



IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 63 of 2019

BETWEEN

CHRIS STEPHEN CONOLLY

Plaintiff/
Defendant by Counterclaim

AND

KADIE SHANDI R EBANKS

Defendant/
Plaintiff by Counterclaim

OPEN COURT

Attendances: Plaintiff/Defendant by Counterclaim, *in person*
Ms. Amelia Fosuhene of Brady Law for the Defendant /Plaintiff by
Counterclaim

Before: Hon. Mme Justice Margaret Ramsay-Hale

Heard: 24 and 25 February, 31 March and 1 April 2021

Draft judgment circulated: 12 November 2021

Judgment delivered: 17 November 2021

HEADNOTE

Contract Law - Agreement for Sale and purchase of land - notice making time of the essence of the contract - rescission of contract - liquidated damages clause - repudiatory breach by vendor - when remedy of specific performance available

JUDGMENT

Introduction

1. On 15 April 2016 the Plaintiff, Chris Stephen Conolly, (“Mr Conolly”), as purchaser, and the Defendant, Kadie Shandi R Ebanks (“Ms Ebanks”) as vendor, executed a sale and purchase agreement (“the Agreement”) in respect of land situate in Lariat Road, Frank Sound, Grand Cayman, registered as Block 59A Parcel number 174, Block 59A (the “Land”) to be purchased via a loan and repayment scheme of regular instalments.



2. This application arises from a dispute over a missed or late payment of an instalment, resulting in Ms. Ebanks taking the decision to notify Mr. Conolly by letter dated 28 February 2019 that he was in arrears and that all arrears then in the sum of \$13,467.50 had to be paid by 28 March 2019 or the contract would be terminated.
3. Mr. Conolly claims against Ms Ebanks in breach of contract and seeks an order for specific performance to compel her to perform her obligations under the Agreement.

The Proceedings

4. The proceedings were commenced on 25 April 2019 when Mr. Conolly filed an *ex parte* Originating Summons seeking an order for Specific Performance on the part of the Defendant in respect of the Agreement, plus costs. Their case is summarized in paragraph 15 of their summons as follows:

"It is submitted that the Defendant is acting unreasonably in citing breach of contract where none exists, and attempts to breach the Sale Agreement themselves in attempting to keep the funds paid to them, seize back the land and dispose of the family home, animals and other property on the land. The reasonable course of action is to either continue with the contract or complete the sale on the land, as suggested by the Plaintiffs in March 2019, and as questioned by the Defendant via email. It is the Plaintiffs' opinion that the Defendant is now aware of the value of the land since signing the Sale Agreement, and wishes to seize the land to re-sell as a higher price."

5. Mr. Conolly case is that he has paid over \$30,000 KYD under the Agreement thus far, with \$55,000 owing in order to complete. In addition, he says he has spent a further \$115,000 in surveying costs for clearing the land, filling the land, having a deep well dug, building a long driveway of over 250 feet, obtaining architects plans for a home, building a stable for animals and have started a plantation and applied for city water supply and electricity in readiness for moving onto the property. He contends that that the action by Ms. Ebanks to terminate the contract is unreasonable and that he has an equitable interest in the Land and should be allowed to complete the purchase.
6. Although Mr. Conolly is the Plaintiff of record as the signatory to the Agreement, his wife, Joanne Conolly ("Mrs. Conolly") acted at all times on his behalf. It was Mrs. Conolly who reached out to Ms Ebanks to inquire about the Land that she had advertised for sale. Mrs. Conolly who later conducted the negotiations for the sale and purchase of the Land and prepared the agreement for sale (and subsequently notarised it). Mrs. Conolly who made all the payments which were made under the Agreement and was the only person with whom Ms Ebanks had any contact after the agreement was made despite Mr. Conolly being the other contracting party.



7. Mrs. Conolly prepared and signed the originating application which commenced these proceedings and was the sole witness of fact for Mr. Conolly.
8. Ms. Ebanks filed an affidavit in response setting out allegations of breach of contract and upon taking her own legal advice, subsequently filed a Defence and Counterclaim. The extracts set out below describe the areas of dispute:

"14 ...The Contract has been breached because the Plaintiff was consistently in arrears since the commencement of the contract. At no point has the Plaintiff brought the arrears up to date. The Defendant did all she could to work with the Plaintiff over the 3 years for which the contract existed. However, the Defendant had to make payments herself to ensure her land was not repossessed due to the late payments by the Plaintiff"

"15. The Plaintiff has further breached the contract by using the land to house farm animals. There has been no approval for animals on the land. The Plaintiff has also breached the contract by building on the land prior to transfer and without the proper planning permissions. There is a small structure on the property erected by the Plaintiff for which there was no planning permission."

"22. The Defendant duly served notice in accordance with section 9 of the contract. The Defendant terminated the contract due to the Plaintiff's continuous breaches. The Plaintiff made no reasonable attempt to remedy the breaches whilst the contract was live. Since March 2019 the Plaintiff has made no payment whatsoever into the account of the Defendant. ...The Defendant was forced to make good on the land mortgage thought (sic) her own wages due to the Plaintiff's behaviour."

"24. Despite the Plaintiff being in breach of the contract, making no payment since March 2019 and the Defendant rescinding the contract, the Plaintiff continued to treat the land as his own. The Plaintiff has trespassed on the property and has continued working on the land despite the Defendant's repeated requests that the Plaintiff vacate the property and cease and desist from using the land."

