[2020] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 82/2015

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

BETWEEN	**LEON COURTNEY ROBINSON (Executor of the Estate of Herman L Denton, Deceased)**	**APPELLANT**
AND	**MICHELLE CHEN**	**1st RESPONDENT**
AND	**THELMA AGATHA CHEN**	**2nd RESPONDENT**
AND	**ERROL ALPHANSO CHEN**	**3rd RESPONDENT**

Miss Janene Laing instructed by Nigel Jones & Co for the appellant

Miss Jacqueline Cummings instructed by Archer, Cummings & Co for the respondents

17 , 18 May 2018 and 25 September 2020

MORRISON P

Introduction

[1] The appellant is the executor of the estate of the late Herman L Denton ('the deceased'), who died on 23 December 2006.

[2] This is an appeal against two judgments given by D Fraser J ('the judge') on 3 October 2014 and 19 December 2014 respectively. In the first judgment ('the judgment on liability'), the judge found the estate of the deceased liable for the breach of an agreement ('the agreement') for the sale of premises known as 9 Myers Drive, Kingston 8 in the parish of Saint Andrew ('the property')[1] to the respondents ('the Chens'). (The first and third named respondents, Miss Michelle Chen and Mr Errol Chen, are the children of the second named respondent, Mrs Thelma Chen.)

[3] In the second judgment ('the judgment on damages'), the judge awarded damages in the sum of $6,242,000.00 to the Chens for breach of the agreement.

[4] In relation to the judgment on liability, the appellant contends that the judge erred in his conclusion that the Chens were entitled to damages for breach of the agreement; and, in relation to the judgment on damages, the appellant contends that the judge erred in awarding the Chens anything more than nominal damages for the breach.

Background

[5] The property is a duplex, meaning to say that it is a residential building which is divided into two separate apartments. The Chens, who are the occupants of one of the apartments on the property, claimed an interest in the property under and by virtue of an agreement for sale entered into in or around November 1997 ('the agreement'), in

[1] The property is registered at Volume 910 Folio 8 of the Register Book of Titles.

which the deceased agreed to sell the property to them for a consideration of $5,000,000.00.

[6] The provisions of the agreement as to payment of the purchase price, completion and possession were as follows:

"PURCHASE PRICE:	FIVE MILLION DOLLARS ($5,000,000.00)
HOW PAYABLE:	(a) An initial payment of $700,000.00 which shall be payable on the signing hereof and which shall be apportioned as follows:- (i) $400,000.00 shall be the deposit. (ii) $300,000.00 payable within 30 days (iii) A further payment of $1,000,000.00 within 120 days. Balance on completion in exchange for the Duplicate Certificate of Title duly endorsed with the transfer to the Purchasers as registered Proprietors.
COMPLETION:	On or before the expiry of (12) months [sic] from the date of this Agreement for Sale in exchange for the Title duly endorsed in the names of the Purchasers as registered proprietors.
POSSESSION:	On November 30, 1997. The Purchasers have agreed to pay a rental fee of $20,000.00 per month subject to Special Condition # 9."

[7] The agreement was subject to nine special conditions, three of which are relevant for the present purposes. Special condition two provided that the deceased's attorney-at-law "shall be entitled to stamp this Agreement for Sale with stamp duty and transfer tax from the deposit …". Special condition four provided that the agreement was subject to the Chens "presenting an irrevocable letter of mortgage commitment from the National Housing Trust and the Bank of Nova Scotia in respect of a sum not less than $2,500,000.00 the balance of the purchase price on or before **6 months** to the [deceased's] Attorneys-at-Law"[2]. And special condition nine (to which the Chens' agreement to pay rent was expressly subject) provided that "the sums paid as rental shall be credited to the balance of purchase moneys due from the [Chens] on completion".

[8] Having entered into the agreement, the Chens went into occupation of one side of the property. The other side was occupied by Mr Dennis Wright and his wife, Lisa ('the Wrights'), who were also tenants of the deceased.

[9] After making the initial payment of $700,000.00, the Chens were unable to maintain the required payment schedule. They therefore failed to come up with the further sum of $1,000,000.00 payable within 120 days. Nor were they able to qualify for a mortgage. As a result, the letter of commitment which the agreement contemplated, was not forthcoming, and the projected completion date of 12 months from the signing of the agreement was not met.

---

[2] Emphasis in the original.

[10] The evidence which the judge accepted was that, through Miss Chen, the Chens "entered into more than one informal agreements with [the deceased] to pay the outstanding sums"[3].

[11] This state of affairs persisted, despite the fact that the deceased caused successive notices to complete, dated 16 July 1999 and 9 May 2001 respectively, to be served on the Chens. On each occasion, the potential crisis was averted by the Chens' offer to make, and the deceased's agreement to accept, further payments.

[12] On 29 October 2001, the deceased again issued notice to complete ('the October 2001 notice'). This notice made time of the essence of the agreement and required the Chens to complete it within 21 days of its date. It ended on this note:

> "If you fail to comply with this Notice within the said twenty-one (21) days, the vendor will rescind the contract, may forfeit the deposit, and may re-sell the premises and claim from you the deficiency in price (if any) on such re-sale and all expenses attending the re-sale and any attempted re-sale and all costs, loss, damage and expenses incurred by him by reason of your delay or default in performing the said agreement."

[13] The Chens did not pay up the outstanding payments within the 21 days. Nor did they provide a letter of commitment in respect of the balance of the purchase money. But, despite the fact that the deceased gave no notification to the Chens that he considered the agreement to be at an end, it appears that this time he was serious. So

---

[3] Judgment on liability, para. [31]

much so that, in a contract entered into on 6 February 2002, he agreed to re-sell the property to the Wrights.

[14] Later that same year, in circumstances to which I will return in a moment[4], the Chens took steps to protect their interest under the agreement by lodging a caveat[5] forbidding the registration of any person as transferor or proprietor of the property.

[15] On 29 May 2006, the Wrights filed action against the deceased for specific performance of his agreement to sell them the property[6]; and on 20 July 2006, they obtained judgment in default against the deceased for specific performance as prayed.

[16] The appellant was appointed representative of the deceased's estate on 25 April 2008. His evidence was that "[the Chens'] continued occupation of a portion of the said [property] has prevented me from completing [the sale to the Wrights], as I am not in a position to provide them with vacant possession of **all** of the said property"[7]. He accordingly filed action against the Chens in the Supreme Court on 18 February 2011[8], with the explicit objective of enabling him to, as he put it[9], "carry out the Orders of the Court for Specific Performance ... giving [the Wrights] possession of the property …".

