JUDGMENT : HIS HONOUR JUDGE HEDLEY (Sitting as a Judge of the High Court) Ch.Div. 7th June 2001

1. This is an appeal from an order of Master Moncaster, made on the l0th January of this year. The order itself has not in fact been drawn up but its effect was to declare the parties bound by an agreement that they had entered into on the 25th July 1996 and in effect it directed the claimant to pay the respondent's costs. By this appeal the claimant seeks in effect a declaration that the agreement of the 25th July 1996 is no longer effective or binding on the parties.

2. The background to this case, although relatively complex, can be fairly simply stated for purposes of this appeal. In or about 1986/1987 the claimant and the defendant began an association that was both personal and business. In October 1989 they purchased a dwelling house, 11 Westmore Road, Tatsfield, in Kent. In July 1996, in rather heated circumstances, the parties separated in that the claimant left whilst the respondent was in Germany on a contract. Thereafter negotiations ensued with a view to dealing with all the outstanding matters between the parties. Those negotiations came to a head, and an agreement was undoubtedly made on the 25th July 1996 and is evidenced in writing.

3. The agreement was drafted by the claimant, who has qualifications as a lawyer, but clearly some last moment amendments were made and clearly the parties entered into what they knew and intended was a binding agreement. It dealt with four areas of dispute between them. It dealt with the possession of chattels relative to their business. It dealt with the property in which they had been living and which they had bought. It dealt with the risks of taxation so far as the claimant was concerned, and it had what can loosely be described as an anti-competition clause in it. I think it right to say that three out of those four matters are no longer the subject of the court's concern. In the case of business matters, that agreement was executed. In the case of the tax liabilities, they came to nothing. In the case of the anti-competition clause, no complaint is made about it.

4. That left the agreement in respect of the dwelling house. I think it right that I should read that part of the agreement*: "From today's date Mr Thirkell will use his* ***best endeavours*** *to release Miss Sutcliff's equity in the jointly owned property known as 11 Westmore Road, Tatsfield, near Westerham, Kent. It has been agreed between the parties that the property's current market value is £85,000 and subject to the current outstanding mortgage of £73,000 to be clarified with the Building Society and the surrender of the Standard Life Insurance policy approx. value £6,000 also to be clarified, Mr Thirkell will subject to the Building Society's approval or remortgage of the property, buy out Miss Sutcliff's part of the equity which on the approx. figures quoted it is agreed will be £7,500 equity and £750 part of the contents of the household furniture, etc., making a total of (8,215 cash, which it is agreed between the parties is the figure owed to Miss Sutcliff, allowances already having been made for Mr Thirkell to have deducted his initial house purchase deposit of £3,000".*

5. Matters progressed after that, perhaps in a somewhat dilatory fashion, not least because the respondent was working abroad for part of the time. But the history has to be resumed on the 21st February 1997, when the claimant issued a writ in the High Court for specific performance of that agreement and was met on the 24th March of that year by the fax in which it was denied that the agreement is effective as between the parties.

6. Some correspondence takes place after that, and then official silence descends on the case towards the end of April 1997. Thereafter the case remained dormant until the 6th March 2000. It is said that, during that time, without prejudice negotiations were taking place. I obviously know nothing whatever about those negotiations and it is right that I should not do so, but I cannot help observing that the parties have made a very serious mistake in failing to come to terms during the course of those negotiations. Be that as it may, they are adults who are entitled to take what steps they please so long as they accept the consequences of their choices.

7. On the 6th March the respondent issued an application for permission to withdraw his defence. On the 9th March the claimant made a further claim under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, in effect denying that the agreement was still valid and seeking an execution of the trusts and a division of the proceeds of sale consequent on execution.

8. On the 5th April the matter came before the court and directions were given by Master Moncaster, the crucial one being that a preliminary issue be determined by the Master as to whether or not the parties were bound by the agreement of the 25th July 1996. I have found no order which permitted the

defendant to withdraw his defence, though it clearly is the case - and I am told that it was the case - that such a matter was argued and was allowed and of course, as Mr Palfrey has observed, it is inevitable from the concession exacted by the Master in paragraph 1 of his order - namely, that the defendant conceded that it was a binding agreement - that such permission must have been given. I have to say that left to myself I am not at all sure that I would have given such a permission. But that is now history and I say that only because the genesis of the Master's order was a significant injustice in this case.

