



[2017] JMSC Civ 121

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2014 HCV 04354**

**IN THE MATTER OF ALL THAT** parcel of land of Kellits in the parish of **CLARENDON** and being part of the land comprised in Certificate of Title formerly registered at Volume 120 Folio 23 and is now registered at Volume 250 Folio 37 of the Register Book of Titles.

**BETWEEN**

**EARLINE LAWRENCE**

**CLAIMANT**

**AND**

**DEAN EDWARDS**

**DEFENDANT**

**IN CHAMBERS**

Ms. Lilieth Deacon instructed by Taylor, Deacon and James for the claimant.

Mr. Lennox Gayle, Attorney-at-Law for the defendant

**Heard:** 27<sup>th</sup> May 2015 and 6<sup>th</sup> September 2017.

**Land Law - Contract Law - Agreement for Sale - Registered Land - Joint Tenancy - Intention to Create Legal Relations - Incomplete Sale Agreement - No Transfer of Interest in Land - Resale of Land - Death of Vendor - Equitable Interest - Decree of Specific Performance.**

**CAMPBELL J;**

**Background**

- [1]** The claimant, Earline Lawrence and her mother, Maria McKay, were the joint registered proprietors of land comprised in the Certificate of Title formerly registered at Volume 120 Folio 23 and now registered at Volume 250 Folio 37 of the Register Book of Titles (hereinafter called “the property”). No disrespect is intended by the further reference to the parties by their first names.
- [2]** In 1986, Earline’s aunt, Myrtle, on her return to Jamaica, entered into an agreement with Earline and Maria (“the 1986 Agreement”), for Myrtle’s occupation of a portion of the property. The effect of that agreement is the subject of dispute between the parties to this claim. The claimant argues that the 1986 agreement was restricted to providing for Myrtle to live in a portion of the building on the property until she chooses to leave or until she died. The sum of Ten Thousand Dollars (\$10,000.00) was tendered by Myrtle, as she was uncomfortable living on the property for free.
- [3]** The defendant contends that the 1986 Agreement, constituted a binding Agreement for Sale of the property to Myrtle, and notwithstanding that the transfer from the vendors, Maria and Earline was not completed, an equitable interest in the said property was created by the signing of the agreement and the passing of the consideration from Myrtle to the vendors.
- [4]** According to the defendant, Dean Edwards, this principle was also applicable to the Agreement for Sale, dated 14<sup>th</sup> June 2007 (“the 2007 Agreement”) which he executed with Myrtle for the sale of the property to him. Myrtle; is now deceased. The defendant claims as a purchaser in possession of the property. The claimant denies that Myrtle acquired any interest that could be transferred to the defendant and has taken legal actions against the defendant.

- [5] In or about 2011, Earline commenced proceedings, in the Chapleton Resident Magistrate Court, against the defendant, for recovery of possession. However, the matter was withdrawn as the question of ownership was in issue.
- [6] On 12<sup>th</sup> November 2014, the claimant filed a Notice of Application for Court Orders seeking an injunction to prevent the defendant from constructing a dividing wall on the property and other actions, until the determination of ownership of the property. On 9<sup>th</sup> April 2015, the court granted Earline the injunction as prayed until the conclusion of the substantive matter.

### **The claim**

- [7] Now before the court is a Fixed Date Claim Form, filed on 17<sup>th</sup> September 2014, seeking the following orders, inter alia;
1. *A Declaration that the claimant is entitled to all the interest in property situated on all that parcel of land part of Kellits in the parish of Clarendon and being part of the land comprised in the Certificate of Title formerly registered at Volume 120 Folio 23 and is now registered at Volume 250 Folio 37 of the Register Book of Titles.*
  2. *That the defendant quit and deliver up possession of the property within Ninety (90) days of the date of any such declaration.*
  3. *That the defendant be ordered to pay mesne profits to the claimant for the period for which he occupied the premises without the permission of the claimant.*
- [8] The grounds, on which the claim rests, are that there is a registered title for the property. That the claimant is one of two registered joint tenants on title, and the other registered joint owner, Maria, is deceased. Additionally, Myrtle, who was a licensee, purported to sell the property to the defendant without the knowledge and/or consent of the registered owners.

