

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2023/0028

BETWEEN:

MICHAEL JOSEPH

Appellant

and

[1] **INDRA HARIPRASHAD CHARLES**
[2] **WILLIAM CHARLES**
[3] **1st NATIONAL BANK FORMERLY RBTT BANK
CARIBBEAN LIMITED**

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Horace Fraser for the Appellant
Mr. Dexter Theodore KC for the 1st and 2nd Respondents
Ms. Vanessa Pinnock with Mr. Mark Maragh for the 3rd Respondent

2024: July 4;
2026: May 4.

Civil appeal – Agreement for sale of land – Breach of agreement for sale of land – Appeal against mixed question of fact and law – Waiver of rights – Whether inaction or delay can amount to waiver of right to rescind – Principal and agent – Irrevocable power of attorney authorizing agent to sell land – Agent entering into an agreement to sell land at a price lower than anticipated by principal – Whether on the evidence the learned judge in finding appellant in breach of agreement

In December 2007, the appellant, as prospective purchaser of Block 0650E Parcels 30 and 31 in Vigie, St Lucia (“the Property”) filed a statement of claim against the first and second respondents alleging breach of contract for the sale of the Property. On 10th March 2008, the first and second respondents filed an ancillary claim against the third respondent, 1st National Bank formerly RBTT Bank Caribbean Limited (“the Bank”), seeking indemnity for

any loss or damage stemming from the Bank's actions. By Power of Attorney dated 2nd April 2003 and granted to the Bank by the first and second respondents after they defaulted on a hypothec, the Bank was authorized to sell the Property at the best price with a current valuation.

In 2006, the Bank auctioned the Property and eventually accepted the appellant's \$400,000.00 bid under an agreement dated 19th June 2006 requiring a non-refundable 10% deposit upon execution with timely balance payment by 19th July 2006. The appellant subsequently applied to the Bank for a mortgage loan to finance the balance of the purchase price. This mortgage was approved on 26th June 2006.

The first and second respondents objected to the sale on the basis that the Property was undervalued. The first respondent wrote to the Bank on 7th August 2006 and requested that they reconsider the sale of the Property. The Bank thereafter rescinded the agreement and offered to refund the appellant the deposit. The appellant refused the refund and lodged a caution against the registered title of the Property and sought specific performance to enforce the sale or, alternatively, damages for loss of bargain.

The first and second respondents resisted the appellant's claim and counterclaimed for the removal of the appellant's cautions on the Property. They argued that the appellant's failure to pay the remaining purchase price by the deadline justified the Bank's cancellation of the sale and that any loss suffered was a result of the Bank acting in contravention of its fiduciary duty when it failed to obtain the best price available, taking the current value of the Property into consideration. The appellant maintained that the contract was in fact breached by the first and second respondents and their agent, the Bank. He asserted that his approved mortgage from the Bank effectively constituted payment of the balance of the purchase price, and that any delay stemmed from unresolved judicial hypothecs and requisite documentation which were beyond his control. He contended that the completion of the sale was contingent on the procurement of mortgage financing from the Bank and that even if he did breach the contract (which he denied), the third and second respondents by their actions would have waived their right to terminate since they acted as if the contract was still in existence even after the lapse of the stated date for completion of the sale, i.e. 19th July 2006.

The Bank in response to the ancillary claim asserted that it had acted within the scope of the POA to settle the first and second respondents' debts and that in accordance with its duties, endeavoured to obtain the best available price for the Property on the market, having tendered the Property for sale over a period of several years.

In his judgment dated 8th November 2023, the learned judge dismissed the appellant's claim entirely, allowing the Bank to retain the \$40,000.00 non-refundable deposit, and permitting the first and second respondents' counterclaim which sought to have the appellant remove the cautions registered against the Property. The ancillary claim against the Bank was also dismissed in its entirety and prescribed costs were awarded to the first and second respondents on the substantive claim. In short, the learned judge concluded that the Bank had acted reasonably in assessing the market value of the Property by obtaining the informed judgment of a qualified valuator and could not have been said to have acted

unreasonably by agreeing to sell the Property at the price which it did. He concluded that the Bank did not act outside the scope of the POA and did not breach its fiduciary duty to the first and second respondents. The learned judge also concluded that the Bank was entitled to rescind the agreement for sale at any point subsequent to 19th July 2006. Moreover, there had been no agreement to extend time nor anything that amounted to waiver of the right to treat time as of the essence nor was there any evidence that it was a condition precedent to the closing of the sale that the appellant would obtain loan financing. Dissatisfied with the learned judge's decision, the appellant filed his notice of appeal on 16th November 2023 (amended on 31st January 2024), in which he advanced 2 grounds of appeal, namely: i. The finding of the learned trial judge that the appellant was in breach of the agreement was not open to him to make as it goes against the grain of the evidence and is contrary to the established legal principles; and ii. The learned trial judge misdirected himself and therefore erred in law when he found as fact and law that the Bank had not acted outside of the scope of the agency agreement and was not therefore liable to indemnify the first and second respondents in respect of any liability in the execution thereof as the said finding goes against the preponderance of the evidence which contradicts such a finding.

Held: dismissing the appeal, affirming the orders of the learned trial judge and awarding costs of the appeal to the respondents to be agreed within 21 days of the date of this order or to be assessed if not agreed and making no order as to costs in respect of the withdrawal of the Bank's cross-appeal, that;

1. Determining an issue involving a mixed question of law and fact requires the appellate court to analyse the different components separately as a mixed question often arises when applying a legal standard to a set of established facts. The standard of review applied varies depending on the "mix" of the mixed question. If the mixed question is "essentially factual", the appellate court will give significant deference to the trial judge's determination. If the mixed question turns primarily on a legal interpretation or the application of a legal rule, the appellate court's review is much closer to the *de novo* standard, allowing it to reverse the lower court's decision if it finds an error in the application of the law. For an appeal involving a mixed question to succeed, the appellant must therefore demonstrate a clear error in either the trial judge's reasoning or legal analysis.

Group Seven Limited v Notable Services LLP [2019] EWCA Civ 614 applied;
JSC BTA Bank v Ablyazov and another [2018] EWCA Civ 1176 applied.

2. It is trite law that although a contractual clause making time of the essence makes deadlines critical conditions, a lawful excuse such as frustration or impossibility might excuse delay. In this case, the appellant alleged that the nonpayment of the purchase price was due to the existence of an un-radiated judicial hypothec or judgment debt against the second respondent. The learned judge observed that the evidence in support of the appellant was not altogether alien to the vagaries of local conveyancing practice and accordingly rejected the reasons advanced to explain or justify the delay or the contention that the cause of the delay lay at the feet of the second respondent or the Bank. The appellant has not advanced any cogent reason to depart from these findings and in the absence of the same, this Court is obliged to accept that the transaction involved a contemporaneous transaction

representative of the style of conveyancing prevalent in St. Lucia. Moreover, by countersigning the Bank's letter of instruction, the appellant's attorneys would have agreed to assume the critical responsibility of searching the title to the Property at both registries; ensuring further that all rates; property and income taxes, employee income taxes and NIS have been paid up to date and providing certification of the same.

Minnevitch v Café de Paris (Londres) Limited [1936] 1 All ER 884 distinguished; **Metrolands Investments Ltd v JH Dewhurst Ltd.** [1986] 3 All ER 659 distinguished; **Edward Wong Finance Co. Ltd. v Johnson Stokes & Master** [1984] A.C. 296 considered; **Mungalsingh v Juman** [2015] UKPC 38 applied.

3. A waiver of a "time is of the essence" clause, under common law, occurs when a party, through express words or clear conduct, indicates that they do not intend to enforce the strict agreed deadline. The defence of waiver however must be pleaded, with all facts upon which the allegation of waiver is based clearly stated. Moreover, although delay (silence or inaction) can amount to a waiver at common law, it does not automatically mean a waiver of rights. Whether a delay amounts to a waiver will depend on the terms of the contract in question and the circumstances of the case. Case law makes it clear that mere silence or inaction can contribute to a waiver by conduct only if it is combined with other actions or a pattern of behaviour that clearly shows an intent to give up a known right. The appellant failed to show in his pleadings or by way of cogent evidence that there was some unambiguous representation by the Bank that amounted to a waiver. There was no prolonged inaction which could be said to have been misleading, neither was there any course of dealing on the part of the parties advanced from which a court could imply waiver. Therefore, on this issue, the appellant's case, as pleaded, would fail.

Barclays v Messenger (1874) 43 L.J.Ch. 449 applied; **Banning v Wright** [1972] 2 All ER 987 applied; **Tele2 International Card Co SA v Post Office Ltd** [2009] EWCA Civ 9 applied; **Essex County Council v UBB Waste (Essex) Ltd** [2020] EWHC 2387 (TCC) considered; **Prakash Industries Ltd v Peter Beck und Partner Vermögensverwaltung GmbH** [2022] EWHC 754 (Comm) applied.

4. Courts refuse to entertain appeals which would effectively be of no utility to the parties because they waste judicial resources. Given the findings in respect of ground 1, the parties' respective pleaded cases in the court below and given the posture adopted by the first and second respondents in respect to ground 2, it is clear that there is no practical utility afforded by the second ground of appeal. Ultimately, if this Court were to conclude that the Bank acted outside the scope of the POA and was therefore liable to indemnify the first and second respondents, that conclusion could only inure to the benefit of the first and second respondents who have conceded that the learned Judge did not err in his disposal of their ancillary claim. This Court would therefore be engaged in a fruitless exercise essentially providing an advisory opinion with no practical impact.

MacNaughton v MacNaughton's Trustees 1953 SC 387 applied.

JUDGMENT

Introduction

- [1] **ELLIS JA:** In this appeal the appellant (who was the claimant in the court below) seeks to challenge the decision of the learned trial judge delivered on 8th November 2023, refusing the appellant's claim for specific performance in lieu of damages on the basis that the appellant was in breach of the sale of land agreement ("the agreement") entered with the third respondent, ("the Bank") (the ancillary defendant in the court below).
- [2] The Bank also filed a cross appeal on 14th February 2024 in which it advanced three main grounds:
- (i) That the learned judge erred in law and misdirected himself by not awarding costs to the Bank on the ancillary claim.
 - (ii) That the learned judge erred in law and misdirected himself by finding that the relationship between the appellant and the Bank was solely that of principal and agent and did not include a mortgagor and mortgagee relationship.
 - (iii) That the learned judge erred in law and misdirected himself by finding that the letter from the first named respondent dated 7th August 2006, was an invitation to reconsider the sale rather than instructions to cancel it.
- [3] In its purported cross appeal, the Bank sought to have all orders of the court below affirmed save the order made (in favour of the first and second respondents) in respect of the costs of the ancillary claim. The Bank also requested that the appellant be ordered to pay its costs associated with this appeal, and the costs incurred during the proceedings in the court below.

- [4] However, during the course of the hearing, counsel for the Bank indicated that it wished to withdraw the cross appeal and so the Court is not required to address the same, save and except the question of costs.

Background

- [5] On 24th December 2007, the appellant, a prospective purchaser of the property in dispute, filed a statement of claim against the first and second respondents, a wife and husband, alleging a breach of contract for the sale of their property at Block 0650E Parcels 30 and 31 in Vigie, St. Lucia ("the Property"). On 10th March 2008, the first and second respondents subsequently filed an ancillary claim against the Bank seeking indemnity for any loss or damage stemming from the Bank's actions.
- [6] The dispute arose from a 2003 irrevocable Power of Attorney granted by the first and second respondents to the Bank after they defaulted on a hypothec. The POA dated 2nd April 2003, authorized the Bank to sell the Property at the best price with a current valuation. It's precise terms of relevant powers in the POA are follows:

- (1) To take charge of manage transact and administer The Properties in such manner as THE ATTORNEY [*the Bank*] shall think fit.
- (2) To sell convey or otherwise dispose of to all or any person or persons all or any part of The Properties for such price or prices and upon such terms and conditions as THE ATTORNEY shall deem fit.
8. To obtain a current valuation of The Properties to be sold or leased or to endeavour to obtain the best sale or lease price available taking the said valuation into account.

