**[2017] JMCA Civ 28**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 54/2012**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)**

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| **BETWEEN** | **STRATA INVEST OU** | **APPELLANT** |
| **AND** | **PALMYRA RESORTS AND SPA LIMITED** | **1ST RESPONDENT** |
| **AND** | **PALMYRA PROPERTIES LIMITED** | **2ND RESPONDENT** |

**Miss Tavia Dunn instructed by Nunes Scholefield DeLeon and Co for the appellant**

**Mrs Denise Kitson QC and Mrs Trudy Ann Dixon Frith instructed by Grant Stewart Phillips and Co for the respondents**

**Mr Stuart Stimpson instructed by Hart Muirhead Fatta observing for the receiver**

**24, 25 June 2014 and 31 July 2017**

**PANTON P**

[1] This appeal questions the decision of Daye J that the agreement between the appellant (Strata Invest) and the respondents (Palmyra) has not been terminated. This decision was made in an order dated 3 February 2012, although it bears the date 15 June 2010. The Court apologizes for the delay in delivering this judgment.

**The undisputed facts**

[2] An agreement was arrived at between the parties after an Estonian businessman, Mr Viido Einer, had seen an advertisement for a development by Palmyra and had had discussions and exchanges of correspondence with Palmyra. The agreement was contained in two documents: one headed "STRATA LOT AGREEMENT FOR SALE" and the other "AGREEMENT FOR CONSTRUCTION OF A CONDOMINIUM UNIT". In the former document, there is an agreement for Palmyra to sell and Strata Invest to purchase registered land in the parish of Saint James. In the latter document, Palmyra agreed to construct a unit on the said land to the point that a certificate of title may be issued under the Registration (Strata Titles) Act, and thereafter to complete the other works in conformity with the plans and specifications of the development.

[3] The advertisement quoted from Travel and Leisure magazine which described Palmyra as "One of the Top 10 most exciting vacation home developments in the world". It invited its readers to "ENJOY A LUXURY LIFESTYLE THAT IS SECOND TO NONE". It announced that the opening would be in the autumn of 2008. Among the features listed in the advertisement were: spacious balconies with breathtaking Caribbean views, golf privileges at Rose Hall, clubhouse with ballroom, state-of the art fitness centre and private palm tree-lined tropical white sand beach.

[4] Mr Einer was visiting Jamaica in February 2008 when he saw the advertisement which invited interested persons to either call on the telephone or visit the sales office located next to the Ritz-Carlton Rose Hall hotel. He visited the office and spoke with Palmyra's representative. He received a brochure and indicated his interest in acquiring

a unit. Schedule A of the agreement for construction of the unit gives the estimated time for completion as the 3rd quarter of 2008. Indeed, the main advertisement that attracted Mr Einer's attention boldly stated "OPENING AUTUMN 2008".

[5] In correspondence between the parties, Palmyra stated:

(a) "Sales and Construction are going well as we are nearing completion" (3 March 2008);

(b) "You do find the [latest] updates in regards to construction and further progress towards our opening for autumn 2008 on The Palmyra website" (2 May 2008);

(c) "Yes progress is being made – if you ask me if we really are opening in October – personally I would rather suggest to look at November/December" (correspondence dated 11 August 2008);

(d) "Our opening has now been rescheduled for March 2009. We are having delays with shipments" (16 October 2008);

(e) "The completion date; as stated, is an estimated completion date at the time of purchase. The delay is due to construction not due to financial shortcomings" (24 November 2008);

(f) "It has been five months since you received my last letter in which I informed you that we anticipated completing construction of The Palmyra Resort & Spa by the end of the first quarter of this year. Nothing saddens me more than to have to write to you today and say that although the first quarter of 2009 has passed, we still have a great deal to do to reach completion. We are now anticipating a completion date of August…" (10 April 2009)

**The fixed date claim form**

[6] On 23 July 2009, Strata Invest filed a fixed date claim form seeking a declaration that the agreements had either been terminated through breach by Palmyra, or by reason of frustration. In the event, Strata Invest sought an order to recover its deposit

with interest. In resisting the order sought, Palmyra has in effect said that the agreements had no room for the return of deposit.