## **The Claimant's Submissions**

- [9] Earline and her mother, Maria are the registered owners of the property which they jointly purchased in 1972, after they returned from the United Kingdom. In or about 1980, the claimant's aunt, and her mother's sister, Myrtle, also returned to Jamaica.
- [10] The 1986 Agreement was entered into among the three ladies, it provided for Myrtle, to live in a portion of the building on the property, in exchange for the sum of Ten Thousand Dollars (\$10,000.00), as Myrtle was opposed to living there for free. The property comprises of a residential and commercial building located on less than a quarter acre of land. Maria died on 28<sup>th</sup> March 2002 and Myrtle continued to reside on the property.
- [11] Subsequently, Earline learnt that Myrtle, had executed the 2007 Agreement to sell the property to the defendant. Myrtle died in 2011. At the time, of Myrtle's death, the defendant occupied the downstairs of the building and operated a business thereon.
- [12] The claimant argues that Myrtle could not sell the property as it was not registered in her name nor surveyed or subdivided. Further, it was not the intention of the registered owners to vest Myrtle with an interest in the property. It was the intention of Maria and Earline, that Myrtle would reside on the property until her death or until she decided to leave. It was never the intention of the claimant or Maria for Myrtle to have a legal interest in the property, hence the reason they did not transfer same.
- [13] The claimant proposed that, the issues for the court's determination are;
1. *Whether the claimant's legal title which she acquired as the sole proprietor by the rule of survivorship can be defeated by a purported equitable interest of which she was not aware?*

2. *Whether the defendant may be considered by this court as a bona fide purchaser for value without notice of the claimant's legal title?*

The claimant submitted that these are the two basic tenets upon which the claimant's case rest and which is answered in the negative.

**The Defendant's Submissions**

- [14] The defendant argues that he executed the 2007 Agreement, on 14<sup>th</sup> June 2007, in which he purchased the property from Myrtle, for a sum of Five Million dollars (\$5,000,000.00). He depones that he, paid her a total sum of Three Million Four Hundred and Fifty Thousand Dollars (\$3,450,000.00) and a balance of One Million Five Hundred and Fifty Thousand Dollars (\$1,550,000.00) remains outstanding pending completion.
- [15] There is nothing in the 2007 Agreement for Sale to say how the sums are to be dealt with. However, it is expressed that the defendant takes possession on 31<sup>st</sup> August 2007. The sale has not been completed because of the death of the vendor. The Vendor's Attorney-at-Law is now deceased and his son now has conduct of the matter.
- [16] Myrtle had in 1986 purchased the property from the claimant and her mother for a consideration of Ten Thousand Dollars (\$10,000.00). The purchase price was paid on the date the Agreement was signed. Counsel John Jackson had carriage of sale and the necessary transfer tax and stamp duty were paid.
- [17] Prior to purchasing the property from Myrtle in June 2007, the defendant had been a monthly tenant from September 1997. In June 2000 he started operating a grocery shop at the property, which he rented from Myrtle. He paid a monthly rent of Fourteen Thousand Dollars (\$14,000.00).
- [18] Mr. Gayle, for the defendant, referred the court to the cases of **Etheline Bourke v Authur Roberts** (1980)17 JLR 6, and **Bramwell v Gordon** (1957) 7 JLR 88.

Based on those authorities, learned counsel submitted, that an equitable interest was created where monies were expended by one party to erect a house on the land of another. Counsel further submitted that where there was a valid contract for sale even where the sale is incomplete the purchaser holds a licence from the vendor which cannot be revoked unless there is default under the agreement. (See; **Esmine Williams v George Breary and Cynthia Breary** (1984) 21 JLR 6).

- [19] Mr. Gayle argued that in the instant case there is a valid contract for sale between the joint proprietors and Myrtle McKay. The authenticity of this signed agreement has not been challenged. The claimant at no time alleged fraud in respect of this Agreement for Sale and in particular her signature. Pursuant to the said Agreement for Sale, Myrtle did pay the sum of Ten Thousand Dollars (\$10,000.00) as consideration for the property. The 1986 Agreement for Sale clearly states that the purchase price was to be paid in full on the signing of the Agreement for Sale. That the date of possession be on the signing of the Agreement for Sale and payment of the purchase price. To date, the claimant has not denied this payment. There is no dispute that Myrtle McKay occupied the premises thereafter until her death.
- [20] That prior to her death, Myrtle McKay rented the downstairs of the said premises to the defendant whilst she lived upstairs. This relationship of landlord and tenant between Myrtle and the defendant continued for about ten (10) years after which Myrtle pursuant to the 2007 Agreement for Sale sold the said land and building to the defendant for the sum Five Million Dollars (\$5,000,000.00). That based on the 2007 Agreement for Sale the defendant paid the sum of Three Million Four Hundred and Fifty Thousand Dollars (\$3,450,000.00).
- [21] The defendant contends that notwithstanding that, under the 1986 Agreement, the transfer from the vendors, Maria McKay and Earline Lawrence was never completed; the case law would suggest that an equitable interest in the said property was created by the signing of the Agreement for Sale and the passing of consideration between the parties.