---

[4] See paras. [23]-[24] below
[5] Sworn to on 5 November 2002
[6] Suit No 2004HCV02341, filed 29 May 2006
[7] Witness statement of Leon Courtney Robinson dated 10 January 2012, para. 10. Emphasis in the original
[8] Claim No 2009 HCV 03801
[9] Witness statement of Leon Courtney Robinson dated 10 January 2012, para. 11

[17] The appellant sought (i) declarations that the agreement had been cancelled, and that any deposit paid to the deceased had been forfeited; (ii) an order that the Chens owed rental totalling $3,180,000.00 and continuing at $20,000.00 per month until the final determination of the matter; (iii) an order for possession of the property; and (iv) damages for breach of contract.

[18] In their defence, the Chens denied that the appellant was entitled to any of the reliefs for which he asked. The Chens in turn sought declarations that (i) they had a beneficial interest in the property; (ii) rental of $1,440,000.00 collected by the deceased from the Wrights should be applied to the agreed purchase price for the property; (iii) the appellant was not entitled to forfeit their deposit or any portion of it. Further or alternatively, the Chens asked for damages for breach of the agreement.

Miss Chen's evidence

[19] By the time of the trial, the deceased was no longer alive. Save in one respect which is no longer of any importance, Miss Chen was therefore the only witness as to fact at the trial. Much of the history of the relations between the deceased and the Chens as I have described it above comes from the judge's summary of Miss Chen's largely unchallenged evidence. However, I think it may be helpful to recount directly some further aspects of her evidence, particularly in relation to (i) the payments which were allegedly made to the deceased on account of the purchase price and/or rent for the property; and (ii) what transpired between the parties in the aftermath of the October 2001 notice.

[20] Miss Chen testified that, after the deceased gave the Chens possession of their side of the property, she and the deceased agreed that she would collect the monthly rental of $30,000.00 payable by the Wrights. However, despite the fact that she informed the Wrights of this agreement, they did not comply with her request that they pay her the rent. Despite her financial difficulties over the period, she paid a total of $3,400,000.00 to the deceased between November 1997 and April 2002[10]. In support of this contention, Miss Chen provided a detailed list of payments spanning the period 30 September 1997 to 25 May 2001. But the total of the payments listed, when read together with the receipts which Miss Chen produced, came to $3,049,954.50.

[21] According to Miss Chen, due to the long delay in completing the agreement, the parties agreed to prepare a new agreement in late 2001 ('the alleged 2001 agreement'). The reasons for this were, first, to avoid the payment of a 100% penalty to the Stamp Commissioner as a result of the late submission of the agreement for stamping; and, second, to facilitate the Chens' application for mortgage financing. Miss Chen said that the deceased's attorney-at-law, Mr Leon Palmer, was very much aware of this development, and the alleged 2001 agreement was prepared by his secretary, Miss Hortense Clarke.

[22] (The stamping issue arose because the requirement of section 32(3)(a) of the Stamp Duty Act, as the judge noted[11], is that an agreement for the sale of land must be

---

[10] Witness statement of Michelle Chen dated 13 January 2012, paras. 20-24
[11] Judgment on liability, para. [32]

stamped within 30 days if its execution, failing which it might be liable to a 100% penalty for the late stamping.)

[23] At the time of service of the October 2001 notice, she was, to the knowledge of both the deceased and Mr Palmer, in the process of negotiating a mortgage loan. She eventually succeeded in obtaining a loan from the Victoria Mutual Building Society for $1,100,000.00 and, on 24 November 2001, less than a week after the expiry of the October 2001 notice, she delivered the letter of commitment to Mr Palmer at his office[12]. On that visit, Mr Palmer did not tell her that the sale had been cancelled, but she observed an agreement for sale of the property to the Wrights on his desk. When she confronted Mr Palmer about this, he told her that he had the deceased's written instructions to sell the property to the Wrights. When she told Mr Palmer that it was unethical for him to be acting as the lawyer in a case in which there were two agreements for sale in existence, he asked her to leave his office.

[24] It was in these circumstances that she instructed her then attorney-at-law to lodge the caveat and to file action in the Supreme Court to prevent the deceased from selling the property to the Wrights[13]. However, the action was beset by procedural and other problems - including the tragic death of her attorney-at-law - and was ultimately ineffectual.

---

[12] The letter of commitment, which was dated 26 November 2001, was admitted in evidence as exhibit 14A
[13] Suit No CL 2002/C-046, filed on 4 March 2002.

[25] Miss Chen accepted that she did not pay any rental after January 2003, that is, after she became aware that the deceased had resold the property to the Wrights and had no intention of completing the agreement. Under vigorous cross-examination[14], Miss Chen was tackled about her evidence that she had paid a total of $3,400,000.00 to the deceased, as well as on the October 2001 notice:

> "Suggestion: You did not pay Three Million and Four Hundred Thousand Dollars ($3,400,000.00).
>
> Answer: I did. I took receipts to an Accountant.
>
> [*NB. Exhibits 14 – 44 were agreed and are indicated on the Notice of Intention to Adduce Hearsay Evidence Contained in Documents filed March 6, 2012*]
>
> Exhibits 24 and 28 shown to witness.
>
> Exhibit 24 – CIBC cheque paid to me from Mr. Darby.
>
> Suggestion: This sum not paid to Mr. Denton.
>
> Answer: Mr. Darby paid me money to get the money in US dollars. I went to CIBC to buy US$ to send US money through Chase Manhattan.
>
> I have paid Jamaican amounts to him as well but he said he wanted US as it much easier for him.
>
> Same answer in respect of exhibit 28 on page 100
>
> I have other receipts in US
>
> That is what I did re the Jamaican sums paid to me as I indicated.

---

[14] Notes of evidence, pages 27-29

Witness referred to paragraph 15

Suggestion: You have failed to meet the terms of the agreement all throughout the agreement.

Answer: I was in default in the sum of One Million Dollars ($1,000,000.00) within 120 days.

Re irrevocable letter of commitment – I am in default of that one as well.

I am in default of all the payment terms of agreement in 1997.

I am not sure if it is two but I know I received one notice to complete the transaction.

Received notice of October 29. It required me to fulfil obligations under contract within 21 days.

That time would end on 19 of November 2001.

I did not provide the balance owing or commitment letter within that time period.

I contacted Mr. Denton over the phone and told him I could not meet the One Million Dollars ($1,000,000.00) in 4 months. I said to him I would have to back out of the contract as apart from the One Million Dollars ($1,000,000.00) I could not afford the mortgage. He said he never had the money to pay me back but I should continue paying as I am paying about every 3 months. He agreed he would give me a vendor's mortgage.

He said when I got to Two Million and Two Hundred Thousand Dollars ($2,200,000.00) he would give me a vendor's mortgage.