9. Ms. Ebanks seeks Damages, Interest, a Declaration that the contract is rescinded, and other relief.
10. Mr. Conolly retained Counsel and on 1 February 2021, Mr. Conolly who was then represented by Counsel filed a Reply to Defence and Defence to Counterclaim. In the Reply, Mr. Conolly denied being in breach of the Agreement and stated that he has been and is willing and able to complete the sale of the Land in full. He averred in his Defence to the Counterclaim that Ms Ebanks had prematurely and prejudicially rescinded the contract when he was not in breach and that he had the funds in the bank to make full payment to Ms Ebanks.



The Issues

11. The issues that arise for resolution in this matter are
- (i) Whether the Agreement was properly terminated by Ms Ebanks;
 - (ii) If the contract was properly terminated, to what relief is Ms Ebanks entitled;
 - (iii) If the Court finds that the Agreement was not properly terminated, and that Ms Ebanks was in repudiatory breach of the Agreement, then the issue is whether Mr. Conolly is entitled to an order for specific performance.

The Agreement

12. The resolution of the issues in this case turns on the construction of the Agreement made between the parties. A purchase price of \$87,000 was offered and accepted which was to be paid via a loan and repayment scheme of regular instalments as set out below:

“IT IS HEREBY AGREED that the Vendor of the First Part shall sell and the Purchaser of the Second Part shall Purchase the absolute unencumbered title to the said Property for the Price of \$87,000 (eighty seven thousand dollars) loaned to the Purchaser by the Vendor, on the terms and conditions set forth herein and, as the context admits or requires, the following terms shall have the following respective meanings when used in this Agreement (including the T&C Schedule):

- a. *‘property’ means registered parcel 174 of block 59A in the Midland East registration section of the Cayman Islands, purchased by the Purchaser, caution to be registered against the property in the names of Joanne Conolly and Chris Stephen Conolly, and this Agreement to be stamped and registered with Lands. Stamp duty to be paid for by the Purchaser.*
- b. *‘Price’ means the sum of \$87,000 being the total purchase price for the Property;*
- c. *‘Interest Rate’ means interest accruing at the rate of 5.00 percent over the term of the loan.*
- d. *‘Deposit’ means the sum of CI\$2,000 payable upon the execution of this Agreement.*
- e. *‘Instalments’ means the sum of \$1,288.75 payable on or before the last day of each calendar month starting two months from the date of this Agreement and continuing to be paid on or before that day on each successive month until the total amount of the Balance (along with interest accrued at the interest rate on the balance of the Price*



outstanding from time to time) has been paid in full with amount of the last of such payment being adjusted accordingly if necessary.”

13. The Agreement also contained a ***Schedule of General Terms and Conditions*** dealing with detailed arrangements such as ‘Payments’, ‘Accounting for Payments’, ‘Rescission Upon Default by Purchaser’, ‘Commission’, ‘Completion’, ‘Interest’ and so on.
14. Ms Ebanks had a mortgage on the Land which was secured by a Charge. The existence of the Charge is acknowledged in Clause 10 dealing with Completion. The clause provides for the Charge to be satisfied and removed by the Vendor, prior to the last instalment being made, allowing for the transfer of the Land free from all encumbrances to the Purchaser on completion.
15. Sections 7 and 9 are the ones that fall to be construed in these proceedings. They provide as follows:

*“7. Payments. Upon entering into this Agreement, the Purchaser shall make all payments hereunder (including the instalments in accordance the (sic) Payment Schedule) to the Vendor direct. Payments hereunder are to be credited as and when received by or on behalf of the Vendor, whether mailed or delivered personally or by courier. Each payment respecting the Price shall be by means of a banker’s draft drawn on a Class A licensed bank in the Cayman Islands or of a cheque drawn on the trust account of a Cayman Islands firm of attorneys-at-law or in other freely available funds acceptable to the Vendor and shall be made without any set-off, deduction or withholding whatsoever. In the event that any of the monies payable hereunder are paid by cheque, none of the Purchaser’ (sic) rights nor the Vendor’s obligations created thereby shall have effect until such cheque has been cleared in the Cayman Islands and in the event a foreign cheque needs to be event of collection, any resulting bank charges are the responsibility of the Purchaser. There shall be no penalty respecting any prepayment of any instalment. However, in the event that any payment hereunder is not paid in full within five business days of its due date, the Vendor may charge a late fee of CI\$50.00; provided (in accounting for any such payment being paid when due) payments will first be credited to reduce arrears of previous payments that were due plus all previous late fees (if applicable). In the event the Purchaser do (sic) not make payment of any instalment within 14 days of its due date, the vendor may at its discretion, request a wages garnishee of the Purchaser’ (sic) employer, which the Purchaser (sic) agree to and details for such purpose, the Purchaser shall provide to the Vendor prior to completion of the Sale, including employer’s letter. It is provided for in this Agreement that the Vendor will accept, as balloon payment, a one-time instalment of **\$35,000 (thirty five thousand Cayman Islands Dollars)** if so offered, prior to 1 January 2018 if offered by the Purchaser. This instalment shall not be subject to interest and will be deducted from the total*



balance outstanding at that time, however, the instalments following the balloon payment will not decrease on a month-on-month basis and those instalments following the balloon payment will revert to being chargeable at a rate of 5 per cent." [emphasis supplied]

