



[2024] JMSC Civ. 176

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2020 CV 02231

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| BETWEEN | CARLTON CLAUDE HAMILTON | CLAIMANT |
| AND | VERONA IVORINE MORGAN-BAKER | DEFENDANT |

Ms Deneve Barnett instructed by Brown and Shaw Attorneys-at-law for the Claimant

Mr Kemar Robinson and Ms Terrisha Grant instructed by Robinson Partners, Attorneys-at-law for the Defendant

May 13 – 16, 2024 and December 17, 2024

Trial – sale of apartment – legal and equitable interest acquired in property – no receipts evidencing sale – Notice to Quit

JUSTICE T MOTT TULLOCH-REID

Background

1. An American proverb reads “Before borrowing money from a friend, decide which you need most.” Had the parties in this case heeded the advice set out in that proverb, the circumstances that led to the termination of what was once a very close friendship and the state of affairs leading up to this trial would have been completely avoided.
2. The Claimant’s claim was made on the basis that there was an agreement between himself and the Defendant in 2013 wherein it was agreed that the Defendant would sell him the Property. Pursuant to the terms of the agreement, the Claimant

purchased the Property, paid the entire purchase price of \$11M and was placed into possession of the Property by the Defendant and her attorneys-at-law.

3. In or about May 2020, the Defendant issued a Notice to Quit and caused it to be served on the Claimant, stating therein that the Claimant was to remove himself and his possessions from the Property on or before June 6, 2020. Having been served with the Notice to Quit, the Claimant caused searches to be done at the Office of the Registrar of Titles and came to find that the Defendant's name was still endorsed on the title to the Property and the said Title had been used to obtain a mortgage. As a result of the aforementioned, the Claimant alleges that he has suffered loss and damage and has incurred expenses and has sought the various remedies outlined in summary above and more particularly in the Further Amended Particulars of Claim filed on January 10, 2022.
4. The Defendant agrees that the parties entered into a sale agreement. She however alleges that the Agreement for Sale was to be completed in 120 days. The Claimant was to provide a Letter of Commitment and Letter of Undertaking. Neither was provided and only the deposit was paid. No additional sums were paid by the Claimant to the Defendant's attorney or to the Defendant herself and as such the Claimant is in breach of the sale agreement and is not entitled to the legal or beneficial interest in the Property.
5. The Defendant raised a counterclaim, claiming entitlement to *mesne profits* in the amount of \$6,320,000 and a set off of approximately \$4.3M.
6. The Claimant filed a Reply to Defence and Counterclaim. The evidence given by both parties substantiates the pleadings and will be dealt with in more detail below.

Case for the Claimant

7. The Claimant's case is contained in his evidence and the evidence of Jerome Symester and Shannon-Dale Reid. The evidence was taken over the course of 3 days and as such I will summarise it. The Claimant's evidence as contained in his

Witness Statement is that the Defendant approached him to purchase the Property. She had originally had a buyer but because she had a mortgage endorsed on the Title to the Property, she wanted the Claimant to make the purchase. If she went with the initial purchaser, she would have to pay off the mortgage before the Title would be available for the transfer to the new owner to be endorsed. She did not wish to go this route as she had recently purchased another property in Roehampton, which required excessive repairs and if she used the money from the sale to pay that mortgage off, she would not have sufficient funds to make the renovations to the Roehampton property. In addition, if she sold to the original purchasers, on completion of the sale she would have to vacate the Property, but she had no money to pay rent while doing the renovations to the Roehampton property and that property was not, at that point, in a state which made it suitable to live in.

8. The Claimant and the Defendant had been friends for many years. They had formed a friendship in or about 1998 or 1999. Theirs was a relationship more like "*sister and brother*" than friends. Based on their relationship, the Claimant decided to assist his sister-friend and they both went to see Mr Xavier Mayne, attorney-at-law. Mr Mayne was to act for both of them (as vendor and purchaser). He seemed however to have been the friend of the Defendant as it is she who introduced the Claimant to Mr Mayne. The agreement with the initial purchaser was cancelled and an agreement was signed between both the Claimant and the Defendant. The Claimant said he initialled every page of the agreement for sale except for the last page which he signed. He however never received a copy of the sale agreement for himself, although he, on numerous occasions, requested a copy from his attorney. The agreement spelled out the purchase price of the Property which was \$11M, that payment was to be in cash and that the purchase price should be paid in full by February 2014.
9. The Claimant said he purchased the Property because it was centrally located and offered some privacy. It was closer to his work than where he was living at the

time, 9 Miraflores Avenue and so when he was working at the Norman Manley International Airport, he would stay there. He also saw it as a good rental opportunity.