[22] Likewise, a similar interest was created by the signing of the contract for sale between Myrtle McKay and the defendant. The defendant has been the purchaser in possession since June 2007 whereas Myrtle McKay was the purchaser in possession from May, 1986 until she died in January 2011. This period represents a total of twenty-five (25) years unmolested. This claim was only brought in September 2014.

[23] It is clear by virtue of the signed 1986 Agreement for Sale that there was a clear intention on the part of the vendors, Maria and Earline to sell Lot 17 part of Kellits Township in the parish of Clarendon registered at Volume 250 Folio 37 which comprised of land and building which was occupied by the said Myrtle McKay.

[24] Relying on the principles of equity and case laws, the fact that the transfer was never completed ought not to defeat the clear intention of the parties. It is on this basis that the court is urged to order specific performance of the respective contracts of sale, vesting legal title in the defendant.

[25] The issues for the court's consideration are as follows;

1. *What interest in law was acquired by Myrtle McKay when she was put in possession pursuant to a valid contract of sale where all purchase monies were paid but no splinter title was obtained?*
2. *What interest in land was acquired by Dean Edwards having being put in possession pursuant to a valid contract of sale with Myrtle McKay who died before the sale was completed?*

### **Discussion and Conclusion**

[26] At the completion of oral presentation of this matter, I sought the further assistance of both counsel requesting that written submissions with authorities be submitted. As such, the court made an order on 27<sup>th</sup> May 2015 for each party to submit written submissions with authorities attached and that they were at

liberty to mount new arguments by 1<sup>st</sup> June 2015 at 12 pm. However, on the court's record there is no evidence of the claimant's submission.

**[27]** The essence of the issue confronting the court is whether Myrtle pursuant to the 1986 Agreement for Sale acquired an interest in the property that could be transferred in accordance with the 2007 Agreement?

**[28]** The evidence adduced by the claimant on the issue as to whether Myrtle acquired an interest in the property, is contained in three (3) Affidavits. In her Affidavit in support of Fixed Dated Claim Form filed on 17<sup>th</sup> September 2014, Earline at paragraph 6, states;

*“That my mother and me entered into an agreement with the said Myrtle Mc Kay to live in a portion of the building on the property, in exchange for the sum of Ten Thousand dollars (\$10,000.00), as she was not comfortable living there for free.”*

**[29]** This assertion is substantially repeated in her Affidavit filed on the 12<sup>th</sup> November 2014, in which an application was made for an injunction requiring Dean Edwards to cease construction of a wall on the property. In this Affidavit, there is expressed denial that Myrtle is a registered owner of the property. The affiant states that; *“I was given permission by my mother to live on the property”*. I understand that what is being claimed by the affiant is that no legal relationship, came about as a result of the 1986 Agreement, the actions were those of a family accommodating a member and saving her from embarrassment, by taking \$10,000.00.

**[30]** The denial of the transfer of any interest to Myrtle continues in the Affidavit of the 12<sup>th</sup> November 2014. Paragraph 6, states;

*“That I did not at any time transfer the property to my late aunt, Myrtle Mc Kay and I have no knowledge of my late mother transferring the property to the said Myrtle Mc Kay.”*

**[31]** The claimant acknowledges being aware of the defendant prior to 2007. At paragraph 7, she says;



*“That since 2004, the Respondent has moved on to the property and has been exercising acts of ownership and has caused much disturbance to myself and my visitors. He has been making threats to kill us and blocks passage through the property with cylinders and motor vehicles which were all reported on numerous occasions to the Crofts Hill Police Station.”*

At paragraph 14;

*“That it was the intention of my mother and me was for my aunt to reside on the property until her death or until she decide to leave.”*

Further at paragraph 15;

*“It was never our intention for her to have a legal interest in the property, hence the reason we did not transfer same.”*

- [32]** There appeared a divergence from the total denial of an intention to transfer a legal interest, as reflected in her earlier Affidavits from that in her Further Affidavit, filed on the 26<sup>th</sup> February 2015, in which she says at paragraph 3 inter alia;

*“That the Agreement .... was entered into to secure her (Myrtle) position as an occupant and in lieu of rent to be registered later as a joint tenant and not for her to have an interest in the property as having a separate interest as a tenant-in-common.”*

And at paragraph 4;

*“That at no time was there any discussion between the three of us named at paragraph 3 hereof that there would be a partition of the property as it was our agreement and understanding that the property would pass eventually to the last survivor which position as fallen to me the claimant.”*

Of the Further Affidavit, I understand that the Agreement was to convey a joint ownership, among the three ladies, the expectation being, that the Earline, the youngest, would eventually emerge as sole survivor.