"9. Rescission Upon Default by Purchaser. In as much as time shall be of the essence of this Agreement, in the event that the Purchaser should fail to make any payment as and when it falls due under this Agreement (see 7 above) or for which a scheduled payment is 30 days overdue, or fails to complete in the terms hereof, the Vendor may elect at the Vendor's option (without prejudice to any other remedy) by giving 28 days written notice requiring the Purchaser to pay up all arrears or to complete in the terms hereof and (if such arrears are not so paid in full or such completion has not occurred before expiry of the said 28 days) the Vendor shall then be entitled to keep absolutely any repayments to this loan, paid by the Purchaser hereunder, as liquidated damages (which the Purchaser hereby acknowledges and agree to be fair and reasonable estimate of the loss and damage thereby caused to the Vendor and not a penalty. Any building on the property will also be forfeit as default by the Purchaser, and in the event of such election, this Agreement shall forthwith be terminated and no party hereto shall have any further rights of action or claim of any nature against any other party hereto respecting this agreement."

16. Section 12 of the Agreement permitted the Purchaser to enter into occupation to the Land and make improvements but also provided that,

"no right of possession in favour of the Purchaser shall be conferred or derived from or under this Agreement...until final payment is made to the satisfaction of the Vendor"

And, as in section 9 above,

"Any modifications or additions made to the property...will be forfeit if the Purchaser shall breach the Agreement. No future claim on the property is warranted by the Purchaser for improvements to the Land or any dwelling thereon should the Purchaser breach this Agreement prior to the final instalment being transacted.

The Agreed Facts

(a) The Payment History

17. It is not disputed that the Conollys failed to pay according to the contract from the date of its execution, whether by missing payments, making late payments or making short payments or



making payments by cheque which were dishonoured by her bank. In the course of her cross-examination, Mrs. Conolly accepted that the schedule of payments¹ prepared by Ms Ebanks was an accurate record and accepted too that she had offered Ms Ebanks the excuses for non-payment, late payment and short payments which Ms Ebanks recorded on that schedule.

18. The schedule records that the deposit of \$2000 reserved by the contract to be paid on execution on 15 April 2016 was not paid as agreed. Instead, the Conollys paid the sum of \$1000 10 days later, on 25 April 2016. The balance of the deposit was never paid. It was the beginning of what was soon to prove a persistent disregard by the Conollys of their obligations to pay under the Agreement. The failure to pay the deposit was, on Mrs. Conolly's evidence, deliberate. Despite promising payment in full and having taken \$2000 out of Mr. Conolly's credit union account for that purpose, they deliberately held a \$1000 back towards the next payment, made an excuse for the short payment and a promise to pay the balance which they never did.
19. Between 15 April 2016 and 12 March 2019, only \$31,060 of the \$78,240 then due was paid. Occasionally, cheques paid to Ms Ebanks were returned for insufficient funds, for which Ms Ebanks was charged by her bank.
20. The litany of excuses offered, when Mrs. Conolly was minded to offer one, included that she had medical expenses, had to do Christmas shopping, was unemployed, had to pay the vet, had car repairs, had to pay her electrician, couldn't get to the bank, had no driver's license.
21. Throughout all of this, Ms Ebanks continued to make regular mortgage payments to her bank in respect of the Land to avoid the loan going into default and the bank exercising its power of sale. Mrs. Conolly's late and missed payments often caused Ms Ebanks account to go into overdraft. Ms Ebanks made several attempts to make it easier for Mrs. Conolly to make the payments.
22. In one instance, Ms Ebanks opened a bank account at Mrs. Conolly's bank so Mrs. Conolly could set up a standing order for the monthly payments to be directly debited and deposited to Ms Ebanks account. This was not pursued by Mrs. Conolly and the pattern of missed and partial payments continued as before.
23. From time to time the issue of the arrears, which had begun accruing from the beginning of the contract, was raised by Ms Ebanks. Promises to pay up the arrears were made by Mrs. Conolly but none of these promises were kept. A promise to pay in October 2016 was scuttled by Mrs. Conolly's inability to get approved for an overdraft facility at her bank. In November 2016, there was a promise to pay through a new payment schedule that would increase the monthly payments, but no payments were made in accordance the proposed payment plan. There was another promise to pay up the arrears in February 2017 which failed to materialise. The arrears continued to mount when Mrs. Conolly lost her job.