10. When he purchased the Property, there was a mortgage endorsed on the title for the benefit of Jamaica National Building Society. The Defendant had told him that she owed about \$3M on that mortgage to the building society. He paid the sum of \$4,265,781.19 to Mr Mayne towards the purchase of the Property. The sum was paid in instalments of \$500,000, \$2M, \$700,000 and \$1,075,781 over a period of time, from May 20, 2013, to May 31, 2013 (Exhibits 2-5 refers). Except for the documents he received from the financial institutions to show proof that the cheques were made payable to Mr Mayne, there is no documentary evidence from Mr Mayne himself as Mr Mayne did not issue any receipts to the Claimant upon receipt of the payments from him.

11. Subsequent to those payments being made, the Defendant asked the Claimant to pay her directly some of the money towards the purchase price as she needed it for the purpose of renovating the Roehampton House. The Claimant obliged because of their relationship. He gave her large sums of money but did not receive any receipts evidencing the payment, from either the Claimant or Mr Mayne. The Claimant allowed the Defendant to live at the Property until the Roehampton House was habitable and during the time she stayed there, she did not pay rent. The Claimant paid sums to the Defendant which was agreed would go towards the purchase price. These sums include sums for worker payroll, hardware bills, purchase of cement and to install the roof. He says he has paid her in total \$11,122,781.11. Between May 2013 and January 2014, he paid her \$1,850,000. I understand this evidence to mean he paid Mrs Morgan-Baker that sum directly. His evidence sets out how the sum was arrived at and the source of income as being from rental income he obtained from renting out another property and his motor vehicle, catering and decorating services and online marketing. He also borrowed money from Andre Chin to pay the Defendant. He paid her additional

sums between August 2013 to January 2014, but he did not state the source from which those funds were obtained. No receipts were issued and none requested because the Claimant trusted the Defendant.

12. Mr Hamilton said that once he completed paying for the Property, the Defendant introduced him to the Strata as its owner and he began to act as the owner. He attended meetings as the owner, paid the maintenance and property taxes. He paid regular maintenance from February 2014 and property taxes from March 2016 for the period 2014-2017. The Defendant paid the property taxes in 2018 and when he sought to reimburse her, she told him "*no worries*".
13. In March 2014, the Defendant informed Mr Mayne that the Claimant had completed paying for the property and she instructed him to issue letters of possession which he did. On the same day, the Claimant instructed Mr Mayne to pay over the initial sums paid to the Defendant.
14. The Defendant assisted the Claimant in finding a tenant to rent the property and in preparing the rental agreement to govern that tenancy. The Defendant needed time to pay off the mortgage owed to Jamaica National Building Society and the Claimant extended the time for her to effect the transfer to him in order to allow her to pay off the mortgage. Thereafter he communicated with the Defendant and Mr Mayne on many occasions as to whether the transfer could be effected but Mr Mayne in 2019/2020 responded that the Defendant was not in a position to clear the mortgage.
15. There was as far as the Claimant was concerned one issue remaining and it was the payment of the closing costs. He was not of the view that he was responsible for paying the entire sum to effect the transfer.
16. In about 2019, the Claimant came to find that the Defendant had obtained another mortgage using the title for the Property. He made inquiries of Mr Mayne as to whether this was so but was assured that that was not the case. His further

inquiries of Mr Mayne as to whether the mortgage was paid so the transfer could be effected was met with an unsatisfactory response as Mr Mayne informed him that the Defendant was reluctant to update him and had indicated that the matter was strictly between herself and the Claimant. Up to the date of the filing of the Witness Statement, the Property had not been transferred to the Claimant.