AND THE CONSTITUENTS [*the first and second respondents*] hereby ratify and confirm and agree to ratify and confirm all and whatever THE

ATTORNEY in or about the premises shall lawfully do or cause to be done by virtue of these presents.

- [7] In 2006, the Bank auctioned the land and eventually accepted the appellant's \$400,000.00 bid under the agreement dated 19th June 2006 requiring a non-refundable 10% deposit upon execution with timely balance payment by 19th July 2006. The appellant subsequently applied to the Bank for a mortgage loan to finance the balance of the purchase price, and this mortgage was approved on 26th June 2006.
- [8] Upon discovering the sale, the first and second respondents objected to the sale on the basis that the Property was undervalued. This contention arose because while the Bank's valuer, Mr. Andrew King valued the property at \$10/sq. ft, the first and second respondents' valuer, Mrs. Giselle Hull-Casimir adduced evidence at trial that the property was worth \$25/sq. ft.
- [9] On 7th August 2006 the first respondent wrote to the Bank and requested that they reconsider the sale of the Property. The relevant excerpt of that letter reads as follows:
- "Whilst you hold a Power of Attorney over these two parcels of land and has (sic) the power to dispose of the Property in a fair manner (given the fact that your bank has already been paid most of the principal sum), I urge you to reconsider your decision to do so especially since the two parcels of lands were brought for \$665,000 (as evident by the Deeds of Sale) are worth much more now. Should you still persist in proceeding with the impending sale (as I gather from our oral conversations), this letter serves as a formal objection to such sale ...
- ... Given these reasons, I trust that you will use your good offices to reconsider your decision and that we could negotiate an amicable way forward."
- [10] The Bank rescinded the agreement on 10th August 2006, and offered to refund the deposit, citing the first and second respondents' disagreement over the price. The appellant, refused the refund, lodged a caution against the registered title of the Property and sought specific performance to enforce the sale or, alternatively, damages for loss of bargain.

[11] The first and second respondents resisted the claim and counterclaimed for the removal of the appellant's cautions on the Property. They denied:

- (a) authorizing the Bank to advertise their property described for sale by auction;
- (b) authorizing the Bank or any agent to give any advice specific or at all to the appellant to seek the services of a structural engineer/geotechnical and environmental engineer; and
- (c) being made aware of the fact that the Bank had entered into an agreement with the appellant for the sale of the aforementioned property or the fact that there was an intention on the part of the appellant to utilize the said property for commercial purposes.
- (d) that the contract was in existence since it was repudiated owing to the appellant's failure to pay the balance of the purchase price by 19th July 2006.

[12] They argued that the appellant's failure to pay the remaining purchase price by the deadline justified the Bank's cancellation of the sale. Moreover, the first and second respondents contended that if any loss was suffered, it was as a result of the Bank acting outside the scope of its authority under the POA when it purported to sell the subject property, and in contravention of its fiduciary duty when it failed to 'obtain the best price available, taking the current value of the property into consideration.' Further, they asserted that the appellant had wrongfully caused a caution to be imposed causing them to suffer loss and damage.

[13] The appellant duly filed a reply to the defence and counterclaim maintaining that the contract was in fact breached by the first and second respondents and their attorney/agent, the Bank. The appellant further asserted that his approved mortgage

from the Bank effectively constituted payment of the balance of the purchase price, and that any delay stemmed from unresolved judicial hypothecs and requisite documentation which were beyond his control. He contended that the completion of the sale was contingent on the procurement of mortgage financing from the Bank and that even if he did breach the contract (which he denied), the third and second named respondents by their actions would have waived their right to terminate since they acted as if the contract was still in existence even after the elapse of the stated date for completion of the sale, i.e. 19th July 2006.

[14] On 10th March 2008, an ancillary claim was filed by the first and second respondents which sought to enjoin their Attorney, the Bank as an ancillary defendant to the claim. In the ancillary claim filed, the first and second respondents claimed against the Bank the difference between the sale price of \$400,000.00 and the current market value of the land at a rate of 11.5% per annum, in the event that they were found to be obligated to transfer the Property to the appellant.

[15] The first and second respondents posited in their ancillary claim that the Bank exceeded its authority under the POA, having breached its fiduciary duty when it failed to obtain a current valuation of the Property. It was asserted that in breach of that duty the Bank:

- (a) Failed to obtain a current valuation of the land.
- (b) Failed to endeavour to obtain the best sale price for the land.
- (c) Entered into an agreement with the appellant to sell the land at an undervalue for the sum of \$400,000.00.
- (d) Agreed to sell the land to the appellant knowing that the lots were purchased for the sum of \$665,000.00 in 1995 having given the first

and second named respondents a loan in the sum of \$500,000.00 for the purchase of the said lots.

- [16] The first and second named respondents emphasised that they never instructed the Bank to cancel the sale, thereby absolving them of any liability. However, they sought compensation from the Bank for the difference between the agreed sale price and the Property's actual market value.
- [17] The Bank countered these claims, asserting it had acted within the scope of the POA to settle the first and second respondents' debt. It asserted that in accordance with its duties, it did endeavour to obtain the best available price for the land on the market, having tendered the Property for sale over a period of several years. The Bank further asserted that it accepted the highest tender ever received for the Property and agreed to waive the balance of monies owed by the first and second named respondents to it, by virtue of delinquent unpaid loans granted to them. The Bank further argued that the first and second respondents were estopped from denying the validity of the exercise of the powers granted to it under the POA. Finally, it also agreed with the first and second respondents that the "time is of the essence" clause in the agreement justified rescinding the contract after the payment deadline passed.

The Judgment in the Court Below

- [18] The learned trial judge addressed four main issues in his judgment delivered on 8th November 2023. The first issue was whether the first and second respondents were liable for breach of the agreement for sale of the Property. The second issue was whether the Bank was liable for any breach of the agreement for sale since it had the power to sell under an irrevocable POA. The third issue was whether the Bank was liable to indemnify the first and second respondents owing to its failure to disclose the fact that it was acting as agent at the time when the agreement was made, and the fourth issue was whether the appellant breached the agreement for sale by failing to complete the sale by 19th July 2019, time being of the essence.

- [19] In delivering his judgment, the learned trial judge dealt with issues 1, 2 and 4 collectively and ultimately determined in his final orders that the ancillary claim should be struck out entirely. He determined that issue 3 would have only been relevant if liability were established via the underlying claim.
- [20] Early in his reasoning, the learned judge took the view that ultimately it matters not whether the first and second respondents gave the Bank instructions to cancel the sale. Rather, the pertinent issue to be decided is whether the Bank had followed its mandate under the POA in such a way as to bind the first and second respondents. He rationalised that the question of the first and second respondents' liability turns on whether the Bank had exceeded its authority under the POA by failing to obtain and consider a current valuation and the best possible price for the Property.
- [21] The learned judge concluded that the Bank had acted reasonably by assessing the market value of the property by obtaining the informed judgment of a qualified valuator as to the market value. To that extent he found that it could not be said that the Bank had acted unreasonably by agreeing to sell the Property at the price which it did.
- [22] The learned judge considered the disparate valuations advanced by each party in support of their case. In assessing the two valuation reports the judge took into account the possible range of market prices for the Property and he concluded that having regard to the range of market prices obtainable on a sale at that time, it cannot be said that the Bank had exercised its judgment and power of sale unreasonably. He observed that the mere fact that the valuation obtained from the Bank's valuer differed significantly from that of the defendants' was not conclusive evidence of negligence because valuation is not an exact science. He therefore found that there was no duty on the Bank to seek a further valuation so as to comply with their duty to the first and second respondents and he concluded that the Bank

had done all that was reasonable to obtain the true market value at the time of the sale.

- [23] The learned trial judge noted that judicial resolution of conflicting expert evidence requires preferring one expert's opinion over another based on factors such as alignment with primary facts, credibility, comparative expertise, objectivity and responses from cross examination rather than simply substituting the court's own opinion. Citing paragraph 15 of Carrington JA [Ag.]'s judgment in **Caribbean Banking Corporation v Alpheus Jacobs**,¹ he observed that a bank acting on a valuer's report is not inherently negligent unless the valuation is plainly unreasonable. He further found that the Bank's acceptance of a price above Mr. King's valuation also suggested, that it had considered the report, fulfilling its fiduciary duty to act in good faith under the POA by obtaining the best price available on a creditor sale as observed in **Scott Hauser (Executor of the estate of Richard Hauser, deceased) and another (Hauser & Hauser) v. National Bank of Anguilla Ltd.**²
- [24] The learned judge concluded that the first and second respondents had failed to establish on the evidence presented that the Bank had breached its fiduciary duty to them by failing to obtain the best price available or the market value of the Property. They further failed to demonstrate that the Bank's decision to sell the Property at the agreed price was the result of any conflict of interest. He therefore, concluded that the Bank did not act outside of the scope of the POA.
- [25] Having concluded that the Bank had not gone beyond the scope of the authority granted to it under the POA and had not breached its fiduciary duty to the first and second respondents, the judge went on to examine whether the Bank was at liberty to exercise its right to rescind the agreement for failure on the part of the appellant to complete the sale at the specified time. He found it indisputable that time was

¹ ANUHCVP2004/0010 (delivered 6th October 2008, unreported).

² AXAHCV2010/0025 (delivered 27th July 2012, unreported).

indeed of the essence in the transaction. He further found that there was no doubt that the appellant understood his obligations under the agreement – that the balance of the purchase price had to be paid by 19th July 2006. The judge found that despite this, there was no evidence that the appellant at any time after 19th July 2006 or prior to 10th August 2006 made any attempt at completing the sale by payment of the balance of the purchase price to the Bank which the Bank refused. He therefore concluded that the Bank was entitled to rescind the agreement for sale at any point subsequent to 19th July 2006.

- [26] The learned judge also found insufficient evidence of an implied or unequivocal waiver by the third respondent, despite the 22-day delay in cancellation, and rejected the appellant's explanation for the delay—namely, that the judicial hypothec registered against Mr. William Charles—as insufficient to justify specific performance. The learned judge concluded that in this case, there had been no agreement to extend time nor anything that amounted to waiver of the right to treat time as of the essence.
- [27] The learned judge further relied on **Brickles v Snell**,³ noting that when time is of the essence, specific performance ought to be denied even for minor defaults. On this basis, he found it irrelevant that the third respondent did not expressly cite the appellant's failure to pay the balance as the main reason for cancelling the sale, since the appellant was aware of his obligations and the deadline.
- [28] The judge then turned his attention to what he described as “a vexing and troubling issue” of whether the court can imply a term into the agreement for sale between the Bank and the appellant that completion was conditional upon the appellant being able to charge the Property by way of security for the purchase price; and whether such term was necessary to give business efficacy to the agreement for the sale of the Property. Ultimately the judge determined that it cannot be implied into the agreement that the completion of the sale was contingent on the appellant obtaining

³ [1916] 2 AC 599.

financing. The method by which the appellant obtained the financing was clearly of no concern to the Bank. In any event, it was not part of the written agreement between the parties that the sale would be completed upon the appellant obtaining financing and therefore so no such term could be enforced against the Bank.

[29] Having considered the totality of the evidence, the judge took the view that it was not enough to establish that it was a condition precedent to the closing of the sale that the appellant would obtain loan financing. The mere fact that the Bank had agreed to provide financing to the appellant on his application is not enough to imply a term into the agreement that completion of the sale was contingent on the appellant obtaining loan financing. There simply is no evidence to even suggest that the Bank agreed to finance the sale of the Property upon the acceptance of the appellant's offer to purchase. The judge felt compelled to find that no such term can be implied into the agreement to give efficacy to it or to permit it to work.

