons.

[54] Do the appellants have a real prospect of succeeding on the defence? The well known statement of by Lord Woolf in **Swain v Hillman** [2001] 1 All ER 91 states that:

> "The words 'no real prospect of succeeding' do not need any amplication, they speak for themselves. The word 'real' distinguishes 'fanciful' prospects of success…[it directs] the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

The critical question, is whether the respondents wrongly, as asserted by the appellants, repudiated the contract. Careful examination of that issue now arises for consideration.

Were the respondents entitled to rescind the contract?

[55] Mr Jones pointed us to the very helpful case of **Lee and Another v Olancastle Ltd**. That case is, in my view, supportive of the respondents' submission. At page 14 of the decision, Millett J said:

> "The Notice to Complete is a formal step preparatory to rescission and forfeiture of the deposit. It is a hostile step,

> and a wise vendor will take every precaution to satisfy himself that he is ready to fulfil all his own outstanding obligations under Contract in order to give validity to the Notice to Complete that he serves."

[56] He referred to the following statement of Lord Denning MR, in **Re Stone v Saville's Contract** [1963] 1 WLR 163:

> "… it seems quite plain to me that the vendor was at fault. He was guilty of a breach going to the root of the contract because he was not, on the face of his documents, able to make a good title to this land. The purchaser was entitled to treat that breach as a repudiation giving her a right to rescind the contract. And she did so…"

[57] In commenting on that passage, Millett J said:

> "In that passage, the Master of the Rolls does not refer to, or rely upon, the service of a bad Notice to Complete. A purchaser who discovers that the vendor has no title is not bound to wait until the date fixed for completion before rescinding the contract; he is entitled to rescind a contract for the vendor's defective title as soon as he discovers it. That is the fundamental difference between defects of title and defects of conveyance only. In the case of a defect of conveyance (as conveyancers describe them), such as the presence of an outstanding charge or mortgage on the land, the purchaser is bound to wait until completion before insisting upon its removal. In the case of a defect of title, the purchaser is entitled to rescind as soon as he discovers it.
>
> But although service of a bad Notice is not by itself a repudiatory breach, it may of course evidence one. A Notice to Complete may be evidence that a vendor is insisting upon performance otherwise than in accordance with the contract. In such a case, it is the vendor's refusal to comply with his contractual obligations, not the service of Notice to Complete -- which is no more than evidence that he is maintaining an untenable position -- which constitutes the repudiatory breach of contract. It is well established that in order

> constitute a repudiatory breach of contract by conduct, the conduct must unequivocally evince an intention not to comply with the contract.″

[58] Did RJCA's inability to complete the sale constitute a breach which went to the root of the title which entitled the respondents to rescind? Can it be properly asserted that the vendor was unable to provide a good title? Although most of the reasons outlined above might be referred to as defects of 'conveyance', there was also the Tewani factor which, in our view, went to the root of the contract. Tewani was a prior purchaser of the same property who had not relinquished his right. He pursued his 'beneficial' interest in the property by way of suit and the lodging of a caveat in the Supreme Court. That caveat was one of the reasons RJCA was unable to complete. There were therefore serious issues concerning RJCA's ability to provide the respondents with a good title.

Was RJCA entitled to reasonable time to comply?

[59] The respondents were given 28 days within which to complete. They rescinded two days after the date which was fixed by RJCA as the date for completion. The authorities clearly state that the notice is binding on both RJCA and the respondents. The respondents were therefore entitled to rescind the agreement upon RJCA's failure to complete within the time which was specified in the notice making time of the essence.

Forfeiture of the deposit

[60] RJCA was patently unable to provide the respondents with a good title. They were therefore in breach of the agreement for sale which entitled the respondents to rescind the said agreement. Even on the appellants' case that their notice was invalid and consequently ineffective, the appellants could not justify the forfeiture of the respondents' deposit as the rescission was premised on the invalid notice. The vendors knew well of their inability to complete. It would be wholly unjust and inequitable to allow the vendors to derive a benefit from an invalid action, on their part, while penalizing the respondents who were ready, willing and able to complete.