Q: Wasn't your last payment on 25th May 2001?

> Answer: He received more payments after that. Some of the receipts are missing off the file.
>
> Suggestion: You made no further payments to Mr. Denton.
>
> Answer: I don't agree."

[26] The only area in which Miss Chen's evidence was contradicted by other evidence related to the alleged 2001 agreement. Both Miss Hortense Clarke, Mr Palmer's secretary, and Mr Palmer himself testified that there was no such agreement.

The judgment on liability

[27] In a judgment given on 3 October 2014 ('the judgment on liability'), the judge found as follows. Firstly, although the parties might have discussed entering into a new agreement at some stage, "the 1997 Agreement represents the only operative written Agreement for Sale entered into between [the deceased] and [the Chens] which the court will have cognizance of"[15]. There is no challenge to this finding and the appeal therefore proceeded on the basis that the agreement described by the judge as "the 1997 agreement" was the governing agreement between the parties.

[28] Secondly, for the following reasons, the agreement was not validly terminated by the October 2001 notice[16]:

> "[52] The full circumstances of the case have to be considered. The original date for completion of the contract

---

[15] Judgment on liability, para. [27]
[16] Paras. [52]-[55]

had long gone by the time of the third Notice to Complete. It is common ground that by then more than half of the sale price had been paid, even though there is a dispute as to the actual amount that has been paid, which the court will subsequently resolve. The vendor had a responsibility to have the agreement stamped within 30 days of receipt of the deposit. Certainly given the amount of money the defendants had already paid, the vendor had no basis to say there was insufficient money at that point for the agreement to have been stamped.

[53] By the practice of the parties they had varied the original terms of the contract. Twice Notices to Complete had been withdrawn after payments were made. I find the defendants were not unreasonable to expect that practice to have been followed upon the presentation of the letter of commitment. As the passage from **Halsbury's Laws of England Fourth Edition** Vol. 42 paragraph 127 shows, a Notice to Complete, (certainly one worded in the manner of the Notice used in this case), does not automatically terminate the contract. It gave the vendor a right to rescind the contract (assuming the Notice was valid) – a right he had on two previous occasions declined to exercise, affirming the contract on each occasion, by accepting further sums towards the outstanding balance.

[54] On the question of the validity of the third Notice, it is, as contended by the defendants, that the vendor was not in a position to complete in 21 days after that Notice. The Agreement was not stamped, and still is not. The property was also subject to a tenancy which it was not expressed in the contract the agreement should be subject to. On the face of the agreement the defendants would have been entitled to vacant possession, which could not reasonably have been procured in 21 days. The breach of the vendor was also significant and sufficient to make that Notice, and by implication the previous two Notices invalid; even though it is accepted that it was the defendant's inability to raise the balance purchase price in a timely fashion that caused the agreement to have remained incomplete after four years.

[55] Even if I am wrong that the Notice was invalid, the vendor did not by letter or actions by himself or his counsel, act in a manner communicated to the defendants that would have advised them that the vendor was rescinding the

> contract. It is not denied that after the letter of commitment was delivered neither the vendor's attorney nor the vendor himself advised the defendants or Mr Darby who at that point acted for them, that the vendor considered the contract at an end. There was silence. In the absence of a contrary indication the defendants were entitled to consider the agreement still alive. No accounting was sent to the defendants indicating the sums paid over to that point and offering to return or returning any of that money. That course of conduct, that inactivity was affirmative of the agreement. There was no effective rescission at that point. The vendor was not at liberty to privately decide to end the contract and keep the defendants' money. The contract lived."

[29] Thirdly, given the finding that it was the deceased and not the Chens who wrongfully terminated the agreement, there was no basis for an order forfeiting the Chens' deposit[17]:

> "[78] It is the vendor who I have found wrongfully caused the Agreement to end by contracting with a second set of purchasers without ending the first contract. Those second purchasers subsequently managed to obtain an order of Specific Performance thus frustrating the initial Agreement with [the Chens]. It therefore follows that there is no basis on which the deposit paid by [the Chens] to [the deceased] should be forfeited."

[30] Fourthly, although the total of the payments listed by Miss Chen in her evidence, when read together with the receipts which she produced, only came to $3,049,954.50, the judge accepted her evidence that she paid $3,400,000.00. In this regard, although

---

[17] Para. [78]

he had already ruled that the alleged 2001 agreement was of no effect, the judge nevertheless derived some support for this conclusion from the fact that, "in the purported agreement dated November 30, 2001 … it is recorded that [the Chens] had paid the sum of $3.4M"[18].

[31] Fifthly, the judge accepted Miss Chen's evidence that rent had been paid up to January 2003. However, given that it was not now possible for the sale to the Chens to be completed, he considered[19] that "the sums that have been paid by [the Chens] … can only now go to set off rent due from the date of their occupation until the date they vacate the premises".

[32] Sixthly, the judge rejected Miss Chen's evidence that the deceased had agreed that rent paid by the Wrights for the use and occupation of the apartment which they occupied should be applied towards the purchase price paid by the Chens for the property. Taking the view[20] that this would have been "a strange bargain indeed", the judge considered that it did not make "economic sense".

[33] Seventhly, and lastly, the judge considered that, although the Chens would have to withdraw the caveat preventing the completion of the sale to the Wrights, they should only be required to do so after they were paid all sums due to them under the judgment.[21]

---

[18] Para. [80]
[19] Para. [83]
[20] Para. [85]
[21] Para. [87]

[34] In the result, the judge made the following declarations and orders:

> "[89] **On the claim**:
>
> a. It is declared that the [November 1997 agreement] between [the Chens] and [the deceased] has been frustrated and cancelled by the order for Specific Performance granted to [the Wrights] … on July 20, 2006.
>
> b. [The appellant] is not entitled to forfeit the deposit paid by [the Chens].
>
> c. [The Chens] owe rental to [the appellant] from November 1997 at the rate at [sic] $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000 paid to [the deceased].
>
> d. [The Chens] shall quit and deliver up possession of the said property to [the appellant] within 14 days of the payment of any sum due and owing to them, in the event that a sum of money is owed by the estate of [the deceased] to [the Chens] after the sum owed for rental is set off against the damages due to [the Chens] from the estate of [the deceased]. This order is subject to the eventual award made for damages and will be varied if necessary.
>
> e. [The Chens] shall withdraw the caveat lodged against the property within 7 days of delivering up possession to [the appellant].
>
> f. Costs to [the appellant] to be agreed or taxed.
>
> [90] **On the Counterclaim:**
>
> a. [The Chens] are awarded damages for breach of the [November 1997 agreement] …
>
> b. The claim for a declaration that the rental in the sum of $1,440,000.00 collected from the Wrights by [the deceased] be applied to the

purchase price as agreed by the parties is refused.

c. [The appellant] is not entitled to forfeit the deposit herein or any portion of the monies paid under the contract.

d. Costs to [the Chens] to be agreed or taxed."