[30] The learned judge accepted the first and second respondents' arguments, in reliance on Articles 1601, 1604, 1616 and 1617 of the **Civil Code** to elicit that the first and second respondents could not be deemed liable for the rescission of the sale agreement. He also relied on the **Civil Code**, and adopted the reasoning set out in **Alsco Pty Ltd v Mircevic**,⁴ **Scott Hauser (Executor of the estate of Richard Hauser, deceased) and another v National Bank of Anguilla Ltd**, and **Caribbean Banking Corporation v Alpheus Jacob** in finding that the third respondent had not breached the sale agreement and was not liable to indemnify the first and second respondents.

[31] In accepting the first and second respondents' arguments, the learned trial judge also relied on Articles 1604 and 1616 of the **Civil Code**, which state that an agent cannot act beyond the authority expressly or implicitly granted by the principal. Accordingly, an agent who acts in his own name without such authority is personally liable to third parties, without prejudice to any rights those parties may have against

⁴ [2013] VSCA 229.

the principal. On this basis, he found that the first and second respondents did not breach the sale agreement, concluding that the third respondent, acting outside the scope of agency, cancelled the sale on its own initiative after receiving a letter from the first respondent, which in his view, merely invited it to reconsider the sale price.

[32] The judge therefore dismissed the appellant's claim entirely, allowing the Bank to retain the \$40,000.00 non-refundable deposit, and permitting the first and second respondents' counterclaim which sought to have the appellant remove the cautions registered against the Property.

[33] The learned judge further determined the first and second respondents were entitled to their prescribed costs on the substantive claim. Although the first and second respondents were unsuccessful on the ancillary claim, the learned judge declined to award costs to the Bank, on the basis that this issue would only have been relevant if the appellant had succeeded against the first and second respondents.

The Appeal

[34] Dissatisfied with the learned judge's judgment, the appellant filed his notice of appeal on 16th November 2023, in which he advanced 2 grounds (amended on 31st January 2024), as follows:

- (i) The finding of the learned trial judge that the appellant was in breach of the agreement was not open to him to make as it goes against the grain of the evidence and is contrary to the established legal principles.
- (ii) The learned trial judge misdirected himself and therefore erred in law when he found as fact and law that the Bank had not acted outside of the scope of the agency agreement and was not therefore liable to indemnify the first and second respondents in respect of any liability in the execution thereof as the said finding goes against the preponderance of the evidence which contradicts such a finding.

GROUND 1:- The learned trial judge's finding that the appellant was in breach of the agreement was not open to him to make as it goes against the grain of the evidence and is contrary to the established legal principles.

The Appellant's Submissions

- [35] The appellant submitted that he could only be in breach of contract if he failed or refused to fulfil his bargain under the agreement. He maintained that he never failed to fulfil his part of the bargain and that the balance of the purchase price was effectively paid when the mortgage facility was approved on 26th June 2006.
- [36] Assuming that his bargain under the contract extended to the registration of the hypothecary obligation, the appellant contended that he was actively executing that process when the agreement was cancelled. The appellant further contended that in rejecting this argument, the learned trial judge failed to take into account that the agreement spoke to the payment of the balance of the purchase price which the learned trial judge conflated with the registration of the hypothecary obligation.
- [37] Counsel for the appellant argued that any delay in the completion of the notarial work, was beyond the appellant's control. The appellant had to radiate a judgment registered against William Charles and was in a position to radiate the said judgment only after 26th July 2006. In the circumstances, his non-performance was not his fault but rather that of the respondents who caused a situation which interfered with the appellant's ability to perform his bargain under the agreement.
- [38] The appellant further argued that there can be no breach of contract when non-performance is justifiable by a reasonable or lawful excuse, such as an extraneous event that interferes with performance. Relying on **Minervitch v Café de Paris (Londres) Limited**⁵ and **Metrolands Investments Ltd v JH Dewhurst Ltd**⁶ he noted that equity would not allow rescission of a contract in such a situation.

⁵ 1 All ER 884 at page 885.

⁶ [1986] 3 All ER 659, per Slade LJ at 669.

[39] The appellant further asserted that a party seeking to enforce their strict contractual rights must themselves be able to fully discharge their obligations under the contract. He asked the court to note that on 19th July 2006, the Bank was not in a position to pass good title to the Property due to the judicial hypothec registered against the second respondent, which prevented the registration of the appellant's hypothecary obligation.

[40] The appellant also argued that the agreement did not expressly require him to seek an extension of time or notify the Bank of his delay, as the Bank was already aware—or should have been aware—that the judicial hypothec against the second respondent prevented the transfer of good title, making the delay attributable to it. Counsel for the appellant relied on Sir Martin Nourse's dictum at paragraph 28 of **Chaitlal and Others v Ramlal**,⁷ where the learned judge found:

“[28] 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 the sale of land in this country, but it does no more than express what would in any event be implied by law; see 42 (1999 reissue) *Halsbury's Laws of England* (4th Edn) 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 4 April 1974, Mr Mahase was in default through not having supplied Mr Ramlal with the appropriate information as to title.”

[41] Counsel for the appellant also submitted that, at law, the injured party is bound to communicate his acceptance of the other party's breach of the agreement. Counsel relied on the judgments in **Elise Meyer v Shoal Bay Development Corporation**⁸ and **Union Eagle Ltd. v Golden Achievement Ltd**⁹ in submitting that a repudiatory breach must be accepted by the injured party; if not, the contract remains in existence, and the breaching party may still tender performance. Counsel argued that in this appeal, the respondents never gave notice to the appellant at any time

⁷ [2003] UKPC 12.

⁸ AXAHCV0028/2010 (delivered 1st March 2012, unreported).

⁹ [1997] 2 All ER 215.

before the cancellation of the agreement that they considered it to be at an end because he failed to complete his obligation by 19th July 2006. It followed that the appellant was entitled to treat the contract as being extant.

- [42] The appellant submitted that the trial judge erred in finding that he breached the sale agreement by virtue of the effluxion of the sale deadline, contending the contract was treated as "extant" by the parties before its cancellation. Counsel for the appellant further submitted that at all material times each party accepted that the agreement was in force before it was cancelled. This is evident by the Bank's solicitors enquiring about judgments registered against "a Michael Joseph"; as late as 13th August 2006.
- [43] The appellant further submitted that the Bank, by its conduct of treating the contract as being in existence [evidenced by the Bank's solicitors inquiring about judgments against the second respondent as late as 13th August 2006], waived its right to avail itself of any supposed breach by the appellant for failing to complete the sale by 19th July 2006. Counsel for the appellant relied on the judgement in **Charles Richards Ltd v Oppenheim**¹⁰ and **Sim v Rotherham Metropolitan Borough Council etc**¹¹ in asserting that had the Bank considered the contract breached on that date, it ought to have positively communicated this to the appellant. Counsel therefore submitted that the learned trial judge erred in finding that there was no need to communicate the true reason for the sale's cancellation.
- [44] Lastly, in relation to the first ground, the appellant in relying on Professor Treitel's text - **The Law of Contract 11th Edition**¹² submitted that the first respondent's letter to the Bank on 7th August 2006, requesting reconsideration of the sale due to dissatisfaction with the selling price, followed by the sale's cancellation, constituted an anticipatory breach on the respondents' part. Although the POA was irrevocable

¹⁰ [1950] 1 K.B. 616.

¹¹ [1987] Ch 216, 254.

¹² GA Treitel, *Law of Contract* (11th edn, Sweet & Maxwell UK 1991) 857.

and the Bank was not obliged to follow such instructions, if it did refuse to carry them out, it would have been shielded from liability. However, the evidence suggests that a decision was taken by the Bank, to renounce performance under the agreement and in this regard, it is liable to the appellant for the breach of the agreement while acting on the first and second respondents' behalf as their agent.

- [45] Counsel for the appellant concluded that in any event, having regard to the contents of that letter of 7th August 2006, the preponderance of the evidence shows that the respondents' contention that the appellant was in breach of the agreement because time was of the essence of the agreement is an afterthought defence not supported by their own evidence.

The First and Second Respondents' Response

- [46] In response to the appeal, the first and second respondents generally submit that the appellant bears a heavy burden to demonstrate that the trial judge erred in assessing the evidence, exercising discretion, or that the decision exceeded the generous ambit within which reasonable disagreement is possible, considering appellate courts should only interfere with a judge's findings of fact and exercise of discretion in exceptional cases as per **Michel Dufour v Helenair Corp.**¹³
- [47] With regard to the first ground of appeal, the respondents submitted that the question of whether the period between the agreed closing date and the rescission date, constituted timely rescission, was a matter for the trial judge's discretion; and that the appellant has not established any basis which would justify appellate interference.
- [48] Counsel for the first and second respondent submitted that there were just three questions which require consideration of the Court. First: who breached the sale agreement? Counsel submitted that because time was of the essence it is clear that the appellant would have breached the contract when he failed to pay the balance

¹³ (1996) 52 WIR 188.

of the purchase price by the 19th July 2006. Counsel also submitted that the appellant's argument that effective payment occurred upon mortgage approval is nothing but sophistry which was correctly rejected by the trial judge. The agreement stipulated time was of the essence for the payment of the balance, not for the approval of the mortgage. The approval by the Bank's vetting lawyers was merely an acknowledgment that the hypothec document was in order and suitable for execution and registration. Such approval could not be equated with payment of the balance of the purchase price.

[49] The respondents also maintained that the trial judge rightly rejected the argument that the appellant's non-performance was justified by a judicial hypothec against the second respondent. They explain, aligning with the learned trial judge's reasoning that the debt would naturally be liquidated from the proceeds of the sale, and the radiation deed would only be signed upon the judgment creditor receiving payment.

[50] Second: Did the Bank waive the breach? Responding tersely in the negative, counsel submitted in order to constitute waiver, a party must make it clear that he or she does not intend to stick to the letter of the terms of the contract. He submitted that as far as the evidence was concerned, there was no unambiguous representation or conduct which would give rise to a waiver. Third: Did the Bank rescind the sale agreement? Counsel submitted that the Bank did in fact rescind the agreement on 10th August 2006 when its representative communicated unequivocally that the sale was quashed. Counsel submitted that regardless of the reasons advanced in the Bank's correspondence, it is clear that the appellant's failure to comply with his obligation to pay the balance of the purchase price when time was of the essence would also have supported rescission. Counsel cited in support the judgment in **C&S Associates UK Ltd v Enterprise Insurance Co Plc**¹⁴ which stands as authority for the principle that if at the time of rescission an inadequate reason is advanced, the innocent party can rely on the better reason as long as the better reason was in existence at the date of the rescission.

¹⁴ [2015] EWHC 3757 (Comm).

- [51] Applying the ratio of Baptiste JA in **Hillary Shillingford v Angel Peter Andrew et al**¹⁵ (applying **Beacon Insurance Company Limited v Maharaj Bookstore Limited**) counsel submitted that the appellant cannot demonstrate that the learned judge in this case was plainly wrong. He reiterated that what occurred on 10th August 2006 was a rescission rather than a repudiatory breach on the part of the Bank.
- [52] Counsel further submitted that the respondents were under no obligation to serve any notice of default indicating an intention to treat the contract as at an end. He argued that it is only when it is not clear that time is of the essence that the innocent party is required to give notice. Where as in this case the position is clear, once there was non-performance on the part of the appellant, the respondent bank was entitled to rescind without any further notice to the appellant.
- [53] Counsel also submitted that the appellant's breach (his failure to pay the balance of the purchase price by the time prescribed) could be relied upon to support the rescission. The judge having determined that in fact that the Bank was entitled to rescind any time after 19th July 2006, counsel concluded that communicating its position as of 10th August 2006 was not such a delay as to constitute a waiver.
- [54] Counsel for the first and second respondents further argued that the learned judge was well within his rights to conclude that the judicial hypothec against the second respondent was not a genuine case of delay. According to counsel, the judge was entitled to have regard to notorious and well established practices and procedures. Counsel further submitted that the existence of the judicial hypothec would not be an impediment to good title since the debt would be paid from the proceeds of sale and the radiation would have been signed together with all the other transactions simultaneously all presented to the registrar with clean title. It follows that the delay was inexcusable as it was within the appellant's ability to comply by 19th July 2006.