¹ Annexed to the judgment



24. In July 2017 she secured new employment and promised to pay the arrears by increasing the monthly payment, but again she did not, and the arrears continued to increase as the months went by.
25. By email of 24 July 2017 Mrs. Conolly promised to pay the \$35,000 balloon payment before January 2018 as provided for in the Agreement - *"there will be no delay on my part"* - but this promise too also failed to bear fruit, as she was unable to find a bank that would lend her the money.
26. In the face of the ever-increasing arrears and despite having failed to make the \$35,000 payment as promised in January 2018, Mrs. Conolly made a particularly galling request of Ms Ebanks, asking if Ms Ebanks would allow her to *"skip"* the upcoming payment for June 2018 as she was planning a family vacation and would need that money to defray the costs.
27. Ms Ebanks refused, stating
- "..because of not receiving the \$30,000 as contracted this month and the arrears, it's not something I can do. I feel have been very accommodating thus far. I'm sorry I can't accommodate you but I hope you find someone else to finance your traveling (sic) needs."*
28. Ms Ebanks recounted in her evidence that 2018 was a difficult year for her as, on occasion, when Mrs. Conolly did not make the payments when they fell due, she did not have any food or money for herself. Asked why she didn't seek to rescind the contract sooner Ms Ebanks said that Mrs. Conolly told her repeatedly that the Agreement couldn't be terminated for non-payment. It was evident that Ms Ebanks felt intimidated by Mrs. Conolly who held herself out to be a lawyer.
29. In May 2018, Ms Ebanks expressed her frustration about the arrears and the way the payments were being made or not made. Mrs. Conolly's response was to say,
- "I understand your frustration ...but the agreement cannot simply be declared 'null and void'*
- and to assure Ms Ebanks - again - that all arrears would be paid as she was expecting \$6000 wire from a friend. She shared that she was trying to *"sell back some holiday"* to her employer to raise funds since the bank wouldn't lend her any as she hadn't been in her job for a year.
30. The payment of \$6000 did not materialise.
31. After missing the date for payment in September 2018, Mrs. Conolly wrote to Ms Ebanks on 1 October 2018 to say that she was aware that the arrears now stood at \$10,200 but would Ms



Ebanks allow them a \$500 reduction in the payments due for September through December 2018 so they could get the electricity sorted on the Land. She also assured Ms Ebanks that RBC would allow her to borrow the balloon payment of \$35,000.

32. Ms Ebanks refused, noting that Mrs. Conolly's bank had refused to lend her \$35,000 on an earlier occasion and asking that the payments be made as under the contract. Despite Mrs. Conolly asking and Ms Ebanks refusing, Mrs. Conolly reduced the payments anyway, paying Ms Ebanks \$800 in September, \$600 for October, \$1000 in November and \$800 in December.
33. In January 2019, Mrs. Conolly made another partial payment of \$800 explaining that she owed \$1000 in Court fines.

(b) The Disputed Notice

34. Matters came to a head in February of 2019. On payday, the 25 February, 2019, Ms Ebanks asked Mrs. Conolly if she could come and get the money from her. Mrs. Conolly agreed but shortly after wrote to say that when she went to get her purse which had Ms Ebanks' cash in it, she realised it was missing, could they make it lunchtime the next day or could she pay it into Ms Ebanks' account in the morning? If she didn't find the purse, would Ms Ebanks give her a few days and she would try to borrow the money? The next day, she emailed Ms Ebanks to advise that she had recovered her purse but the cash for the payment had been stolen. She offered Ms Ebanks the "\$500 grocery money" she had and said, "...hopefully my boss will get me sorted with a cheque before the end of day" to tide her over until the end of the month.
35. Sensing there was going to be another repeat of the pattern of not paying and making excuses, Ms Ebanks refused the offer of \$500 and stated in her email in response,

"I'm sorry to hear about your losses and issues but I will only collect the \$1300 from you this month before month end or I will have a letter drawn up to give you your one month's notice to have all arrears paid.

"I have sacrificed a lot also depending on this contract and I no longer have the patients (sic) as I assured you I wouldn't be doing this again this year."

36. Ms Ebanks thus purported to invoke clause 9 in the Schedule of Terms and Conditions which allowed the Vendor to require the Purchaser to pay all the arrears within 28 days, failing which the Agreement would be terminated.
37. Mrs. Conolly responded:



*“Oh I know that, for sure. Which is how I am kicking myself now for leaving the purse in the school bathroom. I can assure you it will be \$1300 without fail from now on, then once we are on the land I can sort out making repaying each month off the arrears to ensure the contract still lends at the same time. We have invested a lot so cannot possibly fail at this 11th hour when everything with planning is going through, and we are waiting for power so we can move forward.
....*

“ I appreciate all you have done for us thus far and know that as you say - if there are personal issues it is unfortunate, but we would not be able to tell a bank that, and they would expect their payment regardless.....”

38. Ms Ebanks' email in response expressed the depth of her distress and her resolve to insist that the Conollys honour the terms of the contract:

“ ... I made myself clear as of last month I have reached my limit. I too have had to go without food and necessities because there were many month (sic) you didn't follow thru. In March last year I had to put my dog down too and had nothing for the month after spending \$1400 on him trying to keep him alive and have to take money out of C[redit]C[ard] ...I have also had to take loans out and take from my life insurance savings which is what I will have to do again because of your failure to pay.

“I am now drawing up the letter informing you of your arrears and if the \$1300 is not in the bank by end of Bank Day Thursday you will have a signed letter...to inform you of your 28 days.”

39. Mrs. Conolly made a final effort to forestall the payment, asking for more time and asserting in that she was waiting on a cheque from work. Ms Ebanks refused and reminded Mrs. Conolly that she had been paid the Friday before.
40. At 4pm on 28 February, Mrs. Conolly paid a cheque into Ms Ebanks account and advised Ms Ebanks accordingly.
41. On the same day, Ms Ebanks responded with a screenshot of both her bank accounts to show that no money had been credited to her account, noting that Mrs. Conolly knew that a payment by cheque would take 3 to 5 days to clear. As she had not received payment as requested, in that she did not have access as stipulated in the agreement, Ms Ebanks sent the Notice to pay up all the arrears within 28 days failing which the contract would be “null, void and terminated.”