The appeal against the judgment on liability

[35] The appellant contends, in summary, that (i) the judge erred in finding that it was the deceased, rather than the Chens, who breached the agreement and that there was therefore no basis on which the deposit could be forfeited; and (ii) that the Chens were entitled to an award of damages.

[36] The grounds of appeal are as follows:

> "a. The learned judge erred as a matter of fact and/or law in finding that the defendants were not unreasonable to expect that the Agreement was still valid notwithstanding the issuance of the Notice to Complete dated October 29, 2001, as he failed to take adequately take [sic] into account the evidence before the Court that the deceased had considered the Agreement at an end after the Notice had expired.
>
> b. The learned judge erred as a matter of fact and/or law in finding that the Defendants had paid a total of $3,400,000.00 despite the fact that there was no evidence before the court establishing that the entirety of this sum was in fact paid.
>
> c. The learned judge erred as a matter of fact and/or law in finding that the Defendants had paid rent up to January 2003, though there was evidence before the court contrary to this finding.
>
> d. The learned judge erred as a matter of fact and/or law when he found that the Notice to Complete dated October 29, 2001 was invalid, which was contrary to his finding that it was

> the defendants who had caused the Agreement to remain incomplete for over four years.
>
> e. The learned judge in finding that it was the Appellant who wrongfully caused the Agreement to end, erred as a matter of fact and/or law in failing to give sufficient consideration to the evidence before the Court that the Defendants were the cause of the termination of the Agreement.
>
> f. The learned judge erred as a matter of fact and/or law in finding that there was no basis on which the deposit could be forfeited, as he failed to give any or any sufficient consideration to the actions of the Defendants which led to the cancellation of the Agreement.
>
> g. The learned judge erred as a matter of fact and/or law when he stated that the Defendants should receive any damages owed to them before the removal of the caveat, as he failed to give any or any sufficient consideration to the evidence presented by the Claimant and the Defendants themselves that the Defendants had been in breach of the Agreement since its inception."

The submissions

[37] Taking grounds a., d. and e. together, Miss Laing for the appellant submitted that the judge erred as a matter of fact and law in finding that the date of the breach of the agreement was 20 July 2006. She contended that, at the time when the October 2001 notice was issued, the appellant was ready and able to complete the agreement. The fact that the agreement was at that point still unstamped could easily have been rectified and was not an issue going to the root of the contract between the parties. The agreement did not stipulate for vacant possession. The Chens were guilty of unreasonable delay, the period of the notice was reasonable and the deceased accepted no further payment from the Chens after the notice was given. In these circumstances, the judge ought to have

found that the deceased considered the agreement to be at an end once the reasonable period which the Chens were given to complete expired without them having paid up the balance of the purchase moneys. Accordingly, the judge erred in finding that it was the appellant, rather than the Chens, who wrongfully terminated the agreement.

[38] On ground b., Miss Laing submitted that, having found that the 2001 agreement was of no effect, the judge erred in relying on it as regards the sum of $3,400,000.00 which the Chens allegedly paid towards the purchase price of the property under the 2001 agreement.

[39] Miss Laing's submission on ground c. was that, having regard to the various inconsistencies in Miss Chen's evidence, the judge erred in how he resolved them.

[40] On ground f. she submitted that, had the judge found, as he ought to have, that the October 2001 notice was effective to terminate the agreement, it would have followed that the appellant should have been able to the forfeit the Chens' deposit of $400,000.00.

[41] And finally, on ground g., Miss Laing submitted that the judge erred in ordering that the caveat should remain in place until the Chens were paid all sums due to them under the judgment of the court.

[42] In support of her submissions on grounds a., d. and e., Miss Laing referred us to, among other cases, **The Mersey Steel and Iron Co (Limited) v Naylor, Benzon &**

Co[22] ('**Mersey Steel**'), a decision of the House of Lords, **JTM Construction & Equipment Ltd v Circle B Farms Ltd**[23] ('**JTM Construction & Equipment**'), a decision of McDonald-Bishop J (as she then was) at first instance, and the decision of this court in **Jennifer Messado and another v Keith Recas and another**[24] ('**Jennifer Messado**').

[43] In **Mersey Steel**, Lord Blackburn said this[25]:

> "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something …, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct'."

[44] In **JTM Construction & Equipment**, McDonald-Bishop J summarised the three common law requirements of a valid notice to complete as follows[26]:

> "(1) The server must himself be ready and willing to complete at the time of service: **Quadrangle Development and Construction Co. Ltd v Jenner** [1974] 1 All ER 729 at 731.
>
> (2) The notice can only be served after unreasonable delay.
>
> (3) The notice must allow a reasonable time for completion."

---

[22] (1884) 9 App Cas 434
[23] Claim No 2007HCV05110, judgment delivered 29 June 2009
[24] [2015] JMCA App 10
[25] At pages 443-444
[26] At para. 52

[45] McDonald-Bishop J also said[27] that, once time has been made of the essence of a contract for the sale of land by the service of a valid notice to complete -

> "Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission."

[46] And, in **Jennifer Messado**, after a review of some of the leading authorities, Sinclair-Haynes JA (Ag) (as she then was) concluded that[28]:

> "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."

[47] For her part, Miss Cummings also referred to **Jennifer Messado**, to emphasise the principle that a party to an agreement for the sale of land who issues notice to complete must himself be ready, willing and able to complete. She submitted that the deceased was not in a position to do so when he served the October 2001 notice on the Chens, given the fact that the agreement was not stamped and Mr Palmer's evidence that

---

[27] At para. 70
[28] At para. [44]

he had no money in hand to do so[29]. She further submitted that, upon expiry of the period fixed for completion in the notice to complete, "there must be some communication express [sic] in a written document sent to the other party effecting the cancellation of the agreement for sale"[30]. The action of the deceased in "continuing to accept payment [from the Chens] after serving the several notices to complete was evidence that he did not intend to relay [sic] on them further"[31]. In any event, the judge's findings - which were, in the main, findings of fact - were fully supported by the evidence and therefore should not be disturbed. Accordingly, for the reasons which he gave, the judge was correct to treat the notice as ineffectual in the circumstances of this case.