9. The matter came on for trial before the Master on the 10th January of this year. He heard the case over three days and it was on the 10th that in fact he gave judgment in the matter. At the end of his judgment, he gave permission to appeal save in respect of a claim of duress. I think his judgment can be summarised by indicating that, having recited the facts of the case, he made a number of significant findings. First of all he found that the agreement of the 25th July had not, as the claimant had claimed, been procured under duress. Secondly, he found that the requirement of the building society's approval or remortgage was not a condition precedent to the carrying into effect of the agreement. He found that the assertions in the defence amounted to a renunciation of the agreement, but he found that the claimant had never communicated to the defendant her acceptance of that renunciation. He found that the agreement was subject to an implied term that it would be executed within a reasonable time. He held that a reasonable time had not expired by the institution of the without prejudice negotiations in April 1997, but that it would have expired by the time the case came back to life on the 6th March 2000. He found that the parties had agreed, as it were, a further extension of time to cover the without prejudice negotiations. He also found that there was no basis in the case, even if the agreement was defective, for revisiting the figure of £85,000 being the market sale value upon which the agreement was based. The consequence of all that was a declaration that both parties remained bound by the agreement of the 25th July. The reason that no order was drawn up was the entirely sensible reason that, because the order required details as to its implementation, that was pointless to do while an appeal was outstanding.

10. Many of those matters are not in dispute any longer, and indeed it seems to me that essentially there are three matters that I have to consider on this appeal. The first is whether or not there was a condition precedent in terms of the building society's approval to be carried into effect in this agreement; secondly, whether or not there was an agreement to extend the time for the validity of the agreement during the course of the without prejudice negotiations; and, thirdly, if no such agreement was in existence, was there an implied term which would have the effect of re-visiting the market value of the property for the purposes of now carrying the agreement into effect? Of course all this has become highly relevant because of the increase in property values. No one seeks to challenge that this property in July 1996 was worth £85,000. It is now worth getting on for twice that and certainly worth at least £150,000. It would be immediately apparent from the way that the agreement is drawn that the increase of value will inure entirely to the equity, and it follows that, if the claimant is held to her original agreement, she would stand to lose something of the order of £30,000 depending on the kind of credits that she would have to give for the payments made by the defendant in the meantime.

11. As I say, it seems to me there are three issues on this appeal, each requiring separate consideration and I turn first to the question about whether or not there is a condition precedent. In the event, my finding on this may not matter greatly because it still leaves unaffected the argument about the continuation of the implied term for a reasonable time, and accordingly I will deal with it in short order. I have to say that I do not read this agreement as containing within it a condition precedent and to that extent find myself in agreement with the Master. The general tenor of this agreement is a common form approach in sales of dwelling houses in the aftermath of the collapse of relationships even where there are no children and where the parties are not married and a buy-out is taking place. In my view, "***best endeavours***" means precisely that. Everybody recognises that the building society may not co-operate, and everybody accepts that that is a risk. In order to make the approval of the building society or a remortgage a condition precedent to the carrying into effect of an agreement in these circumstances it would require, in my judgment, very much clearer words than appear in this agreement. I read this agreement as having implicit within it an acknowledgment that the building

society may have to take steps over which the parties have no control, but, provided the parties do what they can, then the risk has to be accepted that the matter may have to go through notwithstanding that approval has not been given, and that would then normally be dealt with by undertakings and the like. I am unable to depart from the view that this is not a condition precedent in the circumstances.

12. I also find myself in agreement with the Master in his conclusion that the base figure of £85,000 is incapable of being re-visited. This was justified by new arguments on appeal. Whether they should have been advanced or not, I am not sure, but no injustice whatever was done by allowing them to be advanced and it might have been done if they had not been allowed to be advanced. It seems to me that, had the parties wanted a figure that was other than a set figure, it would have been perfectly possible for them to have agreed that fact, either at the time the agreement was made or, much more likely, that it would have been part of any agreement about a delay to allow negotiations to take place. Any such variation is one that would have had to have been established by the claimant. There is no evidence at all upon which she could rely, other than the views of the disinterested observer or, as the old language used to have it, the officious bystander. But in my view, to rely on such a person when dealing with a written agreement in relation to property of itself is simply not enough. It will do no more than aid a construction that might otherwise have been available to the court.

13. In my view, this agreement is crystal clear. There is not a shred of evidence that it could have been varied by agreement in terms of this, and it seems to me that, if that agreement of the 25th July is in fact valid, then it must be valid at that figure and that figure alone. Of course that is not to say that movements in the property market would be wholly irrelevant to this agreement. Their relevance, however, in my view, would have related to the period which would be regarded as a reasonable time for the implementation of this agreement, because clearly once the property market starts moving then that is a matter which the parties would be deemed to have taken into account in the implication of a reasonable time for executing this agreement. But of course that particular feature is not relevant in this case because of the unchallenged findings - and rightly unchallenged findings - of the Master that that time, whatever the considerations were, had not expired by the time the negotiations began but would have expired by the time they finished.