¹⁵ DOMHCVAP2011/0033 (delivered 24th November 2016, unreported).

The Bank's (the third respondent) Response

- [55] The Bank contested the appellant's appeal on all fronts, submitting that this Court should decline to interfere with the trial judge's findings of fact and exercise of discretion—echoing the first and second respondent's submissions. Relying on **Yates v Blue Sand Investments**,¹⁶ counsel for the Bank contended that an appellate court may only overturn factual findings where they are unsupported by evidence or demonstrably "plainly wrong." As to exercise of that discretion, counsel cited **Michel Dufour v Helenair Corp**, and submitted that intervention is justified only if the trial judge demonstrably misdirected himself in law.
- [56] In response to the appellant's first ground of appeal, the third respondent contended that the appellant's characterization of the time of the essence defence as an afterthought is misconceived as the agreement for sale expressly stipulated that this was the case. The Bank posited that the appellant was aware of his obligation to meet this deadline. Relying on **Halsbury's Laws of England**¹⁷ to emphasize that while equity historically treated time clauses flexibly in land contracts, counsel argued that precise compliance remains mandatory when expressly stipulated or implied by the contract's nature.
- [57] The Bank further submitted that the completion of the sale was not contingent on the appellant obtaining financing, and that no such term could be implied into the agreement, as it is not necessary for business efficacy in such circumstances, much like the case of **Lyra Sewer Collazo v Percival William**.¹⁸ Counsel for the Bank argued that the learned trial judge correctly rejected the appellant's claims that the delays in completing payment were beyond their control, because the judicial hypothec would have been discharged from the sale proceeds and it was the appellant's legal practitioner's responsibility to secure its radiation, which could have been alleviated by a letter of undertaking.

¹⁶ BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

¹⁷ Halsbury's Laws of England Contract (Volume 22 (2019)) 8.

¹⁸ BVIHCVAP2007/024 (delivered on 22nd September 2008, unreported).

[58] Furthermore, while acknowledging the general principle that a party initially citing inadequate grounds for termination may be found to have wrongfully repudiated the contract, the third respondent relied on **C&S Associates UK Ltd v Enterprise Insurance Company plc**¹⁹ to argue that this rule does not apply where the latter relies upon another, and adequate, reason. The Bank also submitted that there was no unambiguous representation that amounted to a waiver of the time of the essence stipulation.

[59] Regarding the appellant's argument about the Bank not presenting a witness to confirm reasons for cancellation, counsel for the Bank cited **Wisniewski v Central Manchester Health Authority**²⁰ as authority for drawing inferences from a witness's absence, noting that if the reason for absence is satisfactory, no adverse inference should be drawn. The Bank submitted that its officer – Mr. Michael Joseph's witness statement was submitted, and that the court could ascribe evidentiary weight to it despite his absence for cross-examination.

GROUND 2:-The learned trial judge misdirected himself and therefore erred in law when he found as fact and law that the Bank had not acted outside of the scope of the agency agreement and was not therefore liable to indemnify the first and second respondents in respect of any liability in the execution thereof as the said finding goes against the preponderance of the evidence which contradicts such a finding.

The Appellant's Submissions

[60] In relation to the second ground of appeal, the appellant asserted that the learned judge misdirected himself and erred in law when he found as fact and law that the Bank had not acted outside the scope of the POA, and was not therefore liable to indemnify the respondents in respect of any liability in the execution thereof.

¹⁹ [2015] EWHC 3757 (Comm) (21 December 2015).

²⁰ [1998] EWCA Civ 596.

- [61] Counsel for the appellant argued that this finding also goes against the preponderance of the evidence which was before the learned judge. He commended to the Court: (1) the POA; (2) the cross examination of Mr Andrew King and (3) the cross examination of Ms Giselle Casimir and (4) the two valuation reports presented by the respondents. With regard to the latter, counsel argued that the trial judge was entitled to reject the valuation report presented by the Bank because (1) the value of the Property in 1995 was higher than the value which was ascribed in 2006 and (2) the report omitted to state the comparative value of the lands in the vicinity which is a standard procedure with such valuations.
- [62] Counsel for the appellant submitted that having entered into an agreement with the appellant on behalf of the respondents; the Bank had the authority to complete the agreement despite any objection which may have been proffered by the respondents. He contends that the Bank failed to complete the sale in accordance with the authority granted to it by the respondents and offered no evidence to legally justify its decision to renounce the agreement.
- [63] The appellant therefore submitted that while the respondents are liable to the appellant for breaching the agreement, they are entitled to indemnification from the Bank for causing their breach and for the respondents' own breach of the POA.
- [64] Responding to the respondents' contention that the Bank acted beyond the scope of its authority in failing to obtain the best price available, the appellant noted that the Bank failed to produce any witness who could adduce evidence regarding the actions taken by it, leaving their case unsupported and suggesting a breach of duty owed to the first and second respondents.
- [65] The appellant further submitted that this issue turns on the construction of clauses 2 and 8 of the POA. The appellant submitted that clause 2 of the POA grants the Bank broad discretion in selling the properties, while clause 8 imposes a qualified duty to endeavour to obtain the best price, contingent on a valuation. Though these

clauses appear discordant, the appellant asserts that clause 8 qualifies the POA, requiring the Bank to act prudently in valuing the Property. This required the Bank to obtain a valuation to ascertain the true value of the Property and to seek to get the best possible price on the market.

[66] Applying the 2006 valuation of 424.00 per square foot, the appellant submitted that the duty imposed on the Bank was clearly not met because the Property would have been sold for a sum which was not remotely close to the market value.

[67] In support of this stance, the appellant relies on **Ming Siu Hung and Others v J.F. Ming Incorporated and Another**²¹ and **Brian Gonsalves v Shelly Joseph**²² where this Court in a judgment authored by Redhead JA, [AG] as he then was, overturned the learned trial judge's decision, finding that she improperly exercised her discretion by drawing unsupported inferences from the facts. The appellant contends that the Bank did not discharge its burden of proving it acted within the scope of its authority, and therefore the trial judge's conclusion to the contrary was plainly wrong.

The First and Second Respondents' Response

[68] Responding to the second ground of appeal, counsel for the first and second respondents reiterated the principle that the weight attached to evidence is a matter for the trial judge's discretion, and should not be interfered with lightly. Citing the judgments in **Hillary Shillingford v Angel Peter Andrew et al** and **Ming Siu Hung v J F Ming Inc. and Another**. Counsel submitted that it is not a proper ground of appeal to argue that a trial judge did not give sufficient weight to particular evidence or that he overlooked one of more pieces of evidence.

[69] Counsel submitted that the learned judge reviewed the conflicting reports and rightly concluded that the disparity in valuations did not indicate the Bank acted in bad faith.

²¹ [2021] UKPC 1.

²² ECSC Civil Appeal No.9 Of 2002 at paragraphs 6,9,12 And 13.

Property appraisal not being an exact science, counsel argued that the Bank was under no duty to seek a further valuation when faced with such divergent valuations.

- [70] According to counsel for the first and second respondents, the trial judge would have examined all of the evidence and concluded that the respondents had not shown that the Bank had breached its fiduciary duty by failing to obtain the best price or that any conflict of interest presented on the facts. He submitted that there was nothing objectionable in the judge's approach, analysis or conclusion. Consequently, the learned trial judge rightfully found that the Bank did not act outside the scope of the POA.

The Bank's (the third respondent's) Response

- [71] In oral submissions, the Bank took issue with the way in which this ground of appeal was framed and pursued. Counsel for the Bank pointed out that in the court below, the appellant initiated his claim as against the first and second respondents and not against the Bank. She submitted that it is therefore not open to the appellant to advance arguments on appeal against the Bank which is a party that he did not sue. Counsel argued that this is not a ground of appeal which the appellant should be permitted to pursue as against the Bank.
- [72] Notwithstanding this position, the Bank agreed with the learned judge's reasoning and findings. Counsel for the Bank submitted that the weight accorded to the relevant expert evidence was within the trial judge's discretion and he submitted that the appellant has a heavy burden to prove that the learned judge was blatantly wrong. Counsel for the Bank further submitted that it is pellucid that the judge carefully considered the evidence and embarked on an expansive evaluation of the evidence. The Bank submitted that the judge was aptly placed to test the evidence before him and where necessary weigh and determine the value of each statement and/or item of documentary evidence before him.

- [73] The third respondent rejected the appellant's contention that clauses 2 and 8 of the POA are discordant. Instead he argued that they impose complementary obligations. He submitted to the Court that a strict approach is to be taken when construing a power of attorney and he cited in support the judgment in **Bryant, Powis & Bryant Ltd. v La Banque du Peuple**.²³ After construing the terms of the POA, counsel submitted that all of the applicable pre-conditions needed prior to the exercise of the power of sale were in fact satisfied prior to the Bank acting. While the Bank retained a broad discretion over sale terms, it was nevertheless bound by the fiduciary duty inherent in the agency relationship to act prudently, a duty it discharged by commissioning Mr. King's valuation and advertising the properties repeatedly between 2003-2006.
- [74] Turning to the critical issue of whether the Bank obtained the best price, counsel for the Bank submitted that the duty of a mortgagee/agent in obtaining the best price is seemingly fact sensitive and dependent on the prevailing circumstances surrounding the sale. Counsel agreed that there was a disparity in the reports, but he underscored that the trial judge correctly applied the test from **Cuckmere Brick Co Ltd v Mutual Finance Ltd**²⁴ in determining which evidence was to be preferred.
- [75] Counsel for the Bank submitted that the difference in the valuations is not conclusive evidence of negligence or that the Bank had failed to obtain the best price. In the absence of evidence to the contrary, it was entitled to proceed on the findings of a duly qualified expert in the field. The Bank was required only to act in good faith and take reasonable care to secure market value, not to guarantee an optimal outcome. To that end, the Bank obtained a valuation from a qualified expert (Mr. King) prior to the sale and to the extent that there was any disparity between his valuation and Mrs. Hull-Casimir's valuation (which notably included additional parcels) this was not conclusive evidence of negligence.

²³ [1893] A.C. 170.

²⁴ [1971] Ch 949.

- [76] Furthermore, the Bank accepted the highest bid of \$400,000.00 which far exceeded the valuator's assessment of the Property's worth, also allowing for the write-off of a significant debt. In support of this stance, the Bank also relied on the ratio in **Caribbean Banking Corporation v Alpheus Jacob**, in support of the proposition that a bank is not obliged to seek a further valuation if the initial one is not demonstrably incorrect.
- [77] Further, contrary to what the appellant would have asserted, the Bank did in fact adduce evidence regarding the actions taken by the Bank to establish the legality of its actions. Counsel commended the untraversed witness statement of Mr. Michael Joseph, a representative of the Bank to the Court. Counsel submitted that this evidence reveals that the sale of the subject lots was not a hasty one. It would also reveal that for several years the Bank attempted to sell the Property and that the respondents were given every opportunity, even after the proposed sale to make a proposition in settlement of their debt. Counsel further submitted that while one may argue that the proposed sale price might appear to be on the low side, market conditions were taken into account.
- [78] Further, when the Property was listed for sale, there was no exceptional number of purchasers willing to buy the Property. Prior to the listing of the properties in 2006, the Bank attempted to sell said lots by advertising the same for sale in the Voice Newspaper on 4th October 2003 and had received only one written bid. This was just one instance of several attempts made by the Bank to sell the lots. However, given the topography of the properties they were unable to do so. Subsequent to this failed attempt, in 2006 another attempt was made to have the Property sold. As such, the Property was advertised in local newspapers and a series of bids were received. Of all the bids received the most noticeable was that of the appellant who placed the highest bid of \$400,000.00, which was significantly higher than the assessed value of the Property.