17. On May 27, 2020, the Claimant was served with a Notice to Quit the Property. He sought legal advice and was informed that a title search had been done. The Defendant had paid off the initial loan and had obtained another mortgage on the same property. She had also noted her marriage on the title. This was done without the Claimant's knowledge or consent. A caveat was lodged on behalf of the Claimant to protect his interest. He has sought unsuccessfully to obtain his file from Mr Mayne. Mr Mayne has indicated in the past that he does not have a file for the Defendant as he no longer represents her. The Defendant took steps to oust the Claimant from the premises by changing the locks, removing personal effects and posting No Trespassing signs on it. The combined loss amounts to \$800,000.
18. Needless to say, the friendship between the parties has deteriorated and began to deteriorate in or around 2018/2019.
19. The collaborating witnesses spoke to the destruction of and removal of the personal effects from the Kensington apartment and the relationship between the parties. Mr Symester said that the Defendant told him that the Claimant gave her money to meet some of the expenses at the Roehampton project. He did not say in his evidence that he ever saw the Claimant do this. He was going off what he was told. When it was put to him in cross-examination that he never put that important piece of information into his Witness Statement, he said he was answering questions asked of him in the moment of cross-examination and at the time of the preparation of the Witness Statement, had given the statement and had probably left out those details.

Defendant's case

20. The Defendant's case is found in her evidence and that of her supporting witness, Carlene Leslie. Ms Leslie's evidence was to the effect that the parties had been friends but stopped being friends sometime in 2015.

21. The Defendant agreed that there was an agreement between the parties for the purchase of the Property. She did not agree that the friendship ended in 2018/2019 but said it ended in 2015. She denied that she told the Claimant that she owed \$3M on the Property when she went into the agreement with him as that was approximately the amount, she had borrowed from the Building Society, and she had been paying monthly instalments of \$42,000 from the time of the loan up the time the time of the agreement and thereafter. She did not agree that the loan period was up to February 2014 as she would not have given up a 120-day sale for a cash sale which would have gone on for months.

22. The evidence of the Defendant conforms with that of the Claimant as it relates to the purchase of the apartment and the Roehampton premises. Where they diverge is in the following instances:
 - a. It was the Claimant who approached her to purchase the Property because of a dream he had, and it is not she who invited him to purchase.
 - b. She cancelled the sale to the initial purchaser which cost her \$180,000 which the Claimant said he would reimburse her and which she still has not received.
 - c. She did not owe the Jamaica National Building Society over \$3M in 2013 as she had had the loan since 2005 and had been making monthly payments. She had owed the bank approximately \$1M.
 - d. The Claimant told her he was obtaining a loan to purchase the Property from her.

- e. The Agreement was a written Agreement and Letters of Commitment and Undertaking should be provided. These were never provided after many attempts made by her to obtain them from the Defendant.
- f. A deposit of \$4,265,871 was paid to Mr Mayne in relation to the purchase. Additional sums towards the purchase were to be paid directly to Mr Mayne.
- g. She moved to Roehampton in 2013.
- h. The Claimant said he was having difficulty obtaining the mortgage but thought he would be favourably considered by the bank if he could prove additional income. The Defendant therefore put him into early possession of the Property in December 2013. The time period to close was extended up to 2018.
- i. Letters of possession were issued to the Claimant in March 2014 to allow him to be in a position to rent the Property. She assisted him in finding a tenant but says that at no time did she ever say he was the owner.
- j. Attempts were made to get the Claimant to complete the sale by paying monies due, but the efforts were futile as no additional sums were received and so the Defendant was of the view that the Claimant did not wish to continue with the purchase of the Property.
- k. The Defendant said that the Property was being rented by the Claimant. She does not say what the terms of the rental agreement was or what the monthly rental was. She said he sublet the Property on a short-term basis. One of his tenants damaged the gate and the Claimant was told to repair it. Those were the circumstances which led to the Claimant repairing the gate.
- l. She instructed Mr Mayne in late 2018 to cancel the agreement. He confirmed that he had done so but she does not know what procedure he followed to have the sale agreement cancelled.
- m. When the sale agreement was cancelled, she opted not to sell the Property but to keep it for her son, who was aged nine at the time. She

also decided to set off the rent payable by the Claimant to her for his occupancy of the Property against the deposit that was paid. She did not inform the Claimant that she intended to do this but had instructed Mr Mayne to do so. She said Mr Mayne confirmed that he informed the Claimant in late 2018 that the sale had been cancelled.