**The judge's reasoning**

[7] The learned judge reasoned and held that business efficacy necessitated an implied term that Palmyra would have completed its part of the bargain within a reasonable time. That time, he said, would be 12 to 15 months, which would mean by September 2009. The learned judge found that there was a breach of this implied term, but the breach was not a fundamental breach. He held that there was no provision for Strata Invest to serve a notice making time of the essence, so Strata Invest would not have had the right to elect to terminate the contract and demand a refund of its deposit. However, Strata Invest can sue for damages for breach of contract.

**The grounds of appeal**

[8] Strata Invest challenges the decision of the learned judge on the following grounds:

a) He misconstrued the terms of the agreement by holding that Palmyra's failure to complete was not a fundamental breach;

b) He erred in concluding that there was no right to terminate and demand a refund as there was no provision for Strata Invest to serve Palmyra a notice and thus make time of the essence;

c) There was no fault on the part of Strata Invest;

d) The learned judge was inconsistent in his interpretation of clause 10 of the construction agreement.

As an alternative, Strata Invest is saying that the agreements it entered into with Palmyra were frustrated and that entitled Strata Invest to a refund of the monies it had paid.

**The submissions**

(a) **For Strata Invest**

[9] It was submitted on behalf of Strata Invest that, there being no express stipulated date for completion, it was an implied term that completion would have been within a reasonable time of the 3rd quarter of 2008. Clauses 4 and 12(1) of the construction agreement show that time limits and completion were clearly of importance. To give business efficacy to the agreements, the provision that completion would have been within a reasonable time would be a condition, the breach of which would give Strata Invest a right to cancel the agreements.

[10] It was further submitted that whether Strata Invest was entitled to terminate the contract falls to be decided according to the law of contract. In this regard, reliance was placed on the case **Urban I (Blonk Street) Limited v Ayres and Another** [2013] EWCA Civ 816. Due to what it refers to as "the length of the delays", Strata Invest says that it was entitled to consider the contract as repudiated, and to demand the refund of the sums it had paid.

[11] As regards the alternative submission that the contract was frustrated, it was submitted that "the delays were such that they frustrated the contract as the weather, strikes etc rendered the Vendor's obligation, to complete by October 2008 or within a reasonable time thereafter, incapable of performance". Miss Tavia Dunn for Strata Invest submitted that performance of the contract was substantially different from what would have been in the parties' contemplation. She said that regard had to be had of the state of events as known to Strata Invest at the time. Strata Invest would have

known of the completion date and, with the subsequent various delays and postponements being without fault on the part of Strata Invest, there was definitely a breach and that breach went to the root of the contract, entitling Strata Invest to rescind the contract and recover the deposit.

[12] Miss Dunn cited the case **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696 as support for her submission that the delay in this case "frustrated the contracts between the parties as it constituted an interruption of the performance of the contract, and was of such that it made the contract different from what it was". She said that "there was such a change in the circumstances due to delay so that at June 2009, the contract would in effect have been frustrated. In that regard the Law Reform (Frustrated Contracts) Act, entitles the appellant to be repaid".

(b) **For Palmyra**

[13] It was submitted on behalf of Palmyra that there was no agreement for the unit to be completed in October 2008; however, if there was it was not an essential term, especially as it was an estimated date. Further, there being no provision that time was of the essence of the contract, then the contract has to be completed in a reasonable time, and in this case Palmyra's obligations were completed within a reasonable time. A related submission was that it would have been necessary for a notice to be served by Strata Invest to make time of the essence, and this was not done.