14. And so it seems to me that I am brought back to the central issue in this case, which is whether or not the Master was right in his conclusion that time did not run, for one reason or another, during the three years that these negotiations took place. The central point of his judgment - which I think in fairness to everyone I ought to set out - is the second half of page 34, where the learned Master says this: "*Undoubtedly Miss Sutcliff could at any time during that long period of three years require prompt performance of the agreement and, if that was not forthcoming, have rescinded. Equally, she could have given notice that she was accepting the defendant's repudiation and brought the agreement to an end in that way. But she or her solicitors took neither course. In my judgment, knowing as I do that without prejudice negotiations continued during this period though not knowing the content of them, and knowing that Miss Sutcliff had neither required completion nor accepted the repudiation, I cannot hold that the agreement has lapsed by reason of the three years` delay. The inference must, I think, be that the parties, having taken no step to bring the agreement to an end but negotiated about it, kept the agreement in being and therefore Mr Thirkell still was in time on the 6th March of this year*". The Master concludes, supported of course by the respondent on this appeal, that the proper inference to draw is that the agreement was kept going; whereas the claimant argues that such an inference is unwarranted.

15. The Master justifies this view that the agreement is still binding in April 1997 by pointing to correspondence - and they have been identified as letters at pages 156 and 160 - which indeed make it clear that the claimant at that stage regarded this agreement as binding and was going to proceed legally on that basis. Also he points out, correctly, that she could have accepted repudiation during the delay and, because she did not, he inferred an agreement to keep the agreement valid. I have to say that I do not think that that is a right conclusion. I do not think you can imply agreement from silence. All that can be implied, in my judgment, is that the claimant accepted that the agreement was in force and did nothing to bring it to an end, whilst the respondent denied that the agreement was in force and did nothing to alter that. In those circumstances, one of two things happens: either the effect

of entering into negotiations of itself is effectively to freeze time so that nothing happens until one party takes a step, or the action continues alive even though the parties choose to do nothing about it. In the former case, time for the purposes of reasonable time would cease to run; whereas in the latter case it would continue to run. In my judgment, this issue as to whether time runs or not is quite separate from the issue of whether or not the claimant communicates her acceptance of renunciation and I am not persuaded that the Master has maintained that distinction. He is clearly right in drawing the inference that she never communicated renunciation or did anything to that end. The question is whether he is right in also inferring an agreement effectively to freeze the running of the implied term as to reasonable time. I have come to the conclusion that he was not right in so holding. In my view, there is no evidence from which one could conclude that there was an agreement to freeze time, and certainly in my judgment the mere fact of entering into negotiations is not enough. If one wanted two illustrations - which are by no means binding and are nothing more than illustrations - one might look at the provisions of the Civil Procedure Rules, which actually allow the court to make orders in effect freezing time while parties negotiate; or one might look at the position under the Limitation Act. Limitation time continues to run notwithstanding negotiations unless there are clear steps taken to deal with that matter. Of course those are loose examples and I draw on them simply for the purpose of demonstrating that the mere fact of without prejudice negotiations without more would not be enough to freeze time.

16. I cannot find within this evidence anything which would justify the conclusion that there was an agreement, express or implied, to freeze time in terms of the implied reasonable time provision which everyone agrees the original agreement was subject to and, on the basis of the master's accepted findings, I conclude that reasonable time expired at least by the 1st March 2000 and that accordingly, when the respondent took the step he did on the 6th March, there was in fact no binding agreement then in force for him to accept or to bring back to life. I take comfort from the fact that this conclusion accords with the substantial justice of this case because I recognise, as the Master clearly recognised, that the conclusion to which he found himself compelled to come was one that worked to the real disadvantage of one party and to the great good fortune of another party who had acquired that good fortune by simply doing absolutely nothing. I am comforted that the conclusion to which I feel I should come is one that rights that wrong and puts the parties in a position which any impartial observer would consider to be a fair one.

17. Accordingly I propose to allow this appeal on the single ground that the Master was wrong in coming to the conclusion that there was any agreement, implied or express, which had the effect of stopping the running of time in respect of the implied condition in the agreement that it was subject to execution within a reasonable time. That time did not cease to run. That time had expired by the time that the respondent came to take the step of seeking to withdraw his defence, and accordingly the parties on that single ground are no longer bound by the agreement of July 1996.

18. That is the judgment that I propose to give. I do not propose that it should be drawn up in any formal order other than the declaration. It seems to me, subject to anything the parties might now wish to say, that the whole matter should be remitted to the Master. In particular, I think the whole question of the costs of the hearing before him should be remitted for his consideration, because, although the claimant may have succeeded on the central issue, the Master will have to take into account the fact that a great part of the hearing was taken up with issues on which she failed, and he will want to consider the propriety or otherwise as to the costs order that would have been made had he reached a conclusion in accordance with the conclusion I have reached on this appeal.

MR MACPHERSON, instructed by Messrs Johnson Sillett Broom, appeared for the Claimant.
MR PALFREY, instructed by Messrs Hadfield & Co. (Sidcup), appeared for the Defendant.