- [33]** The claimant’s statements as to what the 1986 Agreement was intended to pass to Maria, is conflicting. From the evidence adduced, it is unclear as to what is the claimant’s contention. Is it that Myrtle was not a registered owner, but was given permission by her sister Maria to live on the property, and the sum of \$10,000.00 was tendered, because, she was not comfortable living free? Or, was

it to secure her position as an occupant, and later on make her a joint tenant but not a tenant-in-common? It is clear on a perusal of these statements from Earline, that she was unsure or mistaken as to what the document she signed was to achieve.

- [34]** Despite the conflicts in the statements as to what was the claimant's intention in entering into the 1986 Agreement, the agreement itself, remains unchallenged. It is clear and unambiguous. The parties are described as Vendor and Purchaser and recite that, 'the Vendor agrees to sell and the Purchaser agrees to purchase all that parcel of land...' Earline's statements to the effect that Maria gave permission to Myrtle to live on the property, falls away, in light of the clear words of the Agreement.
- [35]** Similarly, the assertion that, Myrtle had tendered \$10,000.00 because, "she would be uncomfortable living there free," is inconsistent with the clear term in the Agreement which states, "*Purchase Price of \$10,000.00 paid in full on signing of this Agreement*". The payment of \$10,000.00 by Myrtle, I find is an obligation placed on her by the Agreement. I reject, Earline's evidence, that it was given by her aunt, because she was uncomfortable living free. Earline's statement that it was never "*our intention for her to have a legal interest*", is inconsistent with her own statement, that herself and Maria, intended to have her registered later as a joint tenant.
- [36]** Moreover both versions are inconsistent with the unchallenged purpose of the agreement as enshrined the 1986 Agreement that "*Whereby the Vendor agrees to sell and the Purchaser agrees to purchase all that parcel of land ...*" Earline states she never intended to partition the property, however, the Special Condition mandated the Vendor to supply a splinter title.
- [37]** Earline is not a party to the 2007 Agreement. In respect of the 1986 Agreement, between herself, as surviving joint owner and Myrtle, there exists a legally binding agreement. Upon signing of the 1986 Agreement, the equitable interest

in the property was immediately vested in Myrtle, as purchaser. Generally, the legal interest remained in the Vendor, until the terms of the Agreement have been met by the purchaser. However, the Vendor, was regarded in equity, as a trustee for the purchaser, and equity was prepared to decree specific performance, on the application of the Purchaser. The Vendor occupies a fiduciary position and must therefore exercise and manage the property with the requisite care demanded of a trustee of trust property. In **Lysaght v Edwards** (1876) 2 Ch D 499 at 506, Jessel M.R states;

*“ The moment you have a valid contract for sale the Vendor becomes in equity a trustee for the purchaser of the estate sold , and the beneficial ownership passes to the purchaser , the vendor having a right to the purchase money , and a right to retain possession of the estate for the security of that purchase money , and a right to retain possession of the estate until the purchase money is paid .in the absence of express contract as to the time of delivering possession “See also , “**The Sale of Land**”, 5<sup>th</sup> Edition, See; **Fairweather v Fairweather** (1944) 69 CLR 121 at 154) (See; **Davies v Littlejohn** (1923) 34 CLR 174 at 185 to 186). As stated in **Marshall v Williams** [1974] VR 592 per Gillard J, once the purchaser has paid the full purchase price the vendor is a bare trustee of the land sold.”*

[38] The purchaser may exercise the right of sale, pending completion. The learned Authors of Cheshire and Fifoot, **Modern Law of Real Property** Tenth Edition, at page 650, states;

*“Thus, for instance, pending completion of the contract, the purchaser is at liberty to dispose of the property by sale or otherwise; he becomes owner of the rents and profits which fall due after the time fixed for completion; and he can demand an occupation rent if the vendor remains in possession after that time.”*

The purchase monies were paid on the date of the signing of the contract; therefore, Earline and Maria, although vested with legal ownership had no right to possession. Myrtle was therefore at liberty to dispose of the property, as of the date of execution of the contract. A court of Equity would decree specific performance.

[39] The claimant has argued it was never their intention to create legal relations with Myrtle, who is her aunt. The general rule, in these familial relationships is that

unlike commercial agreements, in the case of family, domestic or social agreements there is a rebuttable presumption, notwithstanding the presence of consideration that the parties do not intend to create legal relations in the arrangements made between them. This presumption may be seen in respect of agreements between spouses, between parent and child, and other agreements of a family, domestic or social nature (See; **Balfour v Balfour** [1919] 2 KB 571).