[14] As regards the delay in completion, it was submitted that the delay was outside Palmyra's control, and there was no fault on Palmyra's part. Although the estimated

time for completion was exceeded, it does not follow that there was a breach of the obligation to complete the contract within a reasonable time.

[15] Mrs Denise Kitson QC submitted that the appeal presented a straightforward legal situation. She said that the authorities are very clear that in contracts for the sale of land, where there is no specified completion date, and time is not of the essence, an appellant such as the instant one cannot succeed in the situation that has been presented. She said that time is not of the essence in relation to a sale of land unless so stated at the beginning, or made of the essence by the complaining party. "Where time is not of the essence, and a party waits for a reasonable time, that party must make time of the essence on the other party, and thereafter cancel the contract if it is not completed", she submitted.

[16] Mrs Kitson QC submitted that Daye J was correct in disallowing the order sought by Strata Invest. The position of Palmyra is that Strata Invest has received all the benefit it was intended to receive from the agreement as Palmyra "has had available since 2009 a fully furnished and completed unit". Strata Invest "has not suffered any financial loss and the breach is not going to be repeated, as the full obligations of the (agreement) have been executed".

**Reasoning and decision**

[17] It is accepted by the parties to this appeal that the question for determination is whether Strata Invest has the authority to cancel the contract and demand a return of its deposit. This contract is for the purchase of land and the construction of an apartment to be used for occupation by Strata Invest and its guests. Although there

was a provision in the contract to protect Palmyra as regards delays in executing its part of the bargain, there was no such provision to protect Strata Invest. It seems that Strata Invest was not interested in such protection. Otherwise it would have insisted on the inclusion of an appropriate term. The contract has to be considered on the basis of the terms agreed on by the parties.

[18] There is no issue in respect of the Strata Lot Agreement for Sale. The issue is in relation to the Agreement for Construction of the Condominium Unit. Incidentally, whereas the former agreement states that it is governed by the laws of Jamaica, the latter states that it is governed by the laws of the Cayman Islands. However, that is neither here nor there in the scheme of things. In the latter agreement, time is made of the essence in respect of the obligations of Strata Invest. There is no such provision as regards Palmyra. Clearly Strata Invest had no interest in the insertion of a similar clause. They appear to have been prepared to accept the vagaries of the construction industry.

[19] The contract itself did not provide a specific date for completion. The mere use of the word "autumn" suggests a period of time that would be anywhere during the autumn months. The fact that there was no specific date means that the contract should be completed within a reasonable time. Given the accepted and acknowledged possibilities of disruptions in the construction industry in this country, it is certainly not unreasonable for the learned judge to find that a reasonable time would be by September 2009.

[20] In the circumstances, when it is considered that the certificate of completion was issued at about the time that the learned judge contemplated for completion, I am for the dismissal of the appeal. Strata Invest is obliged to complete its part of the contractual obligations.

[21] The submission that the contract has been frustrated is off base. **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696 is apt. In that case, there was a contract to build 78 houses in eight months. The project took 22 months to complete. It was held that the contract was not frustrated. Viscount Simonds said "…it by no means follows that disappointed expectations lead to frustrated contracts" (paragraph 715). For there to be frustration, the circumstances have to be so changed that an entirely new situation has been presented to the parties. In the instant case, the contract is for the purchase of a unit. Nothing has changed. The unit is ready. It is simply that there was some delay in its completion. In my judgment the learned trial judge was right in the decision that he made. I would dismiss the appeal and affirm the order of Daye J. I would also order that the costs of the appeal be Palmyra's, such costs to be agreed or taxed.

**DUKHARAN JA**

[22] I have read in draft the judgment of the learned President and agree entirely with his reasoning and conclusion.

**LAWRENCE-BESWICK JA (AG)**

[23] I have had the privilege of reading the judgment of the Honourable President. I agree.

**PANTON P**

**ORDER**

Appeal dismissed. Order of Daye J affirmed. Costs of the appeal to the respondents to be agreed or taxed.