- n. In 2019 she needed more funds to do home improvement on the Roehampton property and so she used the Kensington property to obtain a mortgage of \$8.8M. She did not advise the Claimant or Mr Mayne that she had taken this step even though she was aware that the Claimant had paid monies towards the purchase of the Property.
- o. In 2020, she decided to issue a Notice to Quit but came to find that the Claimant was not living in the Property. The light bills were low, and the Claimant was not occupying it. All that was there was some old furniture which she asked the Claimant to remove. He did not and so she removed them and put them into storage. There is no inventory of what was removed or the storage fees that were paid.
- p. When the Defendant retained Mr Robinson in 2020 to act on her behalf in serving the Notice to Quit on the Claimant, she had informed him that the Claimant had paid her monies towards the purchase of the Property, that she had received that initial deposit in hand from Mr Mayne and that the Claimant was her tenant. She did not tell him that the Claimant was paying her rent. Her instructions to Mr Robinson were to issue a Notice to Quit with respect to the cancellation of the agreement. The Defendant agreed that she had not complied with her own Notice to Quit as instead of acting in accordance with the law, she locked the Claimant out of the Property and removed his personal effects therefrom.
- q. Mr Mayne told the Defendant in 2017 that the sale was a "dead sale." The Defendant took the file concerning the Kensington property from Mr Mayne in 2020. She, however, did not inform the Claimant that she had done so. She got the title to Kensington in 2018 from Jamaica National Building Society and she informed Mr Mayne that she had done so. She

told him she had intended to use it to get loan from the National Commercial Bank and he told her that she was free to do so as there was nothing forthcoming to finalise the sale.

- r. She has never told the Claimant the amount that was outstanding to complete the sale because he knew what it was. She agreed that the agreement for sale had not been stamped. She knows that neither transfer tax nor stamp duty or the other associated fees was paid. She is aware that there is a penalty for transfer tax if the sum is not paid in time. She was not aware that the transfer tax is paid by the vendor only. She did not know that in this transaction she was the transferor.
- s. To this day the balance outstanding on the Property has not been paid.

Analysis

23. This is indeed an unfortunate state of affairs. Unfortunate, not just because of a friendship gone bad but for many other reasons. The first unfortunate occurrence is that an attorney-at-law went against established first principles and acted for both the Vendor and the Purchaser in a conveyancing transaction. There was an obvious conflict of interest and based on the evidence before me, the conflict of interest favoured the Defendant, who was and remains the Defendant's friend. Upon her request, he gave her the file relating to the sale. There is no evidence that a copy of the file was ever given to the Claimant, even though on his evidence, he had requested it or at the very least a copy of the Sale Agreement. The undisputed evidence is that he did not receive any receipts for the payments which he made to Mr Mayne and he has not received a copy of the Sale Agreement.

24. The other unfortunate occurrence is that there is no sale agreement before the Court. The copy which the Defendant attempted to put into evidence was not stamped and in keeping with Section 36 of the Stamp Duty Act, which reads:

“No instrument, not duly stamped according to law, shall be admitted into evidence as valid or effectual in any court or proceeding for the enforcement thereof.”

The content of an unstamped sale agreement cannot be admitted into evidence. The Court therefore does not know what the parties agreed to in terms of the how the payments were to be made and what the deadline for payment was. It is unfortunate that Mr Mayne did not take the necessary steps to have the sale agreement stamped even though he had sufficient funds to do so and had received those funds not long after the parties had entered into the agreement. It is also unfortunate that a copy of the sale agreement, receipts evidencing payment of sums towards the purchase price or statement of account to close were not given to the Claimant for his records. Most unfortunate is the fact that neither the Claimant nor the Defendant chose to call Mr Mayne to give evidence as to whether their respective recollection as to how the events unfolded was the correct one. I suspect that was lucky for Mr Mayne.

25. It is also unfortunate that there is no documentary evidence to prove that an extension of time was given for the sale to be completed, that there are no receipts to prove that the Claimant had made cash payments directly to the Defendant and that the Claimant thought it prudent to pay the Defendant directly and not through the attorney-at-law.

The Issues

26. The parties agree that there was indeed an Agreement between them wherein the Claimant would purchase the Property from the Defendant. They also agree that the purchase price was set at \$11M. Where they are at odds is whether the full purchase price has been paid. The credibility of the witnesses must play a role in deciding that issue. I will therefore deal with that issue at once.