- [40] A determination is needed, to ascertain whether the parties intended to create legal relations, which Earline has consistently denied. The test to be applied is an objective one; the reasonable man test. However, where there is prima facie an intention to create legal relations, either because the agreement is clearly of a commercial character, or the circumstances otherwise convey that was the likely intention of the parties, this presumption is rebutted.
- [41] The agreement is clearly commercial in nature, the parties to the agreement, had a carefully drafted document, containing all the legal requirements to transfer title from vendor to purchaser. The parties are described as nurse, housewife and stenographer, there is no mention of familial ties on the face of the document. The services of an Attorney-at-Law was engaged and the cost of title borne equally by both sides. There was no submission made on the value of the property at the time of sale, and its updated value. The purchase price was required to be paid on the signing of the Agreement. That requirement being more stringent than is usual in these agreement where a deposit is made and usually time given to secure the balance of the purchase price.
- [42] The 1986 Agreement had the Special Condition mandating the Vendor to provide the purchaser with a splinter title. On the 24<sup>th</sup> September 2002, a survey was conducted on the property, at the instance of Myrtle. Both Earline and M. McKay appeared either in person or had their representatives there. This constitutes a departure from the customary approach in land transactions, involving rural folks generally, and family members in particular. Quite often, land transactions are partly oral agreement, and a part in writing. It is not unusual for boundaries to be

identified by finger pointing. **Etheline Bourke (Administratrix Estate Ruth Christianna Bourke, Deceased) v Arthur Roberts** (1980) 17 J.L.R. 6 is an example of the informal approach to land transactions that is not uncommon in Jamaica. (See pg. 9 letter g of the judgment).

- [43] In the instant case, it is evident by a stamp on the said Agreement for Sale that the transfer tax in the amount of \$450.00 was paid on 11<sup>th</sup> June 1986. There is also a conveyance duty stamp which was later cancelled bearing a mark on the said Agreement for Sale. Having assessed the evidence, I find that the claimant and her mother intended to create a binding legal relation when they entered into the 1986 Agreement.
- [44] The Authors, Charles Harpum, Martin Dixon et al in **Meggary and Wade, The Law of Real Property**, 8<sup>th</sup> Edition, highlighted that if the purchaser is potentially entitled to the equitable remedy of specific performance he obtains an immediate equitable interest in the property contracted to be sold. He is, or soon will be, in a position to call for it specifically. As equity "*looks upon things agreed to be done as actually performed*", the purchaser becomes the owner in the eyes of equity from the date of the contract (See; **Lysaght v Edwards** (1876) 2 Ch D 499 at 506 - 510). It is therefore irrelevant that the date for completion (*when the purchaser may pay the price and take possession of the land*) has not arrived.
- [45] The purchaser does not of course become the legal owner of the land until it is conveyed to him or he is registered as proprietor of it. The purchaser becomes owner in equity through the operation of the doctrine of conversion (See; **Lysaght v Edwards** (1876) 2 Ch D 499 at 506).
- [46] The other issue for the court is whether the defendant has any interest in the property? The defendant being a third party subsequently agreed to purchase the property from Myrtle who was the beneficial owner of the property. There is no issue raised that the 2007 Agreement represents the agreement entered into between Myrtle and the defendant. Earline, complains that she was unaware of

the 2007 agreement until sometime after the death of Myrtle. In any event, according to Earline, her aunt had no interest in the land. There is also no evidence to suggest that the purchaser was not a bona fide purchaser for value without notice. Earline has acknowledged that she has been aware of the defendant from as early as 2004, and had complained that he was demonstrating signs of ownership of the property.

- [47] The defendant in his Affidavit dated 11<sup>th</sup> December 2014, filed in response to Earline's application for an injunction, stated at paragraph 4, "*That I purchased said land from Myrtle Mc Kay on or about June 14, 2007 for a consideration of five million dollars.*" The Affidavit states that he made a part payment of Three Million Four Hundred and Fifty Thousand Dollars (\$3,450,000.00) on or about 14<sup>th</sup> June 2007. The court also notes that the claimant's counsel did not take any issue with the receipts; nor was it challenged that the defendant paid the stated sum to Myrtle. The defendant says he has been a purchaser in possession since 14<sup>th</sup> June 2007. That in April 2013, the claimant withdrew seventeen (17) plaints that she had filed against him seeking recovery of possession and mesne profits for 2011 and 2012.
- [48] The full purchase price of the property has not been paid by the defendant. There is a balance of One Million Five Hundred and Fifty Thousand Dollars (\$1,550,000.00) that remains outstanding pending completion. The defendant argues that the reason for the non-completion of the Sale Agreement was the death of the vendor, Myrtle. The law is clear that Myrtle McKay's personal representative would be the custodian and is entitled to the vendor's lien since all the purchase price has not been paid up.
- [49] P.N. Wikrama-Nayake (2005) in the book entitled "**The Sale of Land**", 5<sup>th</sup> Edition, pointed out that upon the death of a vendor, pending the completion of the contract, the property comprised therein will, subject to the rights of the purchaser under the contract pass to her or his legal personal representative when constituted, and so will the right to receive payment of the balance of

purchase moneys. These moneys form part of her or his personal estate and being secured on the land by a vendor's lien, they may well pass under a bequest of "securities" contained in any will left by the deceased. If after the death of the vendor the purchaser fails to perform the contract and thus leaves the land in the hands of the executor or administrator of the former, it will belong to the persons who are beneficially entitled to the personal estate of the deceased.