[48] Miss Cummings also referred us to the decision of Langrin J (as he then was) at first instance in **Park Traders (Jamaica) Ltd v Bevad Ltd & Transocean Shipping Ltd**[32], to support her submission that there ought to have been something coming from the deceased after the expiry of the period fixed for completion in the notice to complete indicating formally that he considered the agreement to be at an end. In that case, the vendor having served notice to complete, and the purchaser having taken no steps to comply, the vendor wrote a letter terminating the agreement at the end of the time limited by the notice. At the end of the day, Langrin J held that, in all the circumstances of the case, the agreement had been validly terminated.

---

[29] Notes of evidence, pages 14-15
[30] Respondent's submissions dated 12 May 2018, page 3, para. 2
[31] Respondent's submissions dated 12 May 2018, page 3, para. 3
[32] (Unreported), Supreme Court of Jamaica, Suit No E 224/90, judgment delivered 19 September 1997

[49] However, there is nothing in the judgment to suggest that Langrin J considered that the letter formally terminating the agreement was a precondition of the termination of the agreement, as Miss Cummings in effect submitted. I will therefore have to return to this point in a moment[33].

Discussion and conclusions on the appeal against the judgment on liability

[50] I start with grounds a., d. and e, with regard to which Miss Laing contended that the agreement ended in late 2001 after the Chens failed to complete within 21 days of being served with the October 2001 notice.

[51] There is no question that the law is as stated by McDonald-Bishop J and Sinclair-Haynes JA (Ag) in **JTM Construction & Equipment** and **Jennifer Messado** respectively. Although time is not usually of the essence of an agreement for the sale of land, the party not in default may make it so in a case of unreasonable delay on the part of the other party by serving a notice to complete which makes time of the essence of the contract and fixes a reasonable time for completion[34]. However, for the notice to be valid, the party serving the notice must him or herself be ready and willing to complete the agreement. In other words, he or she cannot be in default[35].

[52] This is how Halsbury's explains the principle[36]:

---

[33] See para. [59] below
[34] Megarry & Wade, The Law of Real Property, 7th edn, para. 15-098
[35] **Quadrangle Development and Construction Co Ltd v Jenner** [1974] 1 All ER 729, esp. per Russell LJ at page 731
[36] Halsbury's Laws of England, Fourth Edition Reissue, Vol. 42, para. 121

> "The person serving the notice must himself not only be ready, able and willing to complete at the date when the notice is served, but must remain so throughout the period of the notice. The notice binds the person serving it as well as the other party, and if the person serving it is no longer ready and willing to complete at the date of expiration, the other party may then repudiate the contract. However, time is not of the essence within the period of the notice, and therefore, if the recipient of the notice nominates a day for completion within the period, but in fact is not ready for completion on that date, that party is not in fundamental breach; but the same applies to the server of the notice if that party is not ready to complete on the nominate day. A person cannot serve a notice when he is himself responsible for the delay."

[53] On the basis of these authorities, three questions arise in this case. First, had the occasion for service of notice to complete on the Chens arisen at the date of service of the October 2001 notice by the deceased? Second, was the deceased ready and able to complete the agreement when he served the third notice? And third, the notice not having been complied with, was the deceased required to do anything in its immediate aftermath to make it clear to the Chens that he was rescinding the 1997 agreement?

[54] Although the judge did not address the first question in so many words, it seems clear enough that the four-year period which had elapsed since the signing of the agreement in 1997, during which the deceased had had to issue two previous notices to complete, was unreasonable. Miss Cummings certainly did not suggest otherwise.

[55] As regards the second question, as has been seen, the judge found that the deceased was not ready and able to complete the agreement when he issued the October

2001 notice because the agreement was not stamped and the deceased was not in a position to give vacant possession of the property to the Chens.

[56] In so far as the non-stamping point is concerned, it is a fact that the agreement could not go forward without the agreement being stamped. Further, despite the fact that, on the judge's finding, the Chens had by that time paid a total of $3,400,000.00 to the deceased on account of the purchase price, the deceased had taken no steps to have the agreement stamped. However, as Miss Laing submitted, this was not a point which went to the root of the agreement and the fact that the agreement was unstamped at the date of the October 2001 notice was something which, subject to the penalty being paid, was capable of being cured. If this were the only point on which the Chens relied to say that the October 2001 notice was bad, I might have been strongly inclined, in the absence of any authority to the contrary, to accept Miss Laing's submission.

[57] But it seems to me that Miss Laing faces a more formidable hurdle in relation to the judge's conclusion on the issue of vacant possession. The only reference to possession in the agreement is the statement that it would be, "On or before November 30, 1997". It is well established that, in the absence of any contrary stipulation in the contract, a vendor of land is under an implied obligation to give vacant possession on completion[37]. Accordingly, the presence on the premises of persons who are lawfully in possession as

---

[37] Megarry & Wade, op. cit., para. 15-089; see also L Voumard, The Law Relating to the Sale of Land in Victoria, 2nd edn, page 334.

tenants or licencees will be a breach of that obligation unless the agreement is expressly made subject to existing tenancies.[38]

[58] I therefore agree with the judge that, in this case, there was an implied condition that the deceased would give vacant possession on completion to the Chens and that this "could not reasonably have been procured in 21 days". For this reason, as at the date of the October 2001 notice (and indeed the expiration of the 21 day period of the notice), the deceased was not ready and able to complete the sale to the Chens. Accordingly, the October 2001 notice was bad and of no avail to the deceased as a basis for terminating the agreement.

[59] Which brings me then to the third question, which is, what, if anything, was the deceased obliged to do upon the expiry of the notice to indicate to the Chens that he considered the agreement to be at an end. On this point, as will be recalled, the judge found that, the 21 day period having elapsed, the deceased did nothing to indicate to the Chens that he was rescinding the contract and that the Chens were therefore entitled to treat it as subsisting. Although my conclusion on the second question makes it strictly speaking unnecessary to consider the third, I will indicate briefly why, in my view, the judge was correct in his conclusion on this question as well.

---

[38] **Sharneyford Supplies Ltd v Edge Barrington Black & Co (Third Party)** [1987] Ch 305, per Balcombe LJ at page 321

[60] It will be recalled that the threat which the October 2001 notice held out was that, if the Chens failed to comply with the notice within 21 days of receiving it, "[the deceased] will rescind the contract, may forfeit the deposit, and may re-sell the premises and claim from you the deficiency in price (if any) on such re-sale and all expenses attending the re-sale and any attempted re-sale and all costs, loss, damage and expenses incurred by him by reason of your delay or default in performing the said agreement"[39].

[61] Halsbury's states the principle applicable in these circumstances in this way[40]:

> "When a notice to complete has expired, the party not in default may elect either to affirm or rescind the contract."