Credibility of the Witnesses

27. Having considered the evidence of the witnesses, the Claimant and the Defendant in particular, and considering their demeanour during their respective testimonies, I find that the Claimant's version of events is the more trustworthy one. I have come to this conclusion based on the reasons that follow. The Defendant needed money immediately to assist with renovating her Roehampton home. A sale that went through the usual 120-day cycle would not assist her as based on the evidence, she would not have anywhere to live when the apartment was sold as the Roehampton house was not habitable at that point in time. In addition, she would not have been able to pay off the mortgage outstanding to Jamaica National Building Society as she needed that money to put towards the renovation of her new home. Had the initial sale gone through, before the sale could be completed, whatever sums were owed to Jamaica National Building Society would have to be paid over. The sale to her friend would allow her to get over those two hurdles. The cash sale to her friend, although paid over a longer period would give her access to rent free living quarters during the renovations of the Roehampton House as well as give her access to money as needed to purchase material and pay labourers while maintaining her financial *status quo* as it existed at that time. She would in other words, have her cake and eat it too.

28. It is clear to me that the Defendant needed money as, instead of instructing her attorney to use the deposit and further payment, which exceeded the usual 10-15% of the purchase price payable upon signing the sale agreement, to stamp the sale agreement, she took all of the said sum before the sale was completed and did so, based on the Defendant's evidence in cross-examination from as early as *"late May to early June 2013."*

29. The Defendant's evidence is that she and Mr Mayne both informed the Claimant to close, but this cannot be so as no notice making time of the essence of the sale was issued to the Claimant. Even if there was no time of the essence clause contained in the sale agreement, there was still no letter from either the Defendant

or Mr Mayne informing the Claimant of the need to close by a particular deadline. I however do not suspect that any such notice could have been issued because the Defendant was herself not able to close, the sale agreement having not been stamped even though on the Defendant's evidence, over \$4M which would have represented the deposit and a further payment, had been paid by the Claimant from as early as March 31, 2013. The law is clear that a party may, when there is unreasonable delay by the other party to a contract, give reasonable notice to the delinquent party to complete the contract within a given period of time provided that the party serving the notice has fulfilled his own obligations (see **Smith v Hamilton [1951] CH 174**).

30. I agree with Ms Barnett's submissions that neither the Letter of Undertaking nor the Letter of Commitment would have been issued by the mortgagee until the stamped sale agreement was presented to it and the Defendant having failed to provide the Claimant with a copy of the stamped agreement could not have expected him to produce either document. The Defendant, having recently purchased a house would have known that a stamped sale agreement would have been required by the mortgagee so that the loan could be processed since she herself had obtained a mortgage and would have had to produce those documents in order to obtain same. I need not speak of Mr Mayne's knowledge, since that requirement is a basic requirement of obtaining a mortgage to purchase property.

31. The Defendant's unilateral decision to use the deposit as the monthly rental for the use of the apartment is also telling. She did not inform the Claimant of her decision to do so. According to the Defendant she was informed by Mr Mayne in 2017 that the sale was a "dead sale", yet she took no steps to repossess the property until 2020. She had also recovered the title to the Kensington property from as early as 2018 from Jamaica National Building Society, but she did not inform the Claimant of this but continued to permit him to "live out the deposit" as he had become her tenant. She was, in my opinion, aiming to keep the entire sum for the deposit as well as expect payment for a tenancy without fulfilling her side of the

bargain. She made this decision knowing full well that the sum that was initially paid to Mr Mayne was in the normal course of things to be used to pay Government of Jamaica duties and taxes. I have borne in mind that this is not the Defendant's first rendezvous with respect to purchasing property and as such, she ought to have been familiar with the process and would or should have been guided by her good friend and attorney Mr Mayne. Her behaviour, in my opinion, borders on, if it does not tread on the path of dishonest behaviour and this decision has negatively impacted the Defendant's credibility in the eyes of the Court.