[50] The court notes the following conditions, among others, in the Special Condition of the Agreement for Sale, 2007;

*"a. It is a condition precedent that this Agreement shall not be binding on the Vendor until it is signed by the Vendor and the Purchaser and the deposit and further payment herein mentioned are paid by the Purchaser and the instruments thereof negotiated."*

*e. It is understood and agreed that the Purchaser shall apply to the Bank of Nova Scotia, May Pen Branch for a loan of not less than Two Million Five Hundred Thousand Dollars (2,500,000.00) on the security of the property and the Purchaser shall deliver to the Vendor a written commitment from the bank of Nova Scotia May Pen Branch to pay the said sum to the Vendor in exchange for the Duplicate Certificate of Title registered at Volume 250 Folio 37 of the Registered Book of Titles together with a registrable instrument of transfer."*

[51] Approximately four (4) years after the signing of the 2007 Agreement, the remaining purchase price has not been paid. Time was made of the essence, but there is no evidence of any notice or demand given by the Vendor pursuant to special conditions (g) and (i). Attention is also given to the date of possession and the time for completion. The date of completion is on 31<sup>st</sup> August 2007 and the time for completion is when the title is ready.

[52] Counsel, for the defendant, is asking the court to order specific performance of both agreements, in his written submission he said; *"Relying on the principles and the case laws, the fact that the transfer was never completed ought not to defeat the clear intention of the parties."* Counsel relied on the case of **Etheline Bourke (Administratrix Estate Ruth Christianna Bourke, Deceased) v Arthur Roberts** (1980) 17 J.L.R 6, which in my respectful view was not of assistance to

his cause. In the **Etheline Bourke Case**, RB, had pursuant to an oral agreement agreed to pay a weekly sum to the landlord, and had built a house for the occupation of the landowner until his death, and had collected rent, on another. The landowner conveyed the land to the defendant months prior to the death of RB. RB administratrix brought an action against the defendant, seeking an order for possession of premises and an injunction. The court found that in the absence of clear evidence as to the nature of the oral contract between RB and the landowner, it was impossible for a court to uphold any equitable right to enforce it, however an equity arose as a result of the expenditure of RB, of money in the erection of the house on the land. The defendant had notice of this equity, which can be satisfied by the payment to the RB estate of such amount spent on the house and the rent received. In the instant case, the terms of the Agreement of which enforcement was sought was clear, unambiguous and without challenge, counsel was asking for those terms to be specifically enforced.

- [53] On its way to refusing the order for possession sought, the Court of Appeal cited with approval the decision of the House of Lords, in **Ramsden v Dyson** (1866) L.R.1 .H.C, per Lord Kingsdown;

*“If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and without objection by him, lays out money on the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.”*

In **Etheline Bourke**, the court found that there was insufficient evidence of the oral agreement. The instant case rests on an unchallenged contract, whose terms have not been impeached.

- [54] Similarly, in the case of **Esmin Williams v George Breary and Cynthia Breary** (1984) 21 J.L.R. 6, the court found ‘*no question of any promise been made by either of the joint landowners to transfer the land to the defendant, there was no basis for the transfer of the fee simple being made.*’ The Court found that an



equitable interest arises in the defendant that would entitle him to remain on the land. The plaintiff as owner was entitled to discharge this equity by compensating the defendant.

- [55] Mr. Gayle was better assisted by the case of **Bramwell v Gordon** 3 C.A J.B. 700. The parties had completed an agreement for sale of land under which, the purchaser had paid eighty pounds on execution of the agreement and had issued a promissory note for the balance. The purchaser was put into possession and requested that a survey be done as early as possible to complete title. When the purchaser made arrangements for the survey, the vendor attended and took objection to the survey being done on the basis that the balance of the purchase price was outstanding. Subsequently, the vendor's agent came onto the land to cut trees. The purchaser brought an action for trespass against the vendor. The Resident Magistrate held that the purchaser was a tenant-at-will and the entry of the vendor terminated the tenancy.
- [56] The Court of Appeal, held that, the nature of the relationship, was to be discerned from the intentions of the parties. Counsel for the vendor's argued, that the purchaser was a tenant-at-will, he having been let into possession of the land before completion of the contract of sale. Further, in those circumstances, until completion of the contract of sale or payment of the purchase money, any acts done by the vendor, inconsistent with the tenancy-at-will determines the tenancy and no action for trespass will lie.
- [57] In rejecting, that argument, the Court of Appeal, studied the authorities, to discern the principles that guided the court in the earlier cases, to ascertain whether there was exclusive occupation for an indefinite period, and if so, to come to a conclusion that a tenancy was created. The Court was of the view, that "no attention was given to the intention of the parties". Although cases, such as, **Nixon v Richards** and **Lee v Brown**, could have been construed to demonstrate an intention to create a tenancy-at-will, the court found that it was settled law