[61] In **Manzanilla**, Waller LJ explained with clarity, how the deposit is to be dealt with. At page 14 he said:

> "Cross J. (as he then was) in Skinner v The Trustee of the Property of Reed (A Bankrupt) [1967] Ch 1194, [1967] 2 All ER 1286 at p. 1200 of the latter report recognized the different events which oblige the stakeholder to deal with the deposit in different ways as the following. First, if the contract goes off due to the default of the Vendor, the deposit is returnable to the Purchaser; second, if the contract goes off owing to the default of the Purchaser, the deposit is forfeited to the Vendor; third, if the contract is completed the Purchaser obtains credit for the deposit in the completion statement."

The appellants' complaint is that the learned judge was wrong in striking out their defence. It is important to scrutinize the defence.

[62] It is noteworthy that the appellants, in their amended defence, averred that the vendor was ready, willing and able to complete and that it was the respondents who

were not. That assertion was the very opposite to what was being urged upon the learned judge. The appellants' defence was therefore patently insincere.

[63] Further, the appellants did not plead that the notice making time of the essence was invalid as a result of the vendor's failure to be ready, willing and able to complete. Indeed, to have so pleaded would have been contrary to their pleaded assertion that they were ready, willing and able while the respondents were not.

[64] They also averred that in accordance with the agreement, payment was to be made to Tewani. There is no such clause in the agreement. It was their further averment that they were unable to provide the documents necessary to complete the sale because the respondents were required to obtain a mortgage and provide a commitment letter and they failed to do so. The respondents were also given an opportunity to make the sale a cash sale but did not.

Was it a term of the agreement that the respondents obtain a mortgage?

[65] It is necessary to examine the agreement of sale in light of the appellants' contention that payment by cheque was not in accordance with the agreement for sale. Mr Jones' submission was that the property was mortgaged and the mortgage bank required a commitment letter in order to have the mortgage discharged.

[66] Special Condition 4 of the agreement for sale reads:

> "It is understood that the Purchasers shall obtain a mortgage from a reputable financial institution secured on the subject premises in respect of the balance purchase monies, proof of which must be delivered to the Vendor's

> Attorneys-at-Law on or before FORTY-FIVE (45) days from the date of execution hereof.
>
> In the event that the said mortgage commitment is not delivered to the Vendor's Attorneys within fourteen (14) DAYS of the expiration of FORTY-FIVE (45) DAYS from the date hereof, the Vendor will have the option to rescind this Agreement, by Notice in writing to the Attorneys representing the Purchaser and this Agreement shall be determined and be of no further effect and the Vendor shall refund to the Purchasers the deposit and all other monies paid herein, free of interest."

[67] It was Mr Graham's submission that that clause was included for the benefit of the respondents. RJCA was interested in receiving the purchase money, not a mortgage. We agreed with that submission. RJCA received money, albeit not in the form of a mortgage. The bank surely would take no issue with the form of payment.

[68] It is of interest to note that the agreement for sale stated that the property was sold free from all mortgages and charges but is otherwise subject to reservations, restrictions and restrictive covenants and/or easements endorsed on the individual duplicate certificate of title duly issued under the Registration (Strata) Titles Act.

The stamping of the agreement

[69] The respondents in their particular of claim averred that it was agreed that the agreement for sale would be stamped from the deposit. The appellants in their defence however averred, "*that there was no agreement between the parties with respect to the stamping of the agreement, save as set out in the agreement for sale*". The

agreement for sale refutes the appellants' averment in their defence that there was no agreement that the deposit was to be used in stamping the agreement.

[70] Under the heading special conditions, clause 2 of the agreement for sale states:

> " It is understood and agreed that the Vendor's Attorneys-at -Law shall be entitled to stamp this Agreement for Sale with Stamp Duty and Transfer Tax ,from the deposit and further payment and that if for any reason whatsoever any of the said deposit and/or further payment have to be refunded to the Purchasers and the amount to be refunded is equal to or more than the total of the duty and Tax so paid, then the Purchasers shall to the extent of such duty and/or Tax so imposed be deemed to have been refunded same by delivery up to her of the original Transfer Tax Receipt and stamped Agreement duly noted by the Vendor as cancelled."

[71] The appellants' aforesaid averment is difficult to comprehend in light of clause 2 of the Special Conditions. In light of the foregoing, the appellants did not have a meritorious defence. In the circumstances, there is no real prospect of the defence succeeding.

[72] It is for these reasons that we made the order outlined in paragraph [3].