[62] Upon the expiry of the 21-day period limited by the October 2001 notice, therefore, the deceased had the option either to affirm or rescind the agreement. When, two days later, Miss Chen presented a copy of the letter of commitment from VMBS to Mr Palmer, he did not advise her (or her attorneys-at-law[41]) that the moment had passed, that the deceased had rescinded the agreement, and that her efforts were now in vain. It seems to me that, in these circumstances, the evidence amply justified the judge's view that the Chens were entitled to consider that the deceased had not rescinded the agreement. In

---

[39] See para. [12] above
[40] Halsbury's, op. cit., loc. cit. See also **Johnson and another v Agnew** [1979] 1 All ER 883, per Lord Wilberforce at page 889
[41] The Chens were by this time represented by Derrick Darby & Co.

this regard, I cannot possibly improve upon the judge's conclusion on the point, a part of which I repeat below[42]:

> "No accounting was sent to [the Chens] indicating the sums paid over to that point and offering to return or returning any of that money. That course of conduct, that inactivity was affirmative of the agreement. There was no effective rescission at that point. The [deceased] was not at liberty to privately decide to end the contract and keep the [Chens'] money. The contract lived."

[63] For all of these reasons, my conclusion is that the judge's decision that the October 2001 notice was bad and that the agreement continued to subsist after its expiry date was correct. Grounds a., d. and e. must accordingly fail.

[64] In ground b., as will be recalled, Miss Laing submitted that the judge erred in relying on the contents of the alleged 2001 agreement, given his decision to reject it in favour of the agreement entered into in 1997[43]. While the judge obviously treated the contents of the alleged 2001 agreement as a species of admission, his actual finding of fact as regards the alleged agreement was that, "the parties though they might have been in discussions concerning a new Agreement never entered into a November 30, 2001 Agreement …"[44]

---

[42] Judgment on liability, para. [55] – see para. [28] above
[43] See para. [27] above
[44] Judgment on liability, para. [27]

[65] In these circumstances, I think that Miss Laing made a fair point in submitting that the judge ought to have altogether excluded the alleged 2001 agreement from his consideration of whether Miss Chen's evidence that she had paid a total of $3,400,000.00 to the deceased was to be believed.

[66] But this was not, of course, the end of the matter. Miss Chen's uncontradicted evidence was that she had paid a total of $3,400,000.00 to the deceased on account of the purchase price and/or rent. Although the payments which she listed and the receipts which were exhibited totalled the lesser sum of $3,049,954.50, Miss Chen proffered an explanation, which was that she made payments other than those reflected in the documents. There was therefore evidence, which the judge obviously accepted, having seen and heard Miss Chen testify under rigorous cross-examination[45], that she had in fact paid the deceased a total of $3,400,000.00 as she claimed. In these circumstances, it seems to me that, leaving the alleged 2001 agreement on one side, there was evidence from which the judge could have concluded that Miss Chen's evidence on this point was to be believed.

[67] This court's long-established approach to findings of fact by a trial judge is that, where questions of credibility are involved, this court will not lightly interfere with a trial judge's findings of fact, unless it can be shown that the judge misdirected him or herself in some material respect, or if the conclusion arrived at by the trial judge was plainly

---

[45] See para. [25] above

wrong[46]. In this case, no basis has been shown for us to disturb the judge's finding that the Chens paid a total of $3,400,000.00 to the deceased. I would accordingly decline to do so and dismiss ground b.

[68] In my view, ground c., in which Miss Laing's complaint was that the judge erred in how he resolved the "various inconsistencies" in Miss Chen's evidence, must attract identical consideration. The judge having ruled against the existence of the alleged 2001 agreement and Miss Chen's contention that the deceased had agreed that she should collect the rental for their apartment from the Wrights, the only other significant issue in respect of which her evidence was in dispute related to the payment of the $3,400,000.00 which I have just discussed. I would therefore dismiss ground c. as well.

[69] In the light of my conclusion that the judge's finding that the October 2001 notice did not bring the agreement to an end was correct, ground f., which is that the judge ought to have ordered the forfeiture of the Chens' deposit of $400,000.00, no longer arises.

[70] Nor indeed does ground g., which complained that the judge erred in ordering that the caveat should remain in place until the Chens were paid all sums due to them under the judgment of the court. Having found for the Chens on the critical issue of whether the October 2001 notice was effective to terminate the agreement, it was well within the

---

[46] See, for instance, **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7; and see also the decision of the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, esp. per Lord Hodge at para. 12

judge's power to order that the caveat remain in place as a conservatory measure, pending payment to the Chens of such sums as the court might ultimately order to be due to them.

[71] For all these reasons, I would therefore dismiss the appeal against the judgment on liability.

The judgment on damages

[72] In the subsequent judgment on damages given on 19 December 2014, the judge assessed the amount due to the deceased's estate from the Chens for rent for the period November 1997 to December 2014 as $720,000.00. He arrived at this amount by calculating the total amount due to the estate for rent over the period to be $4,120,000.00 (206 months at $20,000.00 per month), and then subtracting the $3,400,000.00 already paid by the Chens.

[73] In relation to the counterclaim, the judge assessed the amount due to the Chens as damages for the deceased's breach of the agreement to be $6,242,000.00, by the following route.

[74] First, he took the date of breach to be 20 July 2006, the date of the order for specific performance of the contract of sale to the Wrights. He chose this date on this basis[47]:

---

[47] Judgment on damages, paras. [19]-[20]

> "[19] The court having determined that substantial or real damages should be awarded the next issue is what measure of damages should be used? The date of breach or the date of hearing. If the date of breach is to be used it was the defendants' submission that the order for specific performance in 2006 would have to relate back to the date of the Wrights' agreement in 2002 which would be the date of breach. Counsel for the claimant on the other hand submitted that the relevant date should be the initial date for completion in November 1998.
>
> [20] The initial completion date cannot be the relevant date as even on the claimant's case the agreement would have subsisted until November 2001. It was established in the [judgment on liability] that the agreement was frustrated in July 2006. That would therefore be the effective date of breach. Even though the agreement that was being specifically enforced was entered into in 2002, it was not until the order for specific performance of that agreement was obtained that it was determined which of the two existing agreements would be enforced by the court and held to be valid."

[75] The judge then went on to canvass the possibility that, as contended by the Chens, damages should be assessed as at the date of the hearing, before concluding[48] that "damages should be determined as at the date of breach, July 20, 2006".

[76] The judge's next step was to assess the market value of the property as at 20 July 2006. In this regard, there was evidence before the court that the property was valued at $5,900,000.00 as at 12 November 2001[49] and $14,250,000.00 as at 30 January 2012[50].

---

[48] At para. [27]

[49] See valuation report dated 12 November 2001, prepared by W & L Associates Limited (this was the report which the Chens had obtained for the purposes of their mortgage application to the Victoria Mutual Building Society in November 2001).