32. I adopt Justice David Fraser's (as he then was) position in the case of **Saed Habib Mattar v James Salmon [2020] JMSC Civ 48** wherein there was a similar occurrence in which sums paid towards the purchase price of property were unilaterally applied to the payment of rent. Fraser J said at paragraph 65 of his judgment that

"While I understand the claimant's reasoning that he applied these payments to rent due, given that the defendant was not paying rent, it was not open to the claimant to unilaterally convert them to such use especially when they had been expressly paid and received on account of the purchase price."

33. Consideration was also given to the fact that the letters of possession were issued and the Claimant put into possession before the Agreement for Sale was even stamped. It is not unusual for purchasers to be put into early possession of property being purchased but this is usually done when there is some guarantee that all the outstanding sums have been or will be paid. Depending on the stage of the transaction the words "purchaser in possession" are inserted into the letters of possession and not "owner". This makes it clear to all interested third parties that ownership has not yet passed. It seems to me that an attorney who issued possession letters and named the purchaser as owner when the agreement for sale had not been stamped would not be as careful as he ought to be. There is no

claim before me that this was the case and as such it must be that the attorney must have been satisfied that the sum had been paid in its entirety for him to prepare and issue the letters in the way that he did and when he did.

34. It is also somewhat strange that when given the opportunity to pay the duties and associated penalties required so that she could rely on the document which would prove that her version of events was true, the Defendant opted not to do so. It is also strange that none of the documents which would enable the Claimant to obtain the mortgage were prepared by his attorney and given to him, the file that was returned to the Defendant by Mr Mayne, did not contain letters to Jamaica National Building Society which would have to be sent so that the mortgage that she had with them could be discharged so that the transaction could be completed. There was no request for the Statement of Account to Close, no Discharge of Mortgage nor was there the Duplicate Certificate of Title which would be needed to have the mortgage discharged and the new owner endorsed thereon. She also admitted that when she said in that affidavit that she had paid property taxes for 5 years while the Claimant had only paid property taxes for two years, she had lied. She admitted that in May 2018 (at the point in time when she said Mr Mayne had told her that the Claimant had been informed that the sale was cancelled) that she paid property taxes for Kensington and when the Claimant offered to repay her the sum, she told him that "*at the end of the day we never use to watch monetary between each other*". If, at that point in time, the Defendant was of the view that she was still the owner of the Kensington apartment, why would she have given the Claimant the impression she was doing him a favour by paying the property taxes? Similarly, it was put to the Defendant that the title to her property in Portmore notes her as having received it by way of a gift although in her evidence before this Court, she said she obtained a 75% share in it because she took over and paid the mortgage that was on it. Technically this was not a gift and therefore to so note the transfer as being a "gift" does not cast the Defendant in a manner which suggests that she is of trustworthy character.

35. The issue of credibility is an important one as it touches and concerns the payment of the full purchase price. Conflicts in the evidence given by the Defendant were highlighted by Ms Barnett to show that the Defendant's evidence cannot be trusted. Her evidence in Court under cross-examination was that she did not have a contractor working on renovating the Roehampton property, named Mr Laing yet in her affidavit responding to the application for injunction filed in this claim, the Defendant stated that her contractor's name was Mr Laing. This is but one example of such discrepancy between the Defendant's oral and written evidence.

36. It is clear from the Defendant's evidence that in 2013 she needed money to help with the renovation of her previously acquired Roehampton house. She admitted that the approximately \$4M that was paid by the Claimant to Mr Mayne was received by her in full and was used towards the Roehampton renovation. It is clear on the evidence that extensive renovations were undertaken at the Roehampton property. A jacuzzi was installed, modern fixtures and fittings were installed, the roof was redone, the floors were retiled, and furniture and appliances were purchased locally and overseas. Although all these renovations were done and purchases made, the Defendant has not put forward any evidence as to how she came by the sums. The Court was only told of the mortgage acquired to purchase the property.

Does the contract still exist?

37. The parties agree that there was a written agreement in place. Given that the undisputed evidence of the Claimant is that he was never given a copy of the Sale Agreement and the Sale Agreement on which the Defendant wished to rely was not stamped and was therefore not admitted into evidence, the Court is compelled to rely on equitable principles to arrive at a just result.