42. On 1 March, Mrs. Conolly advised Ms Ebanks by email that she had cancelled the cheque and that she would “walk down to RBC shortly and withdraw the funds now in cash and walk to BOB and deposit the cash” She did not deposit the cash.

43. Ms Ebanks delivered the Notice which she had sent the night before. Mrs. Conolly emailed Ms Ebanks to ask,

“... Is this something which you are proceeding with, or can you place it into abeyance as the attorney suggested was a course of action to me as I put to you in an earlier email. I cannot get the arrears paid by 28 March and will struggle to pay an attorney fee.”

44. On 7 March 2019, the cheque drawn to Ms Ebanks on Mrs. Conolly’s account bounced.

45. The cash payment for February was finally paid into Ms Ebanks account on 12 March 2019. In an email to Ms Ebanks of the same date, Mrs. Conolly stated,

“The February land payment and late payment fee are into your account. My employer has told me the March payment will go in on pay day which this month is March 22 (not 29th as first told).

*In respect of the arrears, my attorney will write you in respect of getting the balance of January and late payment, plus arrears paid in full. **Hopefully that will be before the March payment is paid in, but certainly before 28 March.***

“in addition i (sic) have an appointment at Scotiabank this Friday in respect of a land loan as I would like to not only pay the arrears up-to-date, but furnish you with entire payment (sic)” [emphasis mine]

46. On 20 March, she wrote:

“I now have a draft letter from my attorney - whose mother unfortunately died last week, and this has led to a slight delay as he has had to return to Canada.”

47. On the 21 March, she advised that,

“My appointment in order to obtain funds has been pushed back to the 29th, so my attorney said I need to have in place an agreement period the 28th so that the date has not passed by the time I am in a position to make payment.”

48. Ms Ebanks inquired if she would have the loan paid in full on the 29th.

49. On 25 March, Mrs. Conolly wrote to say that she never meant to offer payment of the arrears in full by the 28th,

"I have seen where I wrote the email on 12 March and meant my attorney would be in touch before the 28th. Because when he worked it out the arrears could be paid in full by July this year. I will forward the bank's response when I said it was more urgent and I needed to move quickly, following them moving the appointment to the 29th.

"The attorney's bit of the letter about the arrears I will forward to you too."

50. She then cut and paste an extract from a document purportedly written by her attorney into an email sent later in the day in which it was proposed that the arrears be discharged in April, May and June 2019 at an additional sum of \$1000 per month and fully discharged in July 2019 when Mrs. Conolly anticipated she would receive a lump sum from the government and be able to settle any further arrears.
51. The following day, she wrote to Ms Ebanks to propose yet another plan to discharge the arrears and asked Ms. Ebanks to work with her towards an amicable solution *"in accordance with the Public Service Values (Code of Conduct) we both abide by."* She also advised Ms Ebanks that the Bank was willing to make her a loan to pay for the Land but required a letter from Ms Ebanks confirming how much the Conollys had paid under the Agreement. Ms Ebanks did not provide a letter.
52. The arrears were not paid on 28 March. No monies were tendered by the Conollys on 29 March or on any other date.
53. On 10 April 2019, Ms Ebanks gave the Conollys notice that the agreement was at an end and that she required them to remove all their personal property from the Land including vehicles animals and buildings as the contract was now at an end.
54. In a letter of the same date, Mrs. Conolly asserted that she had made the February payment as requested and that they (Mr. Conolly) were not in breach of their agreement. Rather, it was Ms Ebanks who was in breach in purporting to terminate the Agreement. Mrs. Conolly asserted that she had offered to settle the arrears by July 2019 which was an acceptable time-frame and that she could have completed the sale if Ms Ebanks had provided the information to the Bank as she requested. She maintained that she and her husband were ready and willing to complete the sale and threatened legal action. Mrs. Conolly also wrote the Deputy Governor to complain that Ms Ebanks was acting contrary to the Public Servant's Code of Conduct as she had breached their Agreement for sale and purchase and was attempting to *"illegally seize the Land and dispose of [the Conollys] belongings and half-built family home."*



55. There was no further correspondence between Ms Ebanks and Mrs. Conolly. No monies have since been tendered or paid to Ms Ebanks and the Conollys have remained in possession of the Land on which they keep livestock, including goats and pigs, have stored derelict vehicles and have started construction of a 400 sq ft home.

The Law

56. No submissions on the law were made by Mr. Conolly. Mrs. Conolly set out her understanding of the law in her letter of 10 April 2019 to Ms Ebanks where she stated that breach occurs when a party to a contract fails to fulfill its obligations as described, or communicates intent to fail the obligation or otherwise appears not to be able to perform its obligations under the contract. I accept that as a correct statement of the law.
57. One of the main sources of dispute between parties to an agreement for the sale and purchase is delay. Where a clause in the agreement provides that “*time is of the essence*”, a failure to perform the obligation in the time specified by the clause will put the defaulting party in breach of contract.
58. If time is not initially of the essence of the contract, it may be made so by notice given by one party to the contract to the other. The law is set out in *Halsbury’s Laws of England*, at para 578, from which I extract the following principles:
- (i) if the contract for the sale of property fixed a date for completion or performance of some intermediate obligation, the failure of one party to the contract either to complete or to perform the intermediate obligation by the stipulated date entitles the other party then and there to serve a notice making time of the essence, even though the time fixed by the contract was not of the essence of the contract: *Urban 1 (Blonk Street) Ltd v Ayres and another* [2013] EWCA Civ 816.
 - (ii) The innocent party does not have to wait until there has been unreasonable delay by the party in breach before serving such a notice: *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1.
 - (iii) Parties to a contract may expressly agree that a particular stipulation in the contract is to be a condition of the contract and that any failure of performance should entitle the other party to elect to put an end to all the primary obligations of the parties remaining unperformed: *Chitty on Contracts* Vol 1 12-026.
 - (iv) The notice is essential and must be clear and unequivocal. If the contract provides for a specific period of notice which must be given for the purpose of making time of the essence, no question whether the specified period is reasonable in the circumstances arises. The notice should require completion