[79] While there is no absolute duty to advertise widely, it was submitted that the successive attempts to sell the Property evinces clearly that the Bank harboured no intention of disposing the Property in breach of their duties by accepting the lowest bid or a bid below the market value.

[80] Counsel concluded that there was a large sum of money owed to the Bank and there was no suggestion that the respondents were in a position to pay either the interest accrued or the principal sum outstanding. The Bank made every reasonable effort and took all the necessary steps to obtain the best price available at the time of the sale and therefore, cannot be said to have sold the Property at an undervalue since the agreed purchase price far exceeded the valuator's assessment of the worth of the land.

ANALYSIS AND CONCLUSION

General - Appellate Approach

[81] Given the way in which Ground 1 of this appeal has been framed, it is apparent that it raises a challenge to the learned judge's findings of fact and law. It is therefore critical that this Court first considers the well-established principles guiding the approach which an appellate court should adopt in considering this challenge.

[82] When appealing a mixed question of fact and law, appellate courts apply a standard of review that is highly deferential to the trial judge's factual findings but permits more intensive scrutiny of legal conclusions. This approach (which can be summarised as exercising "appellate restraint") has been extensively examined in numerous judicial authorities.

[83] An appellate court must therefore distinguish between errors of law and errors of fact within the overall decision of the court below with the fundamental distinction for appellate review being that trial courts are the "tribunal of fact," while appellate courts focus on errors of law.

[84] Perhaps the most comprehensive statement is set out in judgment in **Group Seven Limited v Notable Services LLP**²⁵ where the English Court of Appeal put the position the following terms:

“21. Before turning to the issues themselves, it is important to bear in mind the proper approach of an appeal court. First instance decisions will contain judicial conclusions that fall on a spectrum ranging from pure findings of primary fact at one end to pure questions of law at the other. In between are multifactorial assessments, evaluations and inferences drawn from primary facts, exercises of judicial discretion and mixed questions of fact and law. At one end of the spectrum, the appeal court will rarely even contemplate reversing a trial judge's primary findings of fact. This appellate restraint extends also to the trial judge's evaluation of the significance of factual findings or the inferences to be drawn from them. The degree to which this restraint should be exercised in the individual case may, however, be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case or from first-hand experience of the testing of the evidence. In the end, however, no first-instance judicial conclusion is altogether immune from appeal and where a decision is shown to be wrong or to result from a serious procedural error, it is the duty of the appeal court to say so.”

[85] These long-standing principles, based on a combination of practical and policy considerations, have been thoroughly analysed by the English courts in a number of decisions.²⁶ The following extract from **JSC Bank v Ablyazov**²⁷ explains the rationale:

“39. Even where it could in principle be done, for an appellate court in a case involving a substantial body of evidence to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making. Unlike conclusions of law, findings of fact have no status as precedent in future cases and are therefore only capable of affecting the result of the case at hand. Considerations not only of efficiency in time and cost but also of fairness dictate that the judge's conclusions on such points should generally be treated as final. In the words of White J giving the opinion of the United States Supreme Court in *Anderson v City*

²⁵ [2019] EWCA Civ 614.

²⁶ *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Twinsectra v Yardley* [2002] UKHL 12; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; *Re B (A Child)* [2013] UKSC 33; *McGraddie v McGraddie* [2013] UKSC 58; and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41.

²⁷ [2018] EWCA Civ 1176.

of Bessemer [1985] 470 US 564, 575 (quoted with approval by the UK Supreme Court in the McGraddie case at para 3):

‘... the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road'" ...’

40. For these reasons the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is ‘plainly wrong’: see e.g. McGraddie v McGraddie, [2013] UKSC 58; [2013] 1 WLR 2477; Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as “a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence” (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion ‘cannot reasonably be explained or justified’ (ibid). As Lord Reed also stated in the Henderson case (at para 62):

‘It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached.’”

- [86] This approach has been adopted in numerous judgments of this Court including **Yates Associates Construction Company Ltd v Blue Sand Investments Ltd** and **Flat Point Development Limited v Mary Dooley**.²⁸ In the latter case, this Court also made clear that it is not the function of an appellate court to go trawling through the evidence in order to determine whether the findings of fact by the judge were correct. At paragraphs 38-39 of the judgment, the Court stated:

²⁸ ANUHCVP2015/0029 (delivered 13th March 2019, unreported).

"[38]...It is not open to this Court to seek to have a re-run of the trial and to determine who is to be believed. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to the appellate court.

[39] It is the function of the appellate court to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle. After this has been determined, the appellate court has to stand back and determine whether the findings of fact were open to the judge to make. If they were, the appellate court should not interfere."

[87] Questions of law on the other hand concern the interpretation and application of legal rules and as earlier indicated, appellate courts can review a question of law *de novo* (afresh) and substitute their own legal judgment for that of the lower court.

[88] An issue involving a mixed question therefore requires the appellate court to analyse the different components separately as a mixed question often arises when applying a legal standard to a set of established facts. The standard of review applied varies depending on the "mix" of the mixed question. If the mixed question is "essentially factual," the appellate court will give significant deference to the trial judge's determination. If the mixed question turns primarily on a legal interpretation or the application of a legal rule, the appellate court's review is much closer to a *de novo* standard, allowing it to reverse the lower court's decision if it finds an error in the application of the law.

[89] For an appeal involving a mixed question to succeed, the appellant must therefore demonstrate a clear error in either the trial judge's reasoning or legal analysis. Taking into account these statements of principle, I now turn to consider the grounds of appeal.

GROUND 1

The Law – What are the rights and obligations of a buyer and a seller/mortgagee in possession in the sale of mortgaged land following auction.

- [90] Generally, the form and contents of a contract for sale by auction do not differ materially from a contract for sale by private treaty, since the contract comes into existence when the Property is knocked down to the highest bidder and the contracts are normally signed at the close of the sale.
- [91] Best practice dictates that the particulars of the Property and special conditions are read out at the time of the auction or are made available upon request. However, while the mortgagee will generally warrant that the purchaser will get a good title free from the mortgage (and prior interests), very often a mortgagee will sell a property under its power of sale with no title guarantee whatsoever. This is because mortgagees have little, if any, personal knowledge of the property or its history beyond their security interest.
- [92] This means that a potential bidder/purchaser would have no recourse against the mortgagee in possession if it subsequently turns out that there are other defects like unregistered rights or title flaws before bidding or that they were otherwise not entitled to sell the property. This makes it vital for a potential bidder/purchaser to carry out a thorough legal examination of the title and the mortgage documentation. Searches may be carried out by the interested bidder before the auction or, in the alternative, the contract may provide for searches to be made afterwards and afford the potential bidder/purchaser the contractual right to rescind if the certificate of search reveals adverse entries not referenced in the contract.
- [93] Once the contract is formed, the obligations of the parties are otherwise consistent with that which obtains in a sale by private treaty. In respect of the purchaser, he is contractually committed to completing the purchase by paying the full purchase price within the time prescribed for completion. Where completion dates are agreed

upon, if the contract states that "time is of the essence", any delay in payment constitutes a breach of the contract. The party at fault is debarred from enforcing the contract while the other party is free to pursue his remedies for breach of contract if he chooses.²⁹

[94] It is common ground in this appeal that in 2005, the Bank advertised the Property for sale by auction on behalf of the respondents. Intent on offering a bid for the purchase of the same, the appellant carried out a site visit and consulted a building consultant and a geotechnical engineer. Content with these consultations, the appellant made a bid to purchase the said land for the sum of \$400,000.00.

[95] On 19th June 2006, the Bank advised the appellant that his bid was accepted, and he consequently paid a 10% deposit of \$40,000.00. The details of the agreement were unfortunately not the subject of a formal contract but were in fact framed in a letter sent by the Bank to the appellant. The relevant correspondence was signed by both parties and provided as follows:

"We refer to your offer received on June 12, 2006 to purchase the above at a price of \$400,000.00 and confirm our willingness to accept the same.

The conditions of sale will be a non-refundable down payment of 10% (\$40,000), immediately on acceptance of this offer with the balance due and payable no later than July 19, 2006 time being of the essence of this agreement.

We confirm this property will be sold free of encumbrances and with vacant possession but subject to all rents, rates, taxes and other charges (if any), which may be due at the time of this sale." (Emphasis added)

[96] Thereafter, the appellant applied to the Bank for a loan facility in the sum of \$360,000.00 to settle the balance due on the purchase price. That loan facility was approved and formal correspondence setting out these terms was issued by the Bank on 26th June 2006.

²⁹ Parkin v Thorold (1852) 16 Beav. 59

[97] Correspondence of even date was sent by the Bank to the appellant's attorney on 26th June 2006 in which the Bank instructed the attorneys to:

"Kindly prepare the Mortgage in our favour and on completion of the document forward same to our solicitors, McNamara & Company for vetting. We require confirmation on the attached certificate that you have searched the title to the property at both registries and all rates; property and income taxes employee income taxes and NIS have been paid up to date.

Please note that the Attorney for this transaction must be complete (sic) in accordance with the Bank's power of attorney Instrument No. 833/2002." (Emphasis added)

[98] It is important to note that this letter was acknowledged (counter-signed) by the appellant's attorney without any reservations.

[99] The appellant failed to pay the balance of the purchase price by 19th July 2006. However, in the court below, the appellant advanced a multi-layered argument in support of his contention that he was not in breach of the agreement for sale and that the Bank was not entitled to rescind that agreement. None of the arguments advanced found favour with the learned judge.

[100] First, the appellant invited the court having regard to all the surrounding circumstances of the agreement to draw the reasonable inference that the balance of the purchase price was ostensibly paid on 26th June 2006 when the appellant's mortgage loan facility would have been approved by the Bank.

[101] By way of alternative argument, the appellant pointed out that there was a judicial hypothec registered against the second respondent which would have impacted the title to Property. This judicial hypothec would have had to be radiated and that involved obtaining a power of attorney from the judgment creditor in order to execute the necessary radiation and discharge documentation. The appellant accords blame squarely at the feet of the respondents alleging that – "Any delay in the completion of the notarial work in relation to the agreement was caused by the time and effort

spent on radiating the judgment debt of Mr. William Charles, a principal of RBTT Bank Caribbean Limited".³⁰

- [102] According to the appellant, these circumstances demonstrated that the delay in completion was not attributable to any fault on the part of the appellant and that the Bank was either aware or ought to have been aware of these challenges. Counsel for the appellant submitted that there can be no breach of contract when non-performance is justifiable by some reasonable or lawful excuse such as would have obtained here and the Bank was not permitted to rescind the agreement for sale in circumstances.
- [103] By way of further alternative argument, the appellant submitted that a party seeking to insist on his strict contractual right must first also be in a position to fully discharge his obligation under the contract. He reiterated that on the 19th July 2006, the respondents would not have been in a position to pass good title to the Property because of the extant judicial hypothec registered against the second respondent which would have prevented the registration of the hypothecary obligation which the appellant wished to execute and register over the Property in favour of the Bank. They therefore could not insist on their strict legal rights to rescind the contract.
- [104] Finally, the appellant argued that in any event at law the injured party is bound to communicate his acceptance to the other party's breach of an agreement. If the injured party fails to accept the repudiation, the contract remains in existence and the party in breach may tender performance. The appellant argued that the Bank failed to give the appellant notice of its intention to rescind the agreement for sale on account of his non-completion within the stipulated time and therefore he was entitled to treat the agreement as still subsisting. This submission bolstered his argument that the Bank would have effectively waived the purported breach of the agreement for sale by their conduct. The relevant conduct cited and relied upon by the appellant is (i) the Bank informing the appellant in 2006 that the agreement was

³⁰ Witness statement of Ms Henry Collymore.

cancelled because the first and second respondents were not in agreement with the selling price and (ii) the Bank's solicitors making an inquiry in August 2006 about a judgment against a person named Michael Joseph and steps taken in the wake of that inquiry.