[50] Valuation report dated 30 January 2012, prepared by W & L Associates Limited.

The judge accordingly assessed the value of the property as at 20 July 2006 to be $6,962,000.00. He arrived at this figure by taking as his starting point the agreed purchase price of the property of $5,000,000.00 in November 1997. He then had regard to the valuation of $5,900,000.00 as at 12 November 2001. On this basis, given the apparent 18% increase in the value of the property between 1997 and 2001, and assuming a similar 18% increase between 2001 and 2006, the judge determined the market value as at 20 July 2001 to be $6,962,000.00. From this figure, he subtracted the net balance of $720,000.00 due to the deceased's estate for rent, thus yielding the figure of $6,242,000.00 which he awarded as damages.

[77] The judge awarded costs to the appellant on the claim and costs to the Chens on the counterclaim, with both sets of costs to be agreed or taxed.

[78] Accordingly, the judge made the following orders:

> "[33] **On the claim**:
>
> a. [The Chens] owe rental to the claimant representative of the estate of [the deceased] from November 1997 at the rate at [sic] $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000 paid to [the deceased]. As at December 2014 the sum owed is $720,000.00.
>
> b. Costs to [the appellant] to be agreed or taxed.
>
> [34] **On the Counterclaim**:
>
> a. [The Chens] are awarded damages for breach of the 1997 Agreement for Sale they entered into with [the deceased] in the sum of $6,962,000 less the sum of $720,000 owed for

rent to the claimant representative of the estate of [the deceased] as at December 2014. [The Chens] are awarded interest on this sum at the rate of 3% per annum from July 20, 2006 to December 19, 2014.

b. Costs to [the Chens] to be agreed or taxed."

The appeal against the judgment on damages

[79] On this aspect of the appeal, the appellant contends, in summary, that the judge erred in finding that (i) the date of breach of the agreement was 20 July 2006 and that damages should be assessed as of that date; (ii) that the Chens had paid $3,400,000.00 to the deceased in rental; and (iii) that the Chens were entitled to damages in the amount and on the basis ordered by the judge.

[80] The grounds of appeal are as follows:

"a. The learned judge erred as a matter of fact and/or law in finding that the date of the breach of the Agreement was July 20, 2006, as there was evidence before him that the defendants had never complied with the terms of the Agreement which was made in 1997.

b. The learned judge erred as a matter of fact and/or law in finding that damages should have been assessed as at July 20, 2006, and failed to take adequate account of the evidence before him that the actual breach was the fault of the Defendants, and that the Agreement was breached by them from as far back as 1997.

c. The learned judge erred as a matter of fact and/or law in finding that the property enjoyed an increase in value of 18% per annum between 2002 and July 20, 2006 as there was no evidence before the court on which he could make this finding.

> d. The learned judge erred as a matter of fact and/or law when he found that the sum paid in rental by the defendants was $3,400,000.00, and that the sum now due in rental from the defendants was this sum subtracted from the total sum due for rent from November 1997 to December 2014 and continuing until the defendants vacate the premises, as he failed to give sufficient consideration to the evidence before the court that the defendants had in fact not paid that sum in rent.
>
> e. The learned judge erred in finding that the claimants had suffered real damage, and that nominal damages could not be contemplated, as there was evidence before the court that the defendants themselves were the cause of the termination of the agreement."

The submissions

[81] Miss Laing acknowledged that, in her submissions on the judgment on liability, she had already addressed ground d., in which complaint was again made about the judge's findings in relation to the alleged payment of $3,400,000.00 by the Chens. She therefore concentrated her efforts before us on grounds a., b., c. and e.

[82] Taking grounds a. and b. together, Miss Laing submitted that the judge ought not to have taken 20 July 2006 as the appropriate date for the purpose of assessing damages; and that he ought to have used November 2001 instead. She referred to Miss Chen's own evidence that, even after the expiry of the October 2001 notice, the Chens were not in a position to complete. In these circumstances, she submitted[51], "the learned Judge failed

[51] Further written submissions of the appellant dated 13 March 2018, para. 28

to balance the scales between the parties and to take into account the admitted default of [the Chens]".

[83] On ground c., Miss Laing submitted that the judge erred in assuming an 18% increase in the value of the property between November 2001 and 20 July 2006, as there was no evidence of this. She submitted that the judge relied on valuation reports which were not tendered as expert evidence pursuant to Part 32 of the Civil Procedure Rules 2002 ('the CPR'); and that, in the absence of a witness statement from the valuator, the appellant was denied an opportunity to test his evidence by cross-examination in the usual way.

[84] In support of this submission, Miss Laing referred us to **City Properties Limited v New Era Finance Limited**[52], in which objection was successfully taken to reliance on the evidence of a quantity surveyor whose report was not tendered as expert evidence in accordance with Part 32. Despite this, however, Edwards J (as she then was) considered[53] that "a party to a case is not precluded from calling a witness to give factual evidence even if that witness is a qualified expert". On that basis, since the evidence which the witness in question proposed to give in that case was factual evidence, the learned judge accepted that the evidence could be relied on. But this was then subject to the further question of whether the evidence amounted to no more than inadmissible hearsay. In the end, the judge ruled that it was, and that, in the absence of any notice

---

[52] [2016] JMCC Comm. 1
[53] At para. [70]

seeking to tender it as hearsay evidence pursuant to section 31E(2) of the Evidence Act, it could not be relied on.

[85] On ground e., Miss Laing submitted that there was no evidence to ground a substantial award of damages and that the judge's award was therefore exorbitant in the circumstances of the case. On this basis, Miss Laing invited us to substitute an award for nominal damages only, contending that the Chens suffered no real loss, having been in continuous breach of their obligations under the agreement for an extended period, during which, as the judge observed[54], they "have obtained the benefit of living in the premises at the same rent for seventeen years".

[86] Miss Cummings' submissions were as follows. On grounds a. and b., the effective date of the deceased's breach of the agreement was the date on which it was no longer capable of being performed by either party. The judge was therefore correct to choose 20 July 2006 as, up to that time, an order for specific performance was still an available remedy at the suit of either of the parties. On ground c., there was evidence before the judge from which he could make a reasonable estimate of the value of the property in July 2006 and there was no basis to disturb his finding on this point. And, on ground e., this was not an appropriate case for an award of nominal damages, the judge's award was correct and ought not to be disturbed.

---

[54] Judgment on damages, para. [27]

Discussion and conclusions on the appeal against the judgment on damages

[87] It may be convenient to begin with Miss Laing's submission that the judge ought to have awarded the Chens no more than nominal damages.

[88] In response to the identical submission made to him at the hearing on damages, the judge said the following[55]:

> "[17] An appropriate starting point is the question of whether or not as submitted by counsel for the claimant only nominal damages should be awarded to the defendants. In the ***Mediana*** …, Lord Halsbury L.C. in explaining the meaning of nominal damages said:
>
> > ` 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.'
>
> [18] It cannot be correctly maintained in this case that the defendants have not suffered real damage. They have lost the right to purchase the property the subject matter of this dispute and will have to seek to secure alternative accommodation. This is therefore not a case where nominal damages could properly be contemplated."

[89] I agree. As the judge observed, the Chens lost the right to purchase the property and were therefore obliged to seek other accommodation. In short, they lost the benefit of their bargain with the deceased from which they expected to acquire the freehold to

---

[55] Judgment on damages, paras. [17]-[18]

the property. It seems to me that, in circumstances where, as the evidence showed, the property had appreciated in value over the years, that loss could not possibly be characterised as anything other than "real damage".

[90] The substantial questions raised by Miss Laing's submission are therefore whether the judge's choice of 20 July 2006 as the date from which to assess the damages was correct; and whether the evidence before him was sufficient to enable him to make the award which he made.

[91] The date of breach is important because of the well-known rule that, generally speaking, that is the date from which damages for breach of contract are usually assessed. As Lord Wilberforce put it in **Johnson and another v Agnew**[56]:

> "… the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances."

[92] It seems to me that Miss Laing's submission that November 2001 should be treated as the breach date must fall away in the light of the judge's finding, with which I have already expressed agreement, that the October 2001 notice was not effective to

---

[56] At page 896

terminate the agreement. In light of that, the choice of the breach date must then narrow down to either 6 February 2002, the date of the deceased's agreement to sell the property to the Wrights, or 20 July 2006, the date on which, as the judge put it[57], "the agreement was frustrated".

[93] Unless the judge was using the word in a purely non-technical sense, I am bound to say that I find his reference to the agreement having been "frustrated" problematic. A contract is usually said to be frustrated where there has been some supervening event which makes its performance impossible or illegal, or for some other reason incapable of performance. Frustration in the law of contract therefore describes an outcome that is completely independent of the conduct of either of the parties to the contract. This is how the learned author of Treitel on the Law of Contract explains its effect[58]:

> "As frustration operates automatically, it is generally thought to terminate the contract without any election by either party: in this respect it differs from breach, which enables the victim to choose whether to treat the contract as discharged. It follows that frustration can be invoked by either party, and not only by the party likely to be adversely affected by the frustrating event."

[94] In this case, the Chens' counterclaimed for breach of the agreement by the deceased. So no question of frustration arose, either on the pleadings or on the facts. It therefore seems to me, with the greatest of respect, that what the judge did was to

---

[57] Judgment on damages, para. [20]
[58] 12th edn, para. 19-091

conflate the question of the deceased's breach of the agreement with the separate question of whether specific performance was available as a remedy for the breach. In my view, the only significance of the order for specific performance in favour of the Wrights on 20 July 2006 was that it eliminated specific performance as possible remedy for the Chens in this case.

[95] In my view, 6 February 2002 was the date on which the deceased breached the agreement: that was the date on which, by signing the agreement to sell the property to the Wrights, the deceased unequivocally repudiated the agreement to sell to the Chens.

[96] Before I come to the question of the damages due to the Chens in the light of this conclusion, I must briefly consider Miss Laing's objection to the valuator's reports on the basis that they were not tendered in evidence pursuant to Part 32 of the CPR.

[97] In advance of the trial, the Chens filed a notice of intention to adduce hearsay evidence (pursuant to section 31E(2) of the Evidence Act on 6 March 2012). The two valuations of the property done by Messrs W & L Associates and dated 12 November 2001 and 30 January 2012 were included in the list of documents which accompanied the notice. The notes of evidence reveal that those documents were all agreed and admitted in evidence as exhibits 14-44[59].

---

[59] See supplemental index to record of appeal filed on 6 December 2016, page 27. See also pages 40-42, where the full list of documents is set out.

[98] So, irrespective of whether or not the valuations were tendered in accordance with the procedure set out in Part 32 of the CPR, it is clear that they were admitted by consent at the trial and that it was a matter for the judge to determine what weight should be attached to them. In any event, no objection having been taken to the admissibility of the documents after service of the notice of intention to adduce hearsay evidence, the Chens were at liberty to rely on them, again subject always to the judge's assessment of their weight and cogency. In my view, therefore, no objection can be taken at this stage to the judge's consideration of the valuator's reports.

[99] As it happens, by a happy coincidence, the first of the two reports is dated 12 November 2001, that is, within three months of 6 February 2002, the date which I have determined to be the breach date. In these circumstances, that report seems to me to provide a suitable basis on which to assess the damages due to the Chens as at that date. Accordingly, taking the value of the property at that date to have been $5,900,000.00, and reducing that figure by $720,000,00 to allow for the amount which the judge found to be due to the deceased's estate for rent, I would reduce the award of damages to the Chens to $5,180,000.00.

Disposal of the appeal

[100] I would therefore (i) dismiss the appeal against the judgment on liability and affirm the judge's judgment; (ii) allow the appeal against the judgment on damages in part, by setting aside the award of $6,242,000.00, and substituting therefor the sum of $5,180,000.00; and (iii) affirm all other aspects of the judgment on damages.

[101] On the question of costs, the appellant has failed in his challenge to the judgment against liability, but he has had partial success in his challenge to the judgment on damages. In light of this, I would order that, in the absence of any contrary submission, by way of an application in writing from either party within 14 days of the date of this judgment, the Chens should have 90% of the costs of the appeal as a whole, such costs to be agreed or taxed.

An apology

[102] On behalf of the court, I wish to apologise for the delay in rendering this judgment. While the causes of these delays are well known, we fully appreciate the great inconvenience they can and often do cause the parties.

SINCLAIR-HAYNES JA

[103] I have read in draft the judgment of Morrison P and agree with his reasoning and conclusion.

PUSEY JA (AG)

[104] I too have read the draft judgment of Morrison P. I agree with his reasoning and conclusion.

MORRISON P

ORDER

1. The appeal against judgment on liability of D Fraser J made on 3 October 2014 is dismissed.

2. The judgment on liability is affirmed.
3. The appeal against judgment on damages of D Fraser J made on 19 December 2014 is allowed in part.
4. The award of $6,242,000.00 is set aside and substituted therefor is the sum of $5,180,000.00.
5. All other aspects of the judgment on damages are affirmed.
6. In the absence of any contrary submission, by way of an application in writing from either party within 14 days of the date of this judgment, the appellant must pay 90% of the respondents' costs of the appeal against both judgments, such costs to be agreed or taxed.