by the date named and state that in default the contract will be rescinded:
Hatten v Russell (1888) 38 ChD 334 at 346.

59. If the party giving notice of rescission is in repudiatory breach, the innocent party may refuse to terminate the contract and sue for specific performance to compel the party in breach to perform her obligations under the contract. Specific performance is an equitable remedy and the Court has a discretion whether to grant or refuse it, taking account of the claimant's conduct. A court of equity acts upon the rule that he who seeks equity must do equity
60. In **Halsbury's Laws of England**, Vol 95 (2017) at para 541 the learned authors note that the grounds on which specific performance will be refused do not fall into rigid categories and that there is a general jurisdiction to deny specific performance if the court, on the particular facts, considers it just to do so as stated by the Court of Appeal in *Conlon v Murray & Another* [1958] NI 17, which cited Story's *Equity Jurisprudence* 10th ed. (1870), vol. 1, p. 739:

"In truth the exercise of this whole branch of equity jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party; but it is a matter in the discretion of the Court, not indeed of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself so far as it may by general principles; but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

61. Thus specific performance will not be granted if, for instance, the claimant has failed to perform conditions of the contract or done acts amounting to a repudiation of the contract or been guilty of undue delay in performing his part of the contract or if the contract has been rescinded.
62. The principles which guide the exercise of the Court's discretion are set out **Halsbury's Laws of England** Vol 95 (2017) at para 565, as follows:

"A claimant seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract. .. [A]ny failure on his part or breach of his own obligation also bars his claim to specific performance. This rule is applied strictly."

63. The rule was applied by the Privy Council in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, which declined to award specific performance of a contract of sale where time was made of the essence and payment was made a mere ten minutes late. The Board held, dismissing the appeal:



“Held, dismissing the appeal, that failure to complete on time was a repudiatory breach of contract rendering performance by the purchaser impossible and entitling the vendor to reject the late tender of the purchase price and to rescind the contract; that equity would not normally intervene when an ordinary contract for the sale of land was rescinded for non-compliance with an essential condition as to time, and the fact that the purchaser was only slightly late in completing did not justify departure from that general principle even though the result of the rescission was that the purchaser had forfeited the equitable interest in the land arising under the contract; and that, accordingly, relief by way of an order for specific performance had properly been refused.”

Discussion

64. Clause 9 is an inelegantly drafted clause but what is clear that the parties expressly agreed that if the Purchaser failed to make any payment as and when it fell due, the Vendor was entitled to serve Notice requiring the Purchaser to pay up all arrears within 28 days, thus making time of the essence. If the arrears were not paid on or before the 28 days had elapsed, then the Vendor could rescind the Agreement.
65. In consequence of the numerous breaches of the payment terms detailed herein, Ms Ebanks gave notice to the Conollys that she required that February’s payment be paid by on the 28th as stipulated by the agreement. Section 7 of requires that payment be made in *“freely available funds acceptable to the Vendor.”* Section 7 also provides that *“none of the Purchaser’s rights nor the Vendor’s obligations shall have effect until the cheque is cleared.”*
66. In *her viva voce* evidence, Mrs. Connolly said it was her understanding that the Agreement provided for Ms Ebanks to make demand for payment of all arrears within 28 days if there was any breach of the payment terms and for the Agreement to be terminated if those arrears were not paid.
67. Mrs. Conolly paid by cheque which had not cleared by close of business on that day. Mrs. Conolly accepted in correspondence, and under cross-examination, that a cheque drawn on her personal account would take 3 to 5 days to clear. As the payment by cheque on 28 February was not in funds which were *“freely available”* to Ms Ebanks on the day of payment, there was a breach of section 7.
68. That is sufficient to deal with Mr. Conolly’s pleaded case that the payment was made, but I would go further and say that I do not accept Mrs. Conolly’s evidence that when she wrote that cheque there were sufficient funds in her account to cover it.