“Equity permits part-performance to be a substitute for a written note or memorandum. The acts of part-performance are only intelligible if there was

some prior agreement. The relevant section of the Statute of Frauds refers to a contract for sale or other disposition of land and the most frequent act of part-performance is where the purchaser is allowed to enter into the possession of the land. The equitable remedy available to such a purchaser is specific performance so that a vendor is compelled to convey the land and deliver the title or a purchaser is compelled to carry out the undertaking to purchase.” – Downer JA in **Arthur George McCook and ors v Holden Hammond and anor (1988) 25 JLR 296**

38. A fraud would be perpetuated on a purchaser who, based on an agreement he has entered into with a vendor, has paid monies to the vendor and has incurred expenses based on the agreement but the vendor has refused to perform his obligations pursuant to the terms of the agreement.

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the face of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.” (**Steadman v Steadman [1976] AC 536**).

Although there is no written contract before the Court, it is my view that a part from the acknowledgement by both parties that there was in fact an agreement for the sale of the Kensington apartment, there are sufficient acts of part performance (payment of monies for which there is proof, the giving of possession to and entering of possession of the property by the Claimant – see the case of **Kingswood Estate v Anderson [1963] 2 QB 169**) and the repairs/renovations done to the property by the Claimant without objection from the Defendant, to satisfy me that there was in fact an agreement.

39. The question that is left to be answered is whether the contract still exists. The Defendant argues that it has been cancelled. She says she gave Mr Mayne instructions to cancel the agreement, and that Mr Mayne informed her he had done so late in 2018. She has not provided a letter making time of the essence or a

notice or other instrument in writing giving notice to the Claimant that the agreement had been cancelled. All that she speaks to is a Notice to Quit that was served on the Claimant in 2020. It is to be pointed out that the Notice to Quit does not refer to the agreement for sale entered into between the parties. It speaks only to the recovery of possession (see Exhibit 12). When questioned in cross-examination, the Defendant agreed that she asked Mr Robinson, her attorney-at-law at the time to issue a Notice to Quit for the purpose of cancelling the agreement. This would have been in 2020 although her previous evidence was that she had given instructions in 2018 to Mr Mayne to cancel the agreement and he had confirmed that he had done so. If the agreement was cancelled in 2018, I am not sure why it would have to be cancelled again in 2020. What is more, I am very sure that a notice to quit does not terminate a sale agreement. A notice to quit is meant to terminate a tenancy.

40. In the case of **JTM Construction & Equipment v Circle B Farms Limited 2007HCV 05110** heard on January 19, June 17 and 29, 2009, Justice McDonald Bishop (as she then was) said at paragraph 36 of her decision that

“it is a well established rule of conveyancing law that where completion is delayed, the innocent party, if he wishes to be rid of the contract, must first serve a notice requiring completion by a specified date and indicating that if the defaulting party fails to do so then he will treat the non-performance of it as a repudiation of the contract.”

I am of the view that this is so whether the agreement was oral or in writing. If the notice is to be served it must be in writing. It cannot be by word of mouth.

41. Justice McDonald-Bishop went on to say in paragraph 37 of the judgment that:

“Also, it is settled on long established authorities that to be a valid notice to complete the notice must be served. It is stated that in practice most notices are served pursuant to an express term in the agreement.”

In the case before Justice McDonald-Bishop, there was no provision in the agreement for service of the notice to complete. This did not, however, prevent her from abiding by the long-established principle of requiring service of the notice to complete. Justice McDonald-Bishop's findings were adopted by Morrison P (as he then was) in the case of **Leon Courtney Robinson (executor of the estate of Herman L Denton, deceased) v Michelle Chen and ors [2020] JMCA Civ 42**.

42. The Defendant has put forward her case that the agreement was cancelled. He who asserts must prove. There is, however, no evidence before me to indicate that a Notice to Complete was prepared and served on the Claimant. A Notice to Quit cannot stand as substitute for a Notice to Complete. They are two different instruments with two different functions. No Notice to Complete having been served by either party, the Agreement for Sale continues to exist and has not been cancelled. The parties remain bound by the terms, which specifically are that the Vendor, who is the Defendant herein, is to sell the Kensington Apartment property to the Purchaser, who is the Claimant herein for the sum of \$11M, which I have adjudged, has been paid in full by the Claimant to the Defendant in person and to her attorney-at-law, Mr Xavier Mayne.