that one must look to the intention of the parties to determine whether the relationship of landlord and tenant has been created.

[58] The Court of Appeal, following the learning in **Errington v Errington and Woods**, where at page 1202, of that judgment, it was said;

*“The question in all of these cases is one of intention. Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should take a personal privilege with no interest in the land...The defendant had only a personal privilege with no interest in the land, which he could assign or sub-let, and he could not part with the possession to another.”*

[59] The Court, then went on to find that; *“we do not see how under these facts the purchaser became a tenant-at-will, ... It seems to us that he was holding under a licence from the vendor which only could be revoked unless and until he was in default under the agreement.”* The recent decision of the Court of Appeal in **Annie Lopez v Dawkins Brown**, the Court of Appeal, in overturning a decision of the Supreme Court, making a decree for specific performance, and upholding that Court’s ruling on promissory estoppels, the Learned President, with his usual clarity, indicated that within an espousal of the principle of promissory estoppels, and other formulations of the principle, (which I would think, the instant case is one such), there needs be evidence of some unfairness or unconscionability. Morrison P, at paragraph 69 states;

*“As will be seen, the notion of unconscionability of some kind is central to this and other formulations of the principle. However, Lord Scott’s important judgment in **Yeoman’s Row Management Ltd and another v Cobbe**, to which Mr Williams referred us, sounds an important caution (at para. 16) against allowing unconscionability to take on a life of its own:*

*“My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppels cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a ‘proprietary estoppel equity’ as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.”*

[60] Counsel for the defendant has urged the court in the circumstances to award specific performance in relation to the two Sale Agreements. In respect of 1986 Agreement, the purchaser, Myrtle, had completed all her obligations under the agreement. Damages would not be an adequate remedy. Myrtle has already acted upon her rights pursuant to the agreement and transferred the property. The contract for sale was a valid and enforceable agreement. Its terms were unchallenged. The parties intended that Myrtle would purchase the property for \$10,000.00. That sum was paid in full. The Agreement provided for the Vendor to provide a splinter title to the purchaser. The Vendor, participated in the survey called at the instance of the purchaser, and raised no objection to that survey being completed. Specific performance is discretionary, but not capricious or arbitrary. Nothing has been adduced before this court, independent of the agreement that would make it inequitable to decree specific performance of the 1986 Agreement. I therefore make an order for specific performance of the property to Myrtle, pursuant to the 1986 Agreement.

[61] In respect to the 2007 Agreement, the purchaser has not completed the contractual obligation concerning payment. A contract for sale of land may be thus enforced in equity, but in any particular case the court may in its discretion withhold this relief and leave the claimant to the common law remedy. However, where there is a valid contract of a nature which equity ordinarily decrees to be specifically performed, the relief will not be withheld unless for some sound and recognized reason such as delay, some unconscionable dealing on the part of the claimant, hardship or where some other form of order would do justice. The delay incurred in the completion of the sale, in this case, was occasioned in part by the death of the vendor, and her Attorney-at-Law. In any event there is nothing before the Court, to indicate that the delay caused any hardship on any other person, other than the defendant. The learned Authors of Cheshire and Fifoot, **Modern Law of Real Property**, Tenth Edition, at page 655 says;

*“The most important case in which equity grants specific performance with compensation is where a contract for the sale of land is not completed upon the date fixed in the contract. At common law, time was always considered to be of the essence of the contract, and a party who failed to complete on the agreed date was remediless.... Equity, taking a different view that now prevails in all the courts, has always been prepared to decree specific performance notwithstanding failure to observe the exact date fixed for completion, provided that this will not cause injustice to either party.”*

[62] The defendant had been a tenant on the land from 1997, he started a grocery shop in 2000, and he executed the sale agreement on 14<sup>th</sup> June 2007. Pursuant to the Agreement he should have on the 15<sup>th</sup> August 2007, completed the payment of the purchase price. He has not made any further payments since July 2007. The Agreement for Sale contemplates putting the purchaser in possession, two (2) weeks after the date of his final payment towards the consideration, that is, the 31<sup>st</sup> August 2007. That final payment was never made. It seems to me that he needs to satisfy the equity that has arisen in respect of his delay. The satisfaction of that equity is the monthly rent he ought to have been paying before taking up possession. That amount is the rental he has paid prior to entering into the Agreement; fourteen thousand dollars per month. I worried whether this sum should not have the statutory amount applied, in the absence of submissions, I will not take that route. The rental is assessed from 1<sup>st</sup> July 2007 to 1<sup>st</sup> September 2017, a total of One Million Seven Hundred and Eight Thousand Dollars (\$1,708,000.00).