69. Mrs. Conolly's performance of the Purchaser's obligations under the Agreement, which by arrangement with Mr. Conolly fell to her, and the myriad excuses she gave for not making the monthly payments - most not better than "*the dog ate my homework*" - paint her as unreliable at best and dishonest at worst and I do not accept her as a witness of truth. I place no reliance on her evidence save where it is corroborated or otherwise supported by some independent evidence. There was no evidence to support her testimony that there were sufficient funds in her account to cover the cheque until she withdrew the funds to pay Ms Ebanks in cash which is contradicted by the fact that the cheque bounced on the 7th but the cash was not paid in to Ms Ebanks account until the 12th. Mrs. Conolly accepted in cross-examination that writing a bad cheque would be dishonest. It is and she was.
70. The payment for that month not being made in accordance with section 7, I am satisfied and find that Ms Ebanks was entitled, pursuant to section 9, to give Mr. Conolly notice to pay up all the arrears within 28 days, making time the essence of the contract. The Notice required payment by 28 March 2019 and stated that in default the contract will be rescinded, thus complying with the legal requirements for effective notice: see *Hatten v Russell* (1888) 38 ChD 334 at 346.
71. Mr. Conolly failed to pay up the arrears in repudiatory breach of the Agreement. Ms Ebanks accepted the breach and terminated the Agreement by her letter of 10 April 2019 in which she demanded that the Conollys leave the Land and remove their personal property. The Agreement having been terminated in accordance with section 9, Ms Ebanks was not in breach of contract as suggested by Mr. Conolly in the pleaded claim.
72. I am satisfied and find that Ms Ebanks is entitled to the relief claimed which is a declaration that the contract is rescinded. It follows that Mr. Conolly is not entitled to any relief for breach of contract and his claim for specific performance is dismissed.
73. If I were wrong to so find and Ms Ebanks was indeed in breach of their agreement, I would not compel Ms Ebanks to complete the sale to Mr. Conolly in the particular circumstances of this case. Specific performance is a discretionary remedy that sounds in equity. It is not available where the party claiming it has behaved inequitably. Mr. Conolly refused to honour his obligations under the contract from its very inception, failing to pay the deposit on execution of the contract and repeatedly failing to make payments as reserved under the contract or at all. 15 payments were made in full. There were by contrast 12 months of partial payments and 6 months of missed payments. 18 payments were made late.
74. Mrs. Conolly, acting on Mr. Conolly's behalf made repeated, empty promises to pay on time, pay in full, pay the arrears. She told a series of convenient lies to Ms Ebanks over the life of this Agreement in order to avoid or delay the contractual obligation to pay for the Land. In one exchange with Counsel for the Defendant Mrs. Conolly said that they intended that the "*monies would be paid at the end of the term*", though plainly not in equal monthly instalments as



contemplated by the agreement, which prompted Ms Fosuhene to ask who would foot the bill on the payments for the Land in the meanwhile.

75. Nor am I persuaded that Mr. Conolly has invested so much in the Land it would be inequitable to refuse specific performance as he sought to argue. In her affidavit sworn in support of Mr. Conolly's *ex parte* application, Mrs. Conolly stated that Mr. Conolly had spent \$115,000 on surveying costs and on clearing the land, filling the Land, having a deep water well dug, building a long driveway wall, obtaining architect's plans, building stables for their animals, starting a 'plantation', applying for city water supply and electricity and building the family home. Under cross-examination, her evidence changed and she now asserted that Mr. Conolly had "plowed in" the lesser sum of \$100,000 in cash and sweat equity.
76. It was put to Ms Ebanks in cross - examination that the clearing of the Land had cost \$3000, that Mr. Conolly had purchased \$10,000 worth of material and that, all told, Mr. Conolly had spent approximately \$25,000 on the Land, a far cry from the \$115,000 originally claimed. No receipts or other documentation was exhibited to support these assertions.
77. The photographs tendered by Mrs. Conolly and those exhibited to the valuation obtained by the Conollys on 10 April 2019 show the partially completed house on the Land measuring some 400 sq ft in size, a boundary wall under construction, a number of derelict cars on the Land and livestock. The valuer's report confirms that there was a deep water well on the Land but notes that the main water supply had not been connected and a septic tank or sewage treatment plant was required.
78. While unable to comment on the monies Mr. Conolly suggested had been invested in the Land, Ms Ebanks said that if it were true, then Mr. Conolly should have paid her rather than putting money into the Land. It is an observation with which I respectfully agree.
79. Ms Ebanks said, and I accept, that the first time she became aware of the house being constructed on the land was on 1 March 2019 when she visited the Land following the Conollys failure to pay up the arrears. On 10 April 2019, she went to the Planning Department and discovered that an application for a building permit had been submitted on 18 March 2019, after the Notice had been given.
80. She exhibited the Planning permission granted to the Conollys on 27 March 2019 and made the point that the building had been unlawfully erected on the Land as the planning permission stated that the permission was granted on the condition that the Conollys apply for a Building Permit and directed that building "***shall not*** commence prior to the issuance of a Building permit." [emphasis supplied by the author].
81. It also provided that the development had to be carried out "*strictly in accordance with the approved plans which you will receive when the above condition is complied with*"