Whether the Claimant is entitled to damages and *mesne profits*

43. The Claimant has claimed damages in his Further Amended Particulars of Claim. Those damages are claimed on the basis that the Defendant whether by herself or her servants and/or agents changed the lock to the premises and posted a sign on the door of the apartment stating that the property is private property, trespassing is not allowed and unauthorised persons will be prosecuted. These actions prevented the Claimant from accessing the property and as a result he has suffered inconvenience, financial loss and damage. *Mesne profits* have been pleaded in the prayer of the Further Amended Claim Form and Further Amended

Particulars of Claim, however the basis for which that remedy is sought has not been set out in the pleadings.

44. CPR 8.9A provides that:

“The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

Although the Claimant’s evidence in chief and in cross-examination is that he had rented the Property and lost monies from rental income during the time that the Defendant had taken possession of it, and although he said in his evidence that his personal property was destroyed by the Defendant and that he renovated the Property when he was given possession of it, there is nothing in the pleadings on which to ground those allegations and as no permission was sought to rely on the allegations and none was given, the Court will not countenance them. The cost of lost items would fall under special damages and the age-old legal principle that is known to all is that special damages must be specifically pleaded and proven. Special damages were not specifically pleaded and no valuation report setting out the value of the lost or destroyed items was presented to this Court to prove the loss.

45. *Mesne* profits are damages payable to a landowner by a person who occupies the landowner’s property after the period expires for which he is to be in occupation. The *mesne* profits payable would amount to the damages payable for the use and occupation of the property. The Claimant’s Further Amended Particulars of Claim do not set out the period in which the Defendant took possession of the property and ousted him therefrom to allow a Court to come to a conclusion as to what was the extent of his loss and what sums should be awarded. In addition, claiming the sum in the prayer of the pleadings without setting out the basis on which the sum is claimed in the body of the pleadings is not sufficient to persuade a Court to make such an award, especially in light of the requirements under CPR 8.9A.

46. I am however satisfied that the Claimant suffered loss and damage when he was barred from the premises and the Defendant repossessed the Property. Damages is meant to put the innocent party back into the position he would have been had the breach not occurred. That loss of not being able to use one's property is not specifically quantifiable and therefore damages would be at large and so fall under the head of General Damages. I believe however that the damages awarded to the Claimant should be nominal because although he has suffered a legal wrong in being so dispossessed, he did not suffer substantial harm.

47. Unlike the case of **Barrington Hemans v Dean Tenant [2021] JMSC Civ 103**, wherein the Claimant had lost rental income monthly because he was dispossessed, there was no proof before me that the Claimant's loss was so quantifiable. Therefore, the damages awarded will be nominal.

Conclusion and Orders

48. In light of the above, my orders are as follows:

- a. Judgment is granted in the Claimant's favour and the Defendant's Defence and Counterclaim fails in its entirety.
- b. The Claimant is granted specific performance. The sale of the property registered at Volume 1187 Folio 757 in the Register Book of Titles and known as Apartment 6, 17 Kensington Crescent, Kingston 5 in the parish of Saint Andrew (the "Property") to the Claimant herein is to be completed within 180 days of the date of this Judgment.
- c. The Claimant, provided he can complete the sale within the period stipulated in order (b) above, is to be granted vacant possession of the Property, free from encumbrances and mortgages.

- d. The Claimant's Attorneys-at-law, Mesdames Brown and Shaw are to have carriage of Sale.
- e. The Defendant is to pay all the associated penalties and fees payable to the Government of Jamaica as a result of the late stamping of the Agreement, the entire transfer tax and one-half of stamp duties and registration fees payable. The Claimant is to pay one half (1/2) of the Stamp Duties payable as if the Agreement for Sale was assessed and duties paid in May 2013 as well as one half (1/2) registration fees.
- f. The Registrar is empowered to sign any document(s) to give effect to the orders made herein if any party fails or refuses to do so.
- g. The Claimant is awarded nominal damages of \$300,000 plus interest at the rate of 3% per annum from October 7, 2020 to December 17, 2024.
- h. The Defendant is to pay the Claimant costs in the claim, which are to be taxed if not agreed.
- i. Liberty to apply.
- j. The Claimant's attorneys-at-law are to file and serve the Judgment.

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Tania Mott Tulloch-Reid
Puisne Judge