[63] Having carefully assessed the matter at hand, I believe that it is appropriate in the circumstances to make an award of specific performance. In **Annie Lopez v Dawkins Brown & Anor**, Morrison JA, as he then was, in dealing with the issue of remedy, in the kind of case that may have a consensual character but not contractual said at paragraph 84;

*“Robert Walker LJ also referred (at para. [50]) to the kind of case in which the defendant’s assurances, and the claimant’s reliance on them, may have a consensual character falling not far short of an enforceable contract:*

*“...there is a category of case [sic] in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.”*

Moreso, where there is a valid enforceable contract, and within that contract the claimant bargain is certain and unchallenged, the response of the court will be to enforce the contractual terms.

**[64]** The court hereby makes the following orders;

1. The orders as per the Fixed Date Claim Form filed 17<sup>th</sup> September 2014 are refused.
2. Judgment in favour of the defendant.
3. The defendant, Dean Edwards, is hereby declared to be entitled to the transfer of the fee simple ownership of all that parcel of land part of Kellits Township, in the parish of Clarendon and being part of Lot no.17 containing 308.17sq. meters and being part of the land registered at Vol. 250 Folio 37 of the Register Book of Titles, and delineated in a Survey Diagram bearing survey and mapping division examination number 294047, pursuant to the Agreement for Sale dated 14<sup>th</sup> June 2007.
4. The Court orders that the personal representative, agent or successor in title of Myrtle McKay perform the terms of the Sales Agreement dated 14<sup>th</sup> June 2007 to transfer the fee simple in the property, upon payment by him to the said personal representative agent or successor in title of the said Myrtle Mc Kay the sum of \$1,550,000.00, being the sum outstanding on the purchase price in addition to the sum of \$1,708,000.00 being the

rental assessed from 1<sup>st</sup> July 2007 to 1<sup>st</sup> September 2017 allocated as a payment in default of outstanding purchase price. The defendant will also be liable for the usual expenses payable by purchasers of real property.

5. The defendant will make all payments within One Hundred and Twenty (120) days of the date of the Order herein; failing which the property will form part of the estate of Myrtle McKay and pass to the beneficiaries.
6. If the agent or personal representative shall fail or neglect to sign a registrable transfer in compliance with the order of the court, the Registrar of the Supreme Court shall be empowered to sign the transfer and any other document necessary to effect the sale and transfer of Lot No.17 being part of the land registered at Vol. 250 Folio 37 of the Register Book of Titles to the defendant.
7. The sale shall be completed within One Hundred and Twenty (120) days from the date of this order, in respect of which time shall be of the essence.
8. Counsel for the defendant should take the necessary steps in ascertaining the personal representative of the estate of Myrtle McKay.
9. Myrtle McKay, her authorised agent, personal representative or successor in title is hereby declared to be entitled to the transfer of all that portion of land being part of part of Kellits, in the parish of Clarendon being Lot No.17 on the plan of Kellits registered at Vol. 250 Folio 37 of the Register Book of Titles pursuant to the Agreement for Sale dated 19<sup>th</sup> May 1986.
10. Specific Performance compelling the claimant to complete the Agreement for Sale in the terms and conditions of the Agreement for Sale dated 19<sup>th</sup> May 1986 with the personal representative of the estate of Myrtle McKay

to transfer the fee simple in the property to the personal representative of Myrtle McKay.

- 11.If the claimant shall fail or neglect to sign a registrable transfer in compliance with the order of the court, the Registrar of the Supreme Court shall be empowered to sign the transfer and any other document necessary to effect the sale and transfer of Lot no.17 being part of the land registered at Vol. 250 Folio 37 of the Register Book of Titles to the defendant.
12. Specific performance compelling the defendant to pay the outstanding purchase price of \$1,550,000.00 in relation to the property.
13. Counsel for the defendant should direct the personal representative of Myrtle McKay to complete the sale and transfer of the property in the name of the defendant, Dean Edwards, in accordance with the terms and conditions of the Agreement for Sale, 2007.
14. Costs to the defendant to be taxed or agreed.