- [105] On appeal, the appellant has largely repeated the arguments advanced in the Court below contending that judge would have erred in fact and law in rejecting the same. Having reviewed the learned judge's reasoning and the submissions advanced by all sides in this appeal, I cannot agree.

The Purchaser's obligation to pay the Purchase Price – Time being of the Essence

- [106] I have no hesitation in rejecting the appellant's contention that the balance of the purchase price would have ostensibly been paid on 26th June 2006 when his loan facility was approved. While approval is a positive step, it is not enough. Where a bank signifies that a mortgage has been approved, this represents the bank's promise to lend, but the actual transfer of funds may depend on any number of other factors including fulfilment of closing conditions and timing. The bank's approval only means funds can be disbursed, not that they have been or will be paid. It follows that if the sale agreement specifies a payment timeline, missing that date could be tantamount to a breach, (regardless of bank approval) allowing the vendor to cancel the sale, keep deposits, or take legal action, unless the contract is formally extended or renegotiated.
- [107] The appellant's argument appears to be premised on the peculiar facts of this case which see the Bank (*qua* mortgagee) acting as agent for the vendors (the respondents) while appearing to grant a loan facility to the purchaser (the appellant) to facilitate payment of the purchase price. Notwithstanding, the seemingly intermingled nature of these dealings, I am not satisfied that this would *without more* warrant a departure from the usual mode of payment. Business efficacy would demand no less.

[108] In support of the next argument that the Bank was not permitted to rescind the agreement for sale in circumstances where the appellant's non-performance was justifiable by some reasonable or lawful excuse that interfered with his performance of his obligations under the agreement for sale, counsel for the appellant cited in support the English cases of **Minnevit v Café de Paris (Londres) Limited**³¹ and **Metrolands Investments Ltd v JH Dewhurst Ltd**.³² In the former case, the defendant was held not to be in breach of its contract with a group of musicians to play for two of the six days for which they were contracted to play because on those two days all places of public entertainment had to close due to the death of the King. He was, however, held to be in breach of contract by refusing to permit them to play for the following four days. This is an example of a case where a supervening event gave a temporary excuse or defence for non-performance but did not give rise to frustration of the contract.

[109] In **Metrolands Investments**, the lease contained a tenant's break option exercisable at the 14th year by giving between 3 and 6 months' prior notice. Essentially, the question to which the court had to direct its mind was whether there is the proper intention to impute to the parties, from the words which they have used, the intention that the landlord shall lose his right to a review if the stipulated timetable is not strictly adhered to in the relevant respects? The court determined that notwithstanding that there was a clear relationship between the time limits in the rent review clause and those in the break clause, this was not sufficient to rebut the presumption that time was not of the essence in respect of the date by which the arbitrator had to make his decision on the rent review.

[110] In my judgment, neither of these authorities provides useful assistance to the appellant. Generally, if (as in this appeal) time is essential, a party must perform in a timely manner otherwise, the other party can end the contract. However, it is trite

³¹ [1936] 1 All ER 884 at page 885.

³² [1986] 3 All ER 659, per Slade LJ at 669.

law that although a clause making time of the essence makes deadlines critical conditions, a lawful excuse (like frustration or impossibility) might excuse delay.³³

[111] In this appeal, the appellant was prima facie in breach of his obligation to pay the balance of the purchase price by the date prescribed. The question which arises is whether the appellant had any lawful excuse for non-performance by the date prescribed.

[112] The appellant submits that there is a lawful excuse for non-payment of the balance of the purchase price by the 19th July 2006. Briefly, he submitted that on 26th June 2006, his attorneys had received instructions to prepare a mortgage debenture, sale deed and related documents but before they could forward the same for vetting they encountered a major difficulty – the existence of an un-radiated judicial hypothec or judgment debt against the second respondent who resided overseas and acting through a power of attorney. The appellant therefore submitted that his non-performance was not his fault but that of the respondents.

[113] The learned judge dealt with this issue at paragraphs 166 – 168 of his judgment. Noting that the appellant's case was largely bolstered by the evidence of Ms. Henry Collymore who opined on the length of time that it would have taken for all the procedural steps in a transaction to have been completed, the learned judge observed that this evidence was not altogether alien to the vagaries of local conveyancing practice. The judge refused to accept that this was a reasonable explanation for the delay or that the cause for the delay lay at the feet of Mr. Charles and the Bank and at paragraphs 167 – 168 he reasoned as follows:

“[167] The transaction involved was what has been termed a contemporaneous transaction as far as conveyancing practice in this jurisdiction is concerned. All that the Bank would be concerned with was that its security over the property was duly registered as a first existing charge against the property. In order for that to occur the radiation would have to be registered either before the deed of sale and hypothec or presented for registration together with the deed of sale and the hypothec.

³³ Cricklewood Property & Investment Trust Ltd v Leighton Investment Trust Ltd [1945] AC 221, at pp233-234

This is not an unusual practice but indeed a common practice. All that was required at the vetting stage was approval of the hypothec, the deed of sale and an approved draft of the radiations.

[168] In as much as the claimant has sought to have the court adopt the inference that the delay was attributable to Mr. Charles' indebtedness or that the Bank was somehow responsible by failing to adhere to its undertaking in the agreement to convey the property free and clear of all encumbrances, the court finds any such inference untenable. The judicial hypothec would obviously have had to be discharged from the proceeds of the sale. In any case, it would not have been necessary for the radiation to have been signed at that stage. Indeed the radiation would have only been signed upon the judgment creditor receiving payment. Furthermore, it did not appear to be the responsibility of either Mr. Charles or the Bank to obtain a radiation since clearly the claimant's legal practitioner had assumed the responsibility of their own initiative for securing the same."

[114] Again, I can find no basis upon which to interfere with the judge's reasoning. Certainly, the appellant has not advanced any cogent reason to depart from these findings and in the absence of the same, this Court is obliged to accept that this summarises the style of conveyancing prevalent in St. Lucia.

[115] Although counsel for the appellant would have contended that it was not open to the judge to rely on his own personal knowledge of conveyancing practice in St. Lucia³⁴ during his oral submissions before this Court, counsel for the appellant agreed that the conveyancing practice in St. Lucia was as described by the judge.

[116] A similar point of distinction would have occupied the Judicial Committee of the Privy Council in **Edward Wong Finance Co. Ltd. v Johnson Stokes & Master**,³⁵ an appeal from the Court of Appeal of Hong Kong. In that case, the plaintiff finance company and prospective mortgagee brought an action against the defendant solicitors claiming that they had failed to exercise care, skill and judgment in the performance of their duty to protect its interests in a mortgage transaction in Hong Kong.

³⁴ Brian Gonsalves v Shelly Joseph Civil Appeal No.9 Of 2002 (delivered 24th May 2004, unreported).

³⁵ [1984] A.C. 296.

[117] The Board, noted that the normal method of completing a contract for the sale of land in England is for the purchaser's solicitor to deliver to the vendor's solicitor a draft for the balance of the purchase money in exchange for an executed grant of the land or interest in the land contracted to be sold; if the property is subject to a mortgage, the mortgagee will either be a party to the grant and receive the whole or part of the purchase money by way of redemption; or he will execute a separate release of his charge in return for the redemption money; if the property purchased is to be financed by a new mortgage, the loan will be made against delivery of the executed grant and instrument of charge. In other words, the payment of money and perfection of title are simultaneous transactions. The Board however was forced to acknowledge that this was not the practice in Hong Kong. In that country, it was an established conveyancing practice for purchase money to be advanced to a vendor's solicitor in return for undertakings to forward executed documents of title. The Board considered the dicta of Roberts C.J., who delivered the leading judgment in the Court of Appeal, that:

"Virtually every conveyance and mortgage completed in Hong Kong within living memory has been effected by what has become known as the 'Hong Kong style' of completion; I shall refer to it as such. The essence of the Hong Kong style is that the solicitor who is acting for the purchaser/mortgagor forwards the purchase price to the vendor's solicitors (whether by cash, cashier's order, certified cheque or ordinary cheque) in return for an undertaking by the latter to forward the necessary documents of title, duly executed, to the purchaser's solicitor within a stated period."

[118] Their Lordships made clear that they had no reason to doubt the truth of that assessment. The prevalence of the Hong Kong style of completion was established beyond a peradventure. It is determined that it was peculiarly well adapted to the conditions in Hong Kong and presented obvious advantages to both solicitors and their clients. Their Lordships agreed to say nothing to discourage its continuance.

[119] Applying this judgment to the appeal at bar, this Court is simply not in a position to derogate from the judge's findings which are premised on what he described as the conveyancing practice in St. Lucia. This is especially so when this description is not disputed by any of the parties in this appeal.

- [120] Moreover, this Court cannot ignore that by countersigning the Bank's letter of instruction, the appellant's attorneys would have agreed to assume the critical responsibility of searching the title to the Property at both registries; ensuring further that all rates; property and income taxes, employee income taxes and NIS have been paid up to date and providing certification of the same. Assuming that this was the case, it seems incongruous that the appellant would then purport to lay the blame elsewhere for any delay in completing the process which would ensure that it secured the relevant funds to pay the purchase price in a timely manner.
- [121] It would seem that this reasoning would also be equally applicable to the appellant's further submission that the respondents could not in any event insist on their strict contractual rights because they were not in a position to fully discharge their obligations under the agreement. The appellant argued that by 19th July 2006, the respondents would not have been in a position to pass good title to the Property as there was a judicial hypothec registered against the second respondent which prevented registration of the intended hypothecary obligation the appellant executed over the Property in favour of the Bank.
- [122] Counsel for the appellant cited the Privy Council judgment in **Mungalsingh v Juman**³⁶ in which the Board, upheld the Court of Appeal of Trinidad and Tobago's decision that Mr. Juman was entitled to specific performance of a 2006 agreement for the sale of a property. In that case the parties entered into an agreement, dated 13th September 2006, under which the appellant agreed to sell to the respondent a property. The respondent paid a deposit. On 28th December, the appellant's attorney wrote to the respondent referring to the agreement, stating that the respondent had orally agreed to complete within 90 days of 13th September, and calling upon him to pay the balance of the purchase and complete the transaction on or before 31st January 2007, as to which time would be of the essence. There was no reply until 14th February 2007, when the respondent's attorney wrote saying that he wished to complete, but the appellant's failure to provide the water and sewage authority

³⁶ [2015] UKPC 38 at paragraphs 12, 23 and 24.

certificate (WASA certificate) and the land tax receipt (the Documents) was causing the delay. In May, the appellant's attorney wrote saying the transaction was at an end and returning part of the deposit. The partial return of the deposit was not accepted by the respondent, who then investigated the position with regard to the water rates and land tax owing in respect of the property. He obtained the WASA certificate and discovered that there was outstanding land tax, which he paid in July. The respondent was then prepared to complete the agreement and, on discovering that the property was being re-marketed by the appellant, he issued proceedings seeking specific performance of the agreement.

[123] The dispute centred on whether Mr. Mungalsingh had shown good and marketable title before issuing a notice to complete, which he claimed entitled him to terminate the agreement due to Mr. Juman's failure to pay the balance. A critical factor in that matter was the fact that the trial judge would have heard evidence of conveyancing practice in Trinidad and Tobago. This evidence would prove critical in the Board's analysis and ultimately determinative of the issue in dispute.

[124] First, the Board considered what is meant by good and marketable title. At paragraphs 18 -19, Lord Neuberger would have observed:

"18. ..., it appears that (subject to the terms of the relevant contract of sale) good marketable title is what the court will require before it forces a property on an unwilling buyer. It is unsurprising that the court will not insist on a title being accepted unless it is marketable. Further, when it comes to land and buildings, the natural presumption, at least in the absence of evidence to the contrary, would be that there is only one market, which one would expect to include institutional mortgagees.