82. Mr. Conolly did not obtain a building permit before commencing construction and as a consequence, Ms Ebanks was served, on 19 March 2020, with an Enforcement Notice from the Planning department which stated that the building had been constructed without a building permit and advised her to either obtain a building permit for the “*after the fact*” house or demolish the structure and tidy the surrounding land. The Notes to Enforcement Notice warned Ms Ebanks that, as the property owner, she was liable on conviction to a \$5000 fine if she did not comply with this Notice. It is difficult to see how commencing construction in breach of the Planning law and in breach of the payment obligations under the Agreement would make it unfair to refuse specific performance.
83. As Ms Ebanks suggested, the monies Mr. Conolly claims to have spent on the Land might more usefully have been spent securing the Land by making the payments due under the Agreement.
84. I note too that Ms Ebanks raised with Planning personnel the issue of the livestock that had been put on the Land by the Conollys and was advised that a Planning application was required to conduct any type of agricultural operation on the Land. The Conollys had not made any such application or been granted permission to use the land for the purpose of rearing livestock.
85. Ms Ebanks also said, and I accept, that the wall built by Mr. Conolly was not built on “*his driveway*” as asserted by Mrs. Conolly, but on the easement granted over the parcel in front of the Land to allow access to the Land from the main road, without permission of the owner of that parcel.
86. Further, and in any event, I would not order specific performance because the Conollys have not satisfied me on a balance of probability that they were at the time the Notice was given or at any time after that up to the trial of this action, ready willing and able to make the full monthly payments as set out in the schedule or to pay up the arrears or to pay the balance of purchase price in full.
87. The undisputed evidence is that Mrs. Conolly was unable to pay the monthly sums reserved by the Agreement as and when they fell due. It was her evidence that she had to rob Peter to pay Paul to meet her expenses. She was also unable to get either an overdraft to assist her with meeting those monthly payments or raise a loan to pay the arrears or a loan to make the balloon payment of \$35,000. Although Mr. Conolly was the Purchaser under the Agreement, it was plain from her evidence that the payments on the Land fell to her.
88. On 27 February 2019 - the day before the arrears had to be paid in full - Mrs. Conolly was still offering a payment plan for the arrears, offering (again) to pay them off over the ensuing months. In her email of 1 March 2019, Mrs. Conolly made it clear that she was out of options,



“if there was any way I could get \$12k together I would immediately, for you. I still have feelers out but without equity it is very difficult as everyone wants something on a secured asset.”

89. Mrs. Conolly also lamented that,

“I...basically do not earn enough to support a family of 5, no matter how I struggle trying to do it I always appear to need to earn about \$1k a month more...I have also written to all other creditors in respect of lowering payments ...”

90. Despite this, she said, they had purchased the Land because they had thought and hoped they could afford it.

91. Although she accepted on oath that she could not pay the arrears, Mrs. Conolly insisted that Mr. Conolly would have been able to complete on 29 March 2019 as she had been pre-approved by Scotiabank for a loan. Her evidence was that the loan was scuttled by Ms Ebanks failure to provide an account of the monies paid by the Conollys under the Agreement as requested by the Bank. There was no supporting evidence that such pre-approval was granted or that such a request was ever made by the Bank and I reject her evidence.

92. Mrs. Conolly also sought to persuade the Court that she and Mr. Conolly remained, at the date of trial, ready willing and able to complete. She exhibited a number of documents during the course of her cross-examination including an application for a land loan dated 6 August 2020 made by her in which she listed the Land as one of her assets. She also exhibited two copies of a letter of the same date in which Fidelity Bank purportedly offered her a mortgage loan facility in the sum of \$60,550. One was an original document purporting to be an offer letter on Fidelity Bank’s letterhead but not signed on behalf of Fidelity but signed by Mrs. Conolly. The second was a heavily photocopied document in the same terms ostensibly signed by a third party on behalf of Pierre Claassens, “*Manager, Credit*” and signed by Mrs. Conolly on 18 November 2020 as accepting the offer of a loan.

93. Having exhibited those documents, Mrs. Conolly went on to say that Fidelity converted the loan to a personal loan which was not required to be secured on the Land. She exhibited an undated document purporting to be a Promissory Note issued by Fidelity Bank signed by her as Joanne Oliver as proof that, at the date of trial, she had access to \$62,000.

94. Given the unusual features of these documents which had not been previously disclosed, Ms Fosuhene asked for time to make inquiries. When the trial resumed on 31 March 2020, Mrs. Conolly refused to give permission for an officer from Fidelity to attend Court to speak to the documents, stating that it was “*moot*” in any event because Fidelity had withdrawn the loan facility. In the absence of any of the underlying correspondence or supporting evidence from Fidelity, I do not accept that the undated document exhibited at Court was a valid Promissory



Note nor do I accept Mrs. Conolly's evidence that she had been granted a personal loan by Fidelity Bank.

95. At the resumed hearing, Mrs. Conolly again asserted that she and Mr. Conolly were ready, willing and able to complete as she now had confirmation from 2 class A Banks on Island of their willingness to lend should the need arise and that the quickest route was to re-mortgage her UK properties which was already in the works. No supporting documentation was produced to the Court. I reject that evidence too.
96. I note for completion that Mrs. Conolly's evidence runs counter to the pleaded Defence to the Counterclaim in which Mr. Conolly averred that, as at 21 January 2021, he had the funds in his bank to make full payment to Ms Ebanks. Mr. Conolly has failed to produce evidence of those funds standing to his credit which fatally undermines that averment.

ORDER

97. The Plaintiff's claim for specific performance is dismissed. Costs follow the event, and the Plaintiff is to pay the Defendant's costs to be taxed, if not agreed. Judgment is entered for the Defendant as Plaintiff by Counterclaim, the Court declaring that the contract is rescinded. The costs of the Counterclaim are to be paid by the Defendant by Counterclaim to the Plaintiff by counterclaim, such costs to be taxed if not agreed.
98. The Court will hear from the parties on any further orders consequential on the judgment that may be sought.

DATED THE 17th DAY OF NOVEMBER, 2021

A handwritten signature in blue ink, appearing to read "Ramsay-Hale".

Hon Mrs. Justice Ramsay-Hale
Judge of the Grand Court