19 The Board also **finds it very hard to accept the notion that the courts would force on a purchaser a title which would be unacceptable to a reasonable mortgagee, and Mr Chadeesingh explained that his view as to what constituted "good and marketable title" was based on his experience of what a bank would expect as a secured lender.** This is also consistent with what is said in Megarry & Wade: The Law of Real Property (8th ed, 2012), para 15-075." (Emphasis added)

[125] At paragraphs 20-22 of the judgment the import of the relevant conveyancing practice is considered

“20. More particularly, Mr Chadeesingh said, and the Judge accepted, that conveyancing practice in Trinidad and Tobago was that good title was not shown unless the seller produced the Documents. On the face of it at any rate, there is no reason to doubt this. Unpaid land tax gives rise to a charge on the relevant property (see section 18 of the Lands and Buildings Taxes Act), and unpaid water rates and unpaid land tax can each result in distraint on, or even the sale of, the property concerned (see sections 7-13 of the Rates and Charges Recovery Act, section 74(5) of the Water and Sewerage Act and sections 22-27 of the Lands and Buildings Taxes Act respectively). Accordingly, it is easily understandable why a buyer of property would wish to be sure that neither water rates nor land tax were owing in respect of that property before he completes his purchase.

21. Mr Beharrylal argued that requirement for the production of the Documents was not, as a matter of law, capable of being within the ambit of a requisition on title. The precise limits on what constitutes a good title or a valid requisition are not entirely easy to define, as perusal of paras 5.002 and 5.061-5.062 of *Emmet and Farrand* and of para 15-082 of *Megarry & Wade* shows. Thus, even if Mr Mungalsingh was obliged to produce the Documents, it might be argued that it would have been good enough to produce them at actual completion – i.e. that their production was a matter of conveyancing rather than a matter of title.

22. The questions whether the Documents must be produced by a seller, and, if so, whether their production is a matter of title, must, at least to some extent, be governed by the general practice of conveyancers in the jurisdiction in question. (That is supported by the judicial observations quoted at the beginning of para 5.002 of *Emmet and Farrand* and by the “doubt” referred to in para 15-082 of *Megarry & Wade*). In the present case, it appears to the Board that the evidence of Mr Chadeesingh, coupled with the fact that unpaid water rates and land tax can lead to distraint on, or even the sale of, the relevant property, renders it impossible for Mr Mungalsingh to challenge the Judge's conclusion that in Trinidad and Tobago the vendor must produce the Documents before good title is shown.”

[126] The Board ultimately concluded at paragraph 23 of the judgment:

“In those circumstances, it was not open to Mr Mungalsingh to serve notice to complete, making time of the essence, as he purported to do on 28 December 2006, as he had not shown good title by that date – see *Cole v Rose* [1978] 3 All ER 1121 and *Chaitlal v Ramlal* [2004] 1 PCR 1. While it is unnecessary to decide the point, it should be added that, even if production of the Documents had been a conveyancing matter, it may well not have assisted Mr Mungalsingh's case, as he had not obtained the Documents by the date which he had prescribed as the completion date in his letter of 28 December 2006.”

[127] These extracts from the Board's judgment are instructive. The learned Judge's observations at paragraphs 167- 168 seems to indicate that the un-radiated judgment debt would not have impacted the title because in the words of the learned judge:

"The judicial hypothec would obviously have had to be discharged from the proceeds of the sale. In any case, it would not have been necessary for the radiation to have been signed at that stage. Indeed the radiation would have only been signed upon the judgment creditor receiving payment. Furthermore, it did not appear to be the responsibility of either Mr. Charles or the Bank to obtain a radiation since clearly the claimant's legal practitioner had assumed the responsibility of their own initiative for securing the same."

[128] Again, the appellant having advanced no position to the contrary, this Court should be loath to interfere not only with the statement of conveyancing practice in St. Lucia but with the conclusions reached in the wake of its application.

[129] In oral submissions before this Court, counsel for the appellant refined the argument submitting that the critical cause for the delay was the fact the radiation deed (for the judicial hypothec) would have to be executed by his lawfully appointed attorney (given that the judgment creditor was out of state) and that this power of attorney would only have been registered on 26th July 2006 and submitted to his attorney sometime thereafter.

[130] I am not persuaded of the force of this argument. The documents before this Court reflect that following correspondence with Mrs. Shirley Lewis, (counsel for the judgment creditor, John Grable Exports) in early July 2006, counsel would have deposited with a local notary royal, the power of attorney executed by the judgment creditor on 7th July 2006.³⁷

[131] Given this timeline, it is unsurprising that the learned judge would not have been persuaded that this would have afforded a reasonable justification for the delay. The

³⁷ See: Hearing Bundle pages 187- 191

judge was clearly persuaded that since the judicial hypothec would have to be discharged from the proceeds of the same, it would not have been necessary for the radiation to have been signed at that stage. He went on to find that:

“Indeed the radiation would only have been signed upon the judgment creditor receiving payment. Furthermore, it did not appear to be the responsibility of either Mr. Charles or the Bank to obtain a radiation since clearly the claimant’s legal practitioner had assumed the responsibility of their own initiative for securing the same.”

[132] Clearly cognisant of the relevant timeline, at paragraph 170 of the judgment, the learned judge further observed:

“The challenge which the claimant suggested that he faced with regard to the radiation and the apparent delay caused thereby could have been alleviated by the submission of a letter of undertaking to the Bank to secure the release of the proceeds of the hypothec pending registration of the same and the registration of the deed of sale on the strength of such letter of undertaking. No evidence has been presented of the claimant’s legal practitioner having sent a letter of undertaking to the Bank. In the court’s considered view, the challenge which the claimant relied on as being the cause for the delay could have been alleviated by communication with the Bank.”

[133] In the context of a contract for the sale of land making time of the essence, this seems to be a common-sense solution which in all the circumstances may have enabled the appellant to meet his contractual obligation.

[134] Finally, I am equally not persuaded by the appellant’s arguments on the issue of waiver. While I have grave concerns about the lack of a formal sale agreement setting out full details of the parties’ rights and obligations following acceptance of the appellant’s bid, it is clear that the parties specifically agreed to make time of the essence of this contract. In **Barclays v Messenger**³⁸ the court considered an agreement which provided that if the purchaser should fail to pay the balance of the purchase price on a given date, the agreement should become null and void. Jessel MR observed:

³⁸ (1874) 43 L.J.Ch. 449.

“Now the first point to be considered is, was time originally of the essence of this contract. I am clearly of opinion that it was. I do not know how it could have been more strongly expressed than this: an agreement to pay on a given day, or at a deferred date if agreed upon (there was no deferred date agreed upon), and if not the contract to be void.”

[135] Failure to abide by a time clause where time is of the essence amounts to a breach of contract which is no different from breach of any other fundamental term. The party not in default may elect to treat the contract as terminated by the breach and he can choose to pursue normal contractual remedies. Alternatively, the party not in default may treat the contract as still subsisting. This amounts to a waiver of time being of the essence.³⁹

[136] Waiver is the abandonment of a right: **Banning v Wright**.⁴⁰ Waiver operates to prevent a party from insisting upon their strict rights where it would be unjust to allow them to enforce them, having regard to the dealings which have taken place between the parties. It can arise where the innocent party voluntarily or on request, represents to the other party that they will not enforce a provision, and the other party acts in reliance on that representation. This is known as waiver by estoppel. It may also occur where the innocent party, on the occurrence of a repudiatory breach, elects to treat the contract as continuing but does not abandon their right to claim damages for the loss suffered as a result of the breach. This is an example of waiver by election.

[137] In both cases, there must be an unequivocal representation of the waiver communicated to the party in breach. Aikens LJ in **Tele2 International Card Co SA v Post Office Ltd** would have explained the requirements in the following terms:⁴¹

“(1) [I]f a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions

³⁹ per Megarry J *The Rawlplug Co. Ltd v Kamvale Propertis Ltd*. (1969) 20 P&C.R 32 at 37 ; *Steedman v Drinkle* [1916] 1 A.C. 275.

⁴⁰ [1972] 2 All ER 987.

⁴¹ [2009] EWCA Civ 9.

occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether to or not to do so. Its decision is, in law, an election.

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

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

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

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

[138] Aikens LJ also went on to clarify that whether a party has elected to terminate or to affirm a contract is a question of fact.

[139] More specifically, a waiver of a "time is of the essence" clause, under common law, occurs when a party, through express words or clear conduct, indicates they do not intend to enforce the strict deadline. The defence of waiver however must be pleaded, with all facts upon which the allegation of waiver is based clearly stated.⁴²

[140] At paragraph 2 (c) and (d) of his reply, the appellant would have pleaded that if there as a breach of agreement, such breach would have been waived by the respondents who would have relinquished their right to terminate by continuing with the agreement without any protestation. He also contended that the respondents would

⁴² Part 8 of the Civil Procedure Rules.

have treated the agreement as being extant. This pleading was supported by the evidence of Ms. Clarita Henry-Collymore who asserted that:

“On or about 13th August 2006 RBTT Bank Caribbean Limited’s solicitors, McNamara and Company sent us a list of judgments registered against Michael Joseph. I had a conversation with our client Mr. Michael Joseph concerning the said judgments and he therein indicated certain things to me. I then drafted a statutory declaration which was sworn by Mr. Michael Joseph on the 15th August 2006 and duly executed on that date.”

“At all material times after 19th July 2006 the RBTT Bank Caribbean Limited acting through its solicitors continued with the agreement as existing without any protestation.”

[141] Rather than asserting some express unambiguous representation on the part of the respondents, it is apparent that the appellant sought to argue that the respondents’ waiver could be inferred from the conduct of the Bank’s attorneys as well from the fact that no timely objection or “protestation” was advanced by the respondents.

[142] The learned judge below rejected the appellant’s argument *in toto*. At paragraph 160 of the judgment, he would have accepted the Bank’s argument that the appellant has not shown demonstrably either in his pleadings or by way of cogent evidence that there was some unambiguous representation by the Bank that amounted to waiver. The judge placed much reliance on the appellant’s testimony under cross-examination wherein he admitted that he had made no request to the Bank for an extension of time to complete the sale or that the reasons for the delay had been communicated to the Bank.

[143] At paragraphs 151 of the judgment, the learned judge would have dealt with this issue in the following terms:

“The acceptance of any such a proposition presupposes that the Bank had communicated its position to its solicitors on or after 10th August 2006 or that the Bank’s solicitors were aware of the position that the Bank had adopted with regard to the sale. To hold otherwise would be purely engaging in speculation. In any event, the duty and obligation that the Bank’s solicitors owed to the Bank existed within the boundaries of the Bank’s solicitor’s ostensible or otherwise expressed authority and mandate

to ensure that the Bank obtained adequate security for the grant of the loan to the claimant on the registration of the hypothec. It was not part of the Bank's solicitors to inquire into the Bank's position regarding the sale. Furthermore, the mere fact that the Bank had purportedly rescinded the sale rendered the vetting of the hypothec and its approval by the Bank's solicitors entirely superfluous as there would have been no property upon which the Bank's charge could have been secured. In the premises, the court does not accept that the evidence presented by the claimant could by any means amount to either an implied or unequivocal act of waiver."

[144] I can find no fault with the judge's reasoning. While it is clear that a continuance of negotiations for example by considering the procuring of an indemnity to cure defect in title,⁴³ or the racing of requisitions⁴⁴ have been held to amount to conduct from which it could be inferred there was no intention to treat the contract as determined, there would be no legitimate evidential basis upon which the judge could conclude that the Bank's solicitors were not acting in complete ignorance of the parties' rights under the agreement.

[145] Although delay (silence or inaction) can amount to a waiver, at common law, it does not automatically mean a waiver of rights. Whether a delay amounts to a waiver will depend on the terms of the contract in question and the circumstances of the case.⁴⁵ In **Essex County Council v UBB Waste (Essex) Ltd**⁴⁶ the judge commented that although a delay in exercising a right to terminate of two and a half years may well have been sufficient to amount to a waiver, on the facts of the case that right had not been waived.

[146] Indeed, this is a notoriously difficult case to prove with courts making it clear that mere silence or inaction can contribute to a waiver by conduct only if it is combined with other actions or a pattern of behaviour that clearly shows an intent to give up a known right. Courts continue to look for unequivocal acts or a course of dealing and

⁴³ King v Wilson (1843) 6 Beav. 124; 49 E.R. 772

⁴⁴ Hipwell v Knight (1835) 1 Y & C Ex. 401.

⁴⁵ Mardorf Peach & Co. Ltd v. Attica Sea Carriers Corp. of Liberia (The Laconia) [1977] A.C. 850, at page 872 (per Lord Wilberforce).

⁴⁶[2020] EWHC 2387 (TCC) at paragraphs 418 – 419.

not mere quiet inaction. In **Prakash Industries v Peter Beck**,⁴⁷ the court considered whether a delay in serving a default notice was so great as to amount to a positive act of affirmation, such as to take the case outside the scope of a no waiver clause. The judge referred to Rix LJ in **Force India Formula One Team Ltd v Etihad Airways PJSC** and commented that:

“Reliance on silence or omission as a positive act of affirmation is an ambitious submission at the best of times but, even recognising with Rix LJ that there may come a time when it does, the circumstances would have to be exceptional to overcome the hurdle of [the no waiver clause].”

On the facts, the delay in this case was found not to be exceptional and so there was no waiver by delay.

[147] In this appeal, the respondents’ pleaded case is that they accepted the non-payment of the balance of the purchase price as a repudiation of the agreement which would and did entitle them to terminate and cancel the same in the month of August 2006.⁴⁸ The evidence revealed that within days of 19th July 2006 (10th August 2006), the Bank would have communicated to the appellant that the sale had been cancelled. There was therefore no prolonged inaction which could be said to have been misleading, neither was there any course of dealing on the part of the parties advanced from which a court could imply waiver. Therefore, on this issue, the appellant’s case, as pleaded, would fail.

[148] I am therefore satisfied that the appellant has failed under this ground to advance any basis upon which this Court should interfere with the learned Judge’s reasoning.

GROUND 2

The learned trial judge misdirected himself and therefore erred in law when he found as fact and law that the Bank had not acted outside of the scope of the agency agreement and was not therefore liable to indemnify the first and

⁴⁷ [2022] EWHC 754 (Comm).

⁴⁸ Paragraph 8 of the amended defence and counterclaim.

second respondents in respect of any liability in the execution thereof as the said finding goes against the preponderance of the evidence which contradicts such a finding.

[149] This premise upon which this second ground of appeal is advanced is an unusual one. Essentially, the appellant challenges findings which relate to and arise out of the pleaded case advanced by the first and second respondents who have not sought to challenge these findings on appeal/counter appeal and have not aligned themselves the arguments made in support of this ground by the appellants.

[150] It is part of the pleaded case of the first and second respondents (paragraphs 3 and 6 of the defence and 3 – 6 of the ancillary claim) that the Bank acted beyond the scope of its authority as set out in the POA by failing to obtain the best sale price available taking the current value of the Property into consideration. On the other hand, the Bank in their defence to the ancillary claim asserted that the POA gave it an absolute right to sell the Property at such price as it deemed fit and in the alternative that the POA empowered it to sell the Property at such price as the Bank deemed fit having endeavoured to but not restricted by obtaining the best available price taking the valuation into consideration.

[151] Ultimately, the learned judge would have determined this issue in the Bank's favour and his conclusion is reflected at paragraph [191] of the judgement where at (1)- (7) he found that:

“(1) The Bank having held an irrevocable power of attorney was entitled to enter into the agreement for sale of the property.

(2) At the time that the Bank entered into the agreement for sale with the claimant, the Bank was acting as the defendants' agent and the general principles of agency would have applied.

(3) Under the law of agency the defendants would have been held liable for any liability incurred by the Bank while acting in the capacity as agent for the defendants under the irrevocable power of attorney.

(4) The defendants would not incur liability in respect of acts performed by the Bank if the Bank had acted outside the scope of the agency created by the power of attorney.

(5) In the present case, the Bank had not acted outside the scope of the agency; and therefore, was not liable to indemnify the defendants in respect of any liability incurred in the execution of the agency.

(6) As a result of the Bank having acted within the scope of the agency, the defendants would have been liable to the claimant on account of the Bank's rescission of the agreement for sale if it were found that the Bank was not entitled to rescind the sale and the claimant was entitled to specific performance.

(7) The claimant having failed to establish that he was entitled to specific performance of the agreement for sale and it having been established that the Bank was entitled to rescind the sale, neither the Bank nor the defendants could incur any liability to the claimant."

[152] As previously indicated, the first and second respondents have not appealed these findings. In fact, they make clear that they find nothing objectionable in the learned judge's approach, analysis or conclusion and ask that the appellant's appeal be dismissed with costs. Remarkably, it is the appellant who takes issue with the learned judge's findings. The incongruity of this approach was highlighted in the counsel for the Bank's submissions which I accept carry considerable force.

[153] Indeed, in advancing this ground of appeal it appears that the appellant seeks to circumvent the hurdle referenced in the amended defence and counterclaim of the first and second respondents filed 3rd March 2008. At paragraph 13, the first and second respondents would have noted that the appellant had sought to join them as defendants in his claim against the Bank but that this joinder application would have been refused by the master. Having filed no appeal against that refusal, (and the relevant limitation period having passed) they pleaded that any attempt to secure relief against them directly should be dismissed as an abuse of process.

[154] The appellant was therefore left to secure remedies as against the Bank and in appeal submissions which are clearly adverse to his own interest and case in the court below,⁴⁹ he contends that clause 8 of the POA required the Bank to act with

⁴⁹ See: paragraphs 2 and 4 of his Reply and Defence to Counterclaim.

prudence regarding the sale of the Property. This meant getting a valuation done to ascertain the true value of the properties and to seek to get the best possible price for the properties on the market. He submitted that the Property could have fetched a total sum of \$798,000.00 and so it is clear that it was not sold for a sum which is remotely close to the market value.

[155] In advancing this argument it is important to note that the appellant is effectively urging this Court to find that in agreeing to sell the Property to him for the sum of \$400,000.00, the Bank's duty was not met and that (based on the inadequate evidence which was adduced by the Bank regarding its actions), it would not have discharged its burden of proving that it acted within the scope of its authority, thus nullifying the agreement in respect of which he sought an order for specific performance!

[156] Counsel for the appellant asserted that he is justified in advancing these arguments on appeal because there are three possible outcomes in this matter. Either the first and second respondents are liable to the appellant, or the appellant is liable for the breach because of the actions of the Bank, or the Bank is liable because it acted outside the scope its authority. According to Counsel, he felt compelled to advance this ground because if the Bank departed from the agency relationship, then it would be personally liable to the appellant rather than the first and second respondents.

[157] Courts have repeatedly refused to entertain appeals which would effectively be of no utility to the parties because they waste judicial resources.⁵⁰ In 1953, the Lord Justice-Clerk (Thomson) in **MacNaughton v MacNaughton Trustees**⁵¹ put it like this (p. 392):

“Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic

⁵⁰ *Hutcheson (formerly WER) v Popdog Ltd (formerly REW)* [2011] EWCA Civ 1580, [2012] 1 WLR 782; *R v Secretary of State for the Home Department ex p. Wynne* [1993] 1 WLR 115 at 120

⁵¹ 1953 SC 387.

questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case.”

[158] Given the findings in respect of ground 1, the parties’ respective pleaded cases in the court below and given the posture adopted by the first and second respondents in respect to ground 2, it is clear to me that there is no practical utility afforded by this ground of appeal. In my judgment, even if the appellant were to succeed in this ground, the judgment would have no practical effect for the appellant.

[159] Ultimately, if this court were to conclude that the Bank acted outside the scope of the POA and was therefore liable to indemnify the first and second respondents, that conclusion could only inure to the benefit of the first and second respondents who have conceded that the learned Judge did not err in his disposal of their ancillary claim. This court would therefore be engaged in a fruitless exercise essentially providing an advisory opinion with no practical impact. In my judgment this court should decline to do so.

[160] Nevertheless, for completeness, and after considering the submission advanced by all of the parties, I am not satisfied that the appellant has advanced any cogent basis which would justify the Court interfering with the findings of the learned judge. It is clear that the Bank held an irrevocable power of attorney granted by the first and second respondents which authorized it to enter into the agreement for sale of the Property. Clause 8 of the POA would have reiterated the well settled common law principle that in exercising the power of sale, the mortgagee is subject to a duty to take reasonable steps to obtain the best price reasonably obtainable in current market conditions. This means that the mortgagee cannot merely dispose of the property at a price that discharges the mortgage debt. Clause 8 compelled the mortgagee to obtain a current valuation of the Property and to endeavour to obtain the best sale price available taking the said valuation into consideration.

[161] The Bank would only be in default and liable if the Judge found that it plainly fell on the wrong side of the line in exercising its duty. The judge clearly considered the totality of the evidence before him including the contrasting valuation reports and his reasoning at paragraphs 131 – 140 of the judgment culminated in the following conclusion at paragraph 141:

“What the court is concerned with is the conduct of the Bank; and to that extent has scrutinised the evidence presented to ascertain whether any of the claims made by the defendants have been made out. In the present case, the defendants have failed to establish on the evidence presented that Bank had breached its fiduciary duty to them by failing to obtain the best price available or the market value of the property. Also, the defendants have not demonstrated by the evidence presented that the Bank’s decision to sell the property at the agreed price was the result of any conflict of interest. Therefore, the court finds that the Bank did not act outside of the scope of the power of attorney granted to it and that the defendants have not made out their case in that respect.”

[162] The first and second respondents take no issue with these findings and given the way in which the claim was advanced in the court below the appellants would not have advanced any evidence or submissions in the court below which could be said to support a contrary finding or which could form a platform for advancing a challenge on appeal.

Accordingly, I would also dismiss this ground of appeal.

Costs

[163] Consistent with the general rule prescribed under CPR Part 64. 6, costs should follow the event. The respondents are therefore entitled to their costs of the appeal.

[164] The Bank, however, did file a cross appeal which sought to set aside the costs order made in favour of the first and second respondents. Undoubtedly, a cross-appeal occurs when both parties in a legal action file appeals against a lower court’s decision, usually after one party has already initiated an appeal. It is the process by which a respondent challenges an unfavourable part of a judgment, seeking to vary it rather than just upholding it.

[165] However, this cross appeal proceeded in a most unusual fashion in that neither the first or second respondent addressed it in written or oral submissions. Strangely, it was counsel for the appellant who made brief oral submissions in respect of the matters raised (prior to Counsel for the Bank indicating the withdrawal and discontinuance) when it clear that the order in question would not directly affect or impact the appellant.

[166] In the normal course, a respondent joined in a cross appeal which has been withdrawn or discontinued would be entitled to his costs⁵² assessed in accordance with CPR Part 62.27 and Part 65 Appendices B and C. However, given the unusual way in which this matter proceeded, I am not minded to make any order in respect of the costs consequent upon the withdrawal of the cross appeal.

[167] For the reasons set out above I make the following orders:

- (i) The appeal is dismissed.
- (ii) The orders of the learned trial judge are affirmed.
- (iii) Costs of the appeal are awarded to the respondents to be agreed within 21 days of the date of this order or if there is no agreement between the parties, to be assessed by a judge or master of the High Court, upon application.
- (iv) No order as to costs in respect of the withdrawal of the Bank's cross appeal.

⁵² CPR Part 62.26.

[168] The Court expresses its gratitude to counsel for their assistance and regrets the delay in the delivery of this judgment.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar