IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00095

BETWEEN	**HASHEBA DEVELOPMENT COMPANY LIMITED**	**CLAIMANT**
AND	**PETROLEUM CORPORATION OF JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**SEAN KINGHORN**	**2ND DEFENDANT**
AND	**JUDY ANN KINGHORN**	**3RD DEFENDANT**
AND	**KINGHORN & KINGHORN (A PARTNERSHIP LAW FIRM)**	**4TH DEFENDANT**

IN CHAMBERS

Mr Abraham Dabdoub, Mr Christopher Dunkley and Ms Tiffany Sinclair instructed by Dabdoub & Dabdoub, Attorneys-at-Law for the Claimant

Mr Sean Kinghorn, Attorney-at-Law for the Defendants

Heard: 11th,18th, 29th, June, 14th and 22nd July 2020

Civil Procedure – Proper method of commencing claim for relief of specific performance – Whether fixed date claim form procedure appropriate for claim of conspiracy to defraud - Whether only a portion of a claim can be continued as if commenced by claim form - Test for extension of time for affidavits filed in non-compliance with the Civil Procedure Rules 2002 ("CPR") – Whether application for

relief from sanction is required where affiant filed affidavit in breach of time requirement under CPR - Whether appropriate to hear a claim summarily on first hearing of the fixed date claim form – Test for grant of order of specific performance

LAING, J

Background

[1] The Claimant is a limited liability company duly incorporated under the laws of Jamaica, and is engaged in the development of land in the parish of Clarendon which is owned by the Claimant ("the Development").

[2] The 1st Defendant is a limited liability company engaged in the petroleum industry.

[3] In or about September 2018 the Claimant and the 1st Defendant commenced negotiations concerning the possibility of the 1st Defendant purchasing three parcels of land being part of the Development in Clarendon. The negotiations culminated in the execution by the Claimant and the 1st Respondent, of three agreements for sale (together "the Agreements"), incorporating the terms pursuant to which the Claimant would sell and the 1st Defendant would purchase the three separate parcels of land. These Agreements were prepared by the 3rd Defendant.

[4] A part payment was made by the 1st Defendant under each of the three agreements for sale towards the purchase price of each of the three parcels, but there is a dispute between the parties as to the precise allocation as between the three. The Claimant avers that in breach of the Agreements, the 1st Defendant has failed to pay the relevant balances due and owing.

The Claim

[5] By fixed date claim form filed 27th February 2020 the Claimant claims for specific performance of Agreements and damages for breach of contract against the 1st

Claimant. The Claimant also claims against all the Defendants jointly and severally for damages arising from the 1st Defendant's breach of contract of the Agreements.

[6] The 2nd Defendant is an Attorney-at-law who is a director and legal officer of the 1st Defendant as well as a senior partner of the 4th Defendant which is a law firm. The 3nd Defendant is an Attorney-at-law, the wife of the 2nd Defendant and a partner in the 4th Defendant. The Claimant claims against the 2nd 3rd and 4th Defendants as follows:

> *"jointly and severally for damages arising from a breach of fiduciary duty and/or responsibility, a conflict of interest, and for professional negligence in that the 2nd Defendant and 3rd Defendant prepared the three Agreements for Sale which were then entered into by the Claimant and the 1st Defendant and in which the 2nd Defendant acted on behalf of the 1st Defendant and the 3rd and 4th Defendants acted and /or purported to act on behalf of the Claimant but failed and /or neglected to advise the Claimant of the legal, ethical or commercial consequences of the conflicts of interest between the 2nd, 3rd and 4th Defendants and failed and/or neglected to insist upon the Claimant to obtain independent legal advice and/ or representation.*

[7] The Claimant also claims against all four defendants for damages for conspiracy to defraud. The Claimant alleges that:

> *The Defendants together and/or jointly with others known and unknown, conspired to breach the Agreements between the Claimant and the 1st Defendant with the intention of prejudicing the Claimant's ownership of property registered at Volume 1361 Folio 492 of the Register Book of Titles which the Claimant was in the process of developing, for their own financial benefit and unjust enrichment.*

The Amended Notice of Application

[8] By an amended notice of application filed 26th May 2020, the Claimant has sought orders which for the most part replicate the reliefs sought by the Fixed date claim form, including specific performance of the Agreements and payment of the balance of the purchase price amounting to Three Hundred and Thirty-Nine Million and Twenty-Five Thousand Jamaican Dollars (JA$339,025,000.00).

[9] Paragraph 1 of the orders sought on the amended notice of application commences with the following words:

> *1. That the Defendants, not having entered a Defence or Affidavit within 42 days of the service on them of the Fixed Date Claim Form and Affidavit of Gabriel Ishmael Thompson filed herein it is hereby ordered…*

[10] Mr Dabdoub submitted that the Affidavit of Mr Colin Karjon filed on 5th May 2020 which purports to be filed on behalf of all the Defendants is deficient in that Mr Karjon does not swear to the fact that he was duly authorised to file the affidavit on behalf of the 2nd 3rd or 4th Defendants. Mr Dabdoub submitted that more importantly, the affidavit was out of time having not been filed within 42 days as required by the Civil Procedure Rules ("CPR"). Counsel complained that the Affidavit of the 3rd Defendant was also filed out of time and in breach of the CPR having been filed on the 11th June 2020, the day scheduled for the first hearing of the fixed date claim form.

[11] The amendment to the CPR gazetted 15th November 2011 has created a new rule 8.8(2) with the marginal note "*Fixed Date Claim Form Procedure*" which provides as follows:

> *The following steps apply for the purposes of this Rule:*
>
> *(a) Where the claimant uses Form 2 the claimant must file an affidavit containing the evidence on which the claimant intends to rely.*
>
> *(b) The claimant's affidavit must be served on the defendant along with the claim form.*
>
> *(c) A defendant who wishes to rely on written evidence must within 28 days of service of the claim form file an affidavit containing that evidence.*
>
> *(d) Upon so filing the defendant must also serve a copy of the affidavit on the other parties.*
>
> *(e) The Claimant may within 14 days of service of the defendant's affidavit file and serve on the other parties, further affidavit evidence in reply.*

[12] The Claimant's amended notice of application relies heavily on the failure of the Defendants to file their affidavits within the time specified by the CPR. However, in its grounds it also states that the Claimant relies on, *inter alia*, CPR 17.5 and CPR 17.6. CPR 17.5 sets out the general procedure for interim payments and 17.6

sets out the conditions to be satisfied and the matters to be taken into account when the court considers whether it should make an order for interim payment.

Differences between the claim form (form 1) procedure and the fixed date claim form (form 2) procedure.

[13] CPR 8.1 provides that a claimant who wishes to start proceedings must file as claim form and subject to certain specified exceptions, the particulars of claim. CPR 8.1(3) provides that a claim form must be in Form 1, except in the circumstances set out in 8.1(4).

[14] CPR 8.1 (4) provides as follows:

> *(4) Form 2 (fixed date claim form) must be used –*
>
> > *(a) in mortgage claims;*
> >
> > *(b) in claims for possession of land;*
> >
> > *(c) in hire purchase claims;*
> >
> > *(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;*
> >
> > *(e)whenever its use is required by a rule or practice direction; and*
> >
> > *(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion.*

[15] CPR 10.2, the material portion of which provides as follows:

> *"(1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5)*
>
> *(2) However where -*
>
> > *(a) a claim is commenced by fixed date claim in form 2 and there is served with that claim form an affidavit instead of particulars of claim; or*
> >
> > *(b) where any rule requires the service of an affidavit, the defendant may file an affidavit in answer instead of a defence."*

> *(3) In this part the expression "**defence**" includes an affidavit filed under paragraph (2) …*

[16] It is important to appreciate and highlight CPR sub-rule 8.8(2)(c) which provides that "*a defendant who wishes to rely on written evidence must within 28 days of service of the claim form file an affidavit containing that evidence*". Implicit in this rule is an acknowledgment that the filing of an affidavit is not a mandatory requirement but is only required where one intends to rely on evidence. This is because a litigant is still entitled to defend a claim commenced by fixed date claim form on purely legal grounds, without having filed an affidavit. This position has been recognized by these Courts as evidenced in the Privy Council case of **Guyah v Commissioner of Customs and Another** [2018] UKPC 10 which proceeded without any affidavit on the Respondent's behalf.

[17] The CPR provides that a claimant may obtain judgment without trial where a defendant has failed to file an acknowledgement of service giving notice of intention to defend in accordance with Part 9 or has failed to file a defence in accordance with Part 10, such a judgment is called a "default judgment". However, it is important to note that CPR 12.2 (a) provides that a claimant may not obtain a default judgment where the claim is a fixed date claim. This is a fundamental difference between the claim form and fixed date claim form procedure.

[18] Where the Defendant has not filed a defence to a fixed date claim, the court is still required to examine the merits of the claim. In the case of **Agnes Danzie et al and Cecil Anthony** SLUHCVAP2015/0009, the Court of Appeal of the Eastern Caribbean Supreme Court in considering provisions of the Eastern Caribbean Civil Procedure Rules which are similar to the CPR, held that whereas CPR 27.2(3) (which is in the same terms as our CPR 27.2(8)) empowers the court to treat the first hearing of a fixed date claim form as a trial if the claim is not defended or where there is a defence and the court considers that the claim can be dealt with summarily, dealing with a claim summarily does not mean entering judgment. The claimant still has to prove that he is entitled to the relief sought and the court must conduct a trial albeit in a summary way. In arriving at this conclusion the court

referred to the case of **Richard Frederick et al v Comptroller of Customs** SLUHCVAP2008/0037 (delivered 6th July 2009, unreported) in which Her Ladyship Madam George-Creque JA drew the distinction between Part 15 (the Part dealing with summary judgment) and the Eastern Caribbean Rule 27.2(3) (Jamaican CPR 27.2(8)).

[19] It appears that the amended notice of application is a thinly veiled attempt to circumvent the procedure contemplated by CPR 27.2(8) which is for the first hearing of the fixed date claim form to be treated as the hearing of the claim if in fact the prequalifying circumstances exist. All the reliefs claimed in the amended notice of application are reliefs which are claimed in the fixed date claim form or are closely connected, incidental, consequential or in some manner capable of being derived from those reliefs.

[20] I accept the submission of Mr Kinghorn that the provisions for interim payments upon which the Claimant is seeking to apply in its grounds are wholly inapplicable to these facts. The only relief claimed which in my opinion may properly be applied for on an interlocutory application in the circumstances as exists in this matter, is the order sought in the alternative for injunctive relief as follows:

> *2. An order (mandatory injunction) directing the First Defendant, Petroleum Company of Jamaica Limited, to forthwith produce and deliver up to Dabdoub, Dabdoub & Co., Attorneys-at-Law for an on behalf of the Claimant herein the original Duplicate Certificate of Title registered at Volume 1361 Folio 492 of the Register Book of Titles together with the Discharge of Mortgage Numbered 169774, which is registered on said Certificate of Title in favour of Sevens Limited;*

[21] The evidence before the Court is that the transaction involving Volume 1361 Folio 492 of the Register Book of Titles has not yet been completed. In such circumstances the right of the 1st Defendant to the duplicate Certificate of Title is questionable. In the context of the Claim there is a serious issue to be tried as to the entitlement of the Claimant to receive an order for specific performance of the contract. It is of significance however that the certificate of title covers land other than that which is the subject of the three agreements. Therefore, the Claimant's

application for specific performance cannot be viewed as tacit acknowledgement that damages will be an adequate remedy for any loss consequent upon the 1st Defendant retaining the duplicate certificate of title. Unfortunately, the parties have not focused on this element of the amended notice of application and it being in the alternative I will not consider it further.

Ruling on the amended notice of application

[22] I therefore find that the amended notice of application is an inappropriate method to seek the reliefs sought therein and I will decline to grant any orders sought under the Amended Notice of Application.

At what stage should the court make an order that the claim be treated as if begun by claim form instead of fixed date claim form

[23] The Claimant submitted that because the fixed date claim form included a claim for specific performance then the claim was properly commenced by fixed date claim form pursuant to 8.1 (4)(f). This seems to be a valid submission. However, the addition of other claims creates a difficulty because they may not be appropriate to be dealt with on the fixed date claim form procedure and raises the issue as to whether the claim should be treated as if begun by claim form.

[24] The timing of the Court's ruling on this issue may be a critical procedural matter. This is because if the Court rules that the claim should be treated as begun by claim form, then the usual case management orders which would naturally follow may include an order that the Defendants file a defence, constituting their statement of case in response to the Claimant's particulars of claim (as distinct from the affidavits which the defendants have filed). The effect of this is that the non- compliance of the Defendants with the time requirements of the CPR would be largely academic as they would benefit from what would be, in effect, an automatic extension of the time for them to file their defence/affidavits.

[25] If the Court reserves this issue until after it considers whether the first hearing of the fixed date claim form should be treated as the hearing of the claim or a hearing of certain issues, then the failure to file the affidavits within the prescribed time becomes an important consideration. This is because if the fixed date claim is deemed to be undefended or undefended in part, then that would provide a basis for there to be a trial at the first hearing.

[26] I will therefore firstly consider whether it is appropriate or desirable to have a trial of the claim or any part therefor at the first hearing and if it may be necessary to convert the remaining portion of the claim to the claim form procedure.

What is the effect of a defendant failing to file his affidavit within the time specified by CPR 8.8(2)(c)

[27] In making a determination as to whether the first hearing is to be treated as the trial of the claim the first consideration is whether the claim is defended. This issue has to be resolved by a determination of the subsidiary issue of what is the consequence of the fact that affidavits of the Defendants have been filed outside the prescribed time.

[28] The submission made initially by Mr Dabdoub was that, the applications having been filed without the leave of the Court, were not properly before the court and their contents could not be considered. He complained that the Defendants have not filed a notice of application to enlarge the time for filing the affidavits and an application for relief from sanction. His co-counsel Mr Dunkley offered a more nuanced position, he submitted that the affidavits could be considered by the Court for the limited purpose of considering the explanations proffered therein for the Defendants' failure to file within the appropriate period.

[29] I am attracted in part by Mr Dunkley's submissions, however to the extent that the contents of the affidavits are relevant to the amended notice of application, it is my opinion that the Defendants' affidavits should also be considered for purposes of

the determination of the issues on that application, including whether a defence with merit is disclosed.

[30] CPR 26.8 (1) provides as follows:

> *An application from relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*

There are numerous cases decided in this jurisdiction and beyond which have held that an application for relief from sanction under CPR 26.8 (1) is only necessary where a sanction has been imposed by a court order or by a rule. In the Privy Council case of the **Attorney General (Appellant) v Keron Matthews (Respondent)** [2011] UKPC 38 their Lordships in an appeal from the Court of Appeal of Trinidad and Tobago considered the provisions of the CPR in that jurisdiction and rejected the argument that the consequence of con-compliance with the rule which specified a time for filing of a defence was the imposition of an "implied sanction". Their Lordships at paragraph 15 of the judgment offered as examples, a number of provisions which impose a sanction such as the rule dealing with the filing of witness statements, in that where there is a breach of the time requirement specified by the court for the filing of a witness statement or witness summary, then the witness may not be called unless the court permits (see CPR 29.11 (1)).

[31] At paragraph 16 of **Attorney General v Keron Matthews** (supra), having examined the examples of provision of the Trinidadian CPR which impose a sanction, their Lordships made the following observations which are well worth noting:

> *16. It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what parties may do if the defendant fails*

> *to file a defence within the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.*

[32] In the instant case under consideration the CPR has not provided a sanction for a defendant not having filed his affidavit within the prescribed time. In these circumstances, although the defendants are clearly out of time insofar as the filing of their affidavits is concerned, this non-compliance did not automatically attract any sanction. There has been no sanction as yet imposed on them for this failure to comply with CPR or any other provision by operation of any enactment, nor has there been any other sanction imposed by way of an order of the Court such as an unless order.

[33] A fundamental feature of the regime implemented by the CPR is the application for court orders, which may be made before during or after the course of proceedings and must include, *inter alia*, the order the applicant is seeking and the grounds on which the order is being sought. CPR 26.1(2) (c) empowers the court under its general powers of management to "*extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed*".

[34] The need for the Defendants to have filed a notice of application to enlarge the time for the filing of their affidavits is pellucid. I find no merit in Mr Kinghorn's submissions to the contrary. What the Defendants have done is to include a request for an extension of time in the affidavits filed. In the case of Mr Karjohn's affidavit, it demonstrates that he appreciates the issue of the non-compliance and the possible need for an extension of time. At paragraph 46 he states as follows:

> *46. Wherefore the 1st Defendant claims the following relief:*

> *(i) An extension of time, if necessary, for the filing of this affidavit to the date it was filed and for this affidavit to stand as the Defendant's response to the Claimant's claim; ….*

[35] Whereas the 3rd Defendant who is an Attorney-at-law acknowledges the 2nd, 3rd and 4th Defendant's non- compliance with the appropriate deadline and proffers an explanation therefor, in contrast to Mr Karjon's affidavit, whether deliberately or by inadvertence, Counsel's affidavit does not demonstrate an appreciation of seriousness of the non-compliance and the issue of whether there is a need to obtain an order for the enlargement of time from the court.

What is the consequence of the Defendant's not having filed a notice of application to extend time for the filing of the affidavits?

[36] The obvious consequence of the Defendants not having filed a notice of application to extend the time for the filing of their affidavits is the **risk** that they may not be permitted by the Court to rely on such affidavits in defence of the claim. In such a case, the Claimant may be able to convince the Court to invoke the operation of CPR 27.2 (8), to treat the first hearing of the fixed date claim form as the trial of the claim and to deal with the claim summarily, as the Claimant in this case is attempting to do.

[37] CPR 26.3(1)(a) gives the Court a discretion to strike out a statement of case or part of a statement of case in a number of circumstances, including if it appears to the Court that there has been a failure to comply with a rule or practice direction. CPR 2.4 provides that:

> *"**Statement of Case**" means –*
>
> *(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and*
>
> *(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court…*

CPR Part 10 addresses defence. CPR 10.2(3) provides that "*in this Part the expression "defence" includes an affidavit filed under paragraph (2)*". It is arguable

that the specific limitation to Part 10 suggests that an affidavit filed pursuant to CPR 10.2 (2) in answer to a fixed date claim form and accompanying affidavit does not strictly fall with the ambit of the definition of statement of case contained in CPR 2.4. However, an affidavit in response to a claim by fixed date claim form supported by an affidavit functions in the same way as a defence. Applying a purposive interpretation, it is inconceivable that the wide powers granted under CPR 26.3 and 26.4 to strike out a statement of case or part thereof do not include a similar power to strike out an affidavit filed out of time. Alternatively, the court has a power to prevent the Defendants from utilizing an affidavit filed outside the prescribed time.

[38] Regardless of how one characterizes the Court's power in respect of the Defendants' affidavits, the paramount consideration is that the Court must consider what is the appropriate course having regard to all the circumstances, including whether there are alternative penalties available that would achieve the ends of justice.

[39] Whether the Court strikes out the Defendants' affidavits or refuses to permit their use, the effect is the same. The Defendants will be deprived of their defence. The courts have repeatedly emphasised the undesirability of depriving a litigant of the opportunity to present his case without a good reason.

[40] CPR 26.9 gives the court a general power to rectify matters where there has been a procedural error. It provides as follows:

> *(1) This rule applies where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> *(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*

> *(4) the court may make such an order on or without an application by a party.*

[41] Notwithstanding the absence of a notice of application filed by the Defendants, I will consider whether the time for Defendants to file their affidavits ought to be extended. The principles to be applied have been repeated in numerous cases including **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**, Motion No 12/1999, (judgment delivered 6 December 1999), in which Panton JA as he then was, gave the following guidance at page 20 of the judgment (albeit on an application to extend time for leave to appeal):

> *The legal position may therefore be summarised thus:*
>
> *(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*
>
> *(2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.*
>
> *(3) In exercising its discretion, the Court will consider-*
>
> *(i) the length of the delay;*
>
> *(ii) the reasons for the delay;*
>
> *(iii) whether there is an arguable case for an appeal and;*
>
> *(iv) the degree of prejudice to the other parties if time is extended.*
>
> *(4) Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.*

[42] In the case of **Fiesta Car Rentals v National Water Commission** [2010] JMCA Civ 4 on appeal against a judge's decision in which he refused the application to extend time to file a defence and consequent on that decision he entered summary judgment, the Court of Appeal at paragraph 15 of the judgment made the following observations:

> *[15] The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was*

summarised by Lightman J., in an application for extension of time to appeal in the case of ***Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.*** *[2001] EWHC Ch 456. He is reported to have outlined the principle as follows:*

> *"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.*
>
> *Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."*
>
> *[16] The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had good reasons for its failure to have filed its defence in the time prescribed by rule 10.3 (1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit.*

[43] The guidance in **Fiesta** (supra) was again approved in the case of **The Attorney General of Jamaica and Another v Rashaka Brooks** [2013] JMCA Civ 16 in which the Court of Appeal also seized the opportunity to reiterate the importance of the overriding objective, to which the court must give effect when exercising any power given to it under the CPR. The Court also reinforced the desirability of applying the principle set out **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926 in which the courts were encouraged by the English Court of Appeal to utilize the greater powers afforded by the CPR to allow the trial of appropriate cases by the extension of time to file a defence, but with the application of proportionate sanctions for the failure to file within the prescribed time.

Length of the delay

[44] The Fixed date claim form was filed on 27th February 2020. The Defendants were required to file their affidavits within twenty-eight days of service of the claim form pursuant to CPR 8.8 (2). Mr Karjohn's admitted service sometime in March 2020 and his affidavit was filed 5th June 2020. Mr and Mrs Kinghorn's Affidavits are both filed 11th June 2020, the date fixed for the first hearing of the fixed date claim form. The length of the delay is significant but in and of itself not an egregious breach.

Reason for the delay

[45] Mr Karjohn's affidavit explains that the delay in the 1st Defendant's affidavit was as a result of the disruption caused by the Covid 19 pandemic, especially having regard to his age.

[46] Mrs Kinghorn's affidavit at paragraphs 39 and 40 offers a similar explanation and reads as follows:

> *39. That the delay in filing this application is regretted. Much of the delay was based by my displacement caused by the Covid Pandemic in our office operations as our Chambers have only started to return to normality.*
>
> *40. That I have filed an Affidavit in response instead of a Defence as my understanding is that this matter will be before the Court by dint of a Fixed Date Claim Form. This requires a hearing by affidavit evidence. At this first hearing which ought to be treated as a case management conference, I am prepared for my affidavit to stand as my Defence or file a separate Defence if the Court deems it necessary.*

[47] I fully appreciate that the global pandemic has resulted in tremendous disruption to most persons. Everyone has had to adapt to the disruption and using available technology the Defendants ought to have been able to consult with Counsel and filed their affidavit by the deadline. These reasons are not good reasons in my opinion.

Prejudice

[48] The Claimant will suffer some prejudice from any unnecessary further delay but this is also a consequence which could be ameliorated by an appropriate order for costs, provided that any extension of time is justified

[49] The length of the delay, the reasons for the delay and possible prejudice are considerations but the prime issue is whether the defences have any merit.

Is there any merit in the Defences?

(a) The defence of the first defendant

[50] Mr Dabdoub submitted that the issues which fall for determination in respect of the specific performance claim are easily resolved if close scrutiny is paid to the main features of the agreements. Counsel's submissions as to these fundamental provisions are extracted from the written submissions on behalf of the Claimant and edited to make more concise as follows:

First Agreement for Sale –

1. This Agreement was entered into for the purchase of 8,094.656 square metres of land ("Parcel 1") for a purchase price of Eighty Million Dollars ($80,000,000.00). The contract provides that upon the signing of the Agreement a deposit of $8 million be paid to the Vendor's Attorneys-at-Law.
2. The Agreement provides for a payment of Four Hundred and Twenty-Five Thousand United States Dollars (US$425,000.00), the equivalent of Jamaican $57,800,00.00, to be paid to Sevens Limited for the Discharge of Vendor's Mortgage 1697744 which was only one half of the Eight Hundred and Fifty Thousand Dollars (US$850,000.00 required to discharge the mortgage in its entirely. The Claimant acknowledges that this sum of US$425,000.00 was in fact paid and applied in part payment of the discharge of that mortgage.
3. A further payment of at least Nine Million Dollars ($ 9,000,000.00) to be made to Epping Oil Company Limited to satisfy the withdrawal of

caveat number 1869010 lodged on 24th February 2014 pursuant to an agreement for sale dated 14 May 2012 ("The Epping Oil Caveat").

4. The balance of purchase price along with closing costs if any shall be applied towards discharging of caveats numbered 1630384 by the Registrar of Lands ("the Registrar's Caveat") and 2135400 by Loretta Coley ("the Loretta Coley Caveat") endorsed on the Certificate of Title registered at Volume 1361 Folio 292 of the Register book of titles.

5. It was acknowledged and agreed in special conditions 8, 9 and 10 that the land was subject to 3 caveats, the Registrar of Lands Caveat, the Epping Oil Caveat and the Loretta Coley Caveat. It was agreed that it was the Vendor's obligation to have these three caveats withdrawn to facilitate the sale of the property and to secure the transfer to the Purchaser and/or its nominee.

6. Completion was to be on or before the expiration of 180 days from the date of signing of the first agreement for sale or upon the presentation of Duplicate Certificate of Title for the property duly endorsed with the name of the purchaser and/or nominee.

7. The Claimant claims that the balance due and owing and/or payable in respect of the 1st Agreement for Sale is $14,200,000.00 plus closing costs.

Second Agreement for Sale

1. This 2nd Agreement for Sale was entered into for the purchase of 8,158.947 square metres of land (Parcel 2") for a purchase price of Eighty Million Dollars ($80,000,000.00).

2. The 2nd Agreement for Sale provides that upon the signing of the Agreement a deposit of Eight Million Dollars ($8,000,000.00) be paid to the Vendor's Attorneys-at-Law. The Vendor acknowledged receipt.

3. The 2nd Agreement for Sale provides for a payment of Four Hundred and Twenty-Five Thousand United States Dollars (US$425,000.00), the equivalent of Jamaican $ 57,800,00.00, to be paid to Seven Seas Limited for the Discharge of Vendor's Mortgage 1697744. This is the same mortgage referred to in the First Agreement for Sale which is in a total amount of Eight Hundred and Fifty Thousand United States Dollars (US$850,000.00).

4. It also provides for the balance of purchase price along with closing costs if any shall be applied towards discharging of the Epping Oil Caveat and the Loretta Coley Caveat.
5. The completion date is the same as for Parcel 1.
6. The Claimant Claims that the balance due and owing and/or payable in respect of the 1st Agreement for Sale is Fourteen Million Two Hundred Thousand Dollars ($14,200,000.00) plus closing costs.
7. Special condition 10. 2 of the 1st and 2nd Agreements for Sale provides that:

> *"it is further understood and agreed that the vendor is required to repurchase a section of the land from National Road Operating and Constructing Company Limited (NROCC) for Thirty- Four Million Eight Hundred and Forty-Nine Thousand and Seventy-Four Dollars and Eight Cents ($34,849,074.08). The Vendor hereby directs and the Purchaser agrees that a part of the proceeds of sale shall be applied towards the repurchasing of a part of the property from NROCC and that the Purchaser will settle the sum of Thirty-Four Million Thirty- Four Million Eight Hundred and Forty-Nine Thousand and Seventy-Four Dollars and Eight Cents ($34,849,074.08) or part thereof as part payment of the consideration herein.*

The 3rd Agreement for Sale

1. This Agreement is entered into for the purchase of 35,609.421 square metres of land (the 3rd Parcel") (approximately 8.79 acres) for a purchase price of Three Hundred and Twenty-Nine Million Six Hundred and Twenty-Five Thousand Dollars ($329,625,000.00).
2. The Agreement stipulates that a deposit of Thirty-Two Million Nine Hundred and Sixty-Two Thousand Five Hundred Dollars ($32,962,500.00) is payable to the Vendor's Attorneys-at-Law on signing of the Agreement.
3. A further payment of Twenty-Five Million Dollars ($25,000,000.00) payable to the Vendor's Attorneys-at-Law. The Vendor has

acknowledged in its Fixed Date Claim and by Affidavit that it received the sum of Twenty-Five Million Dollars ($25,000,000.00).

4. The balance of purchase price shall be paid in monthly instalments of Five Million Dollars ($5,000,000.00) and the Purchaser agrees and consents that the said sum of Five Million Dollars ($5,000,000.00) was paid over to the Vendor in satisfaction of the purchase price.

5. The Claimant claims that the balance due and owing in respect of the 3rd Agreement for Sale is $294,635,000.00

[51] It is noteworthy that the completion date of the 3rd Agreement for Sale is different from that of the 1st and 2nd Agreements for Sale and is fixed as being on or before the expiration of three years from the date of signing or upon presentation of a Duplicate Certificate of Title for the subject property endorsed with the name of the Purchaser and/or nominee.

[52] The position of the Claimant is that the combined price of the three parcels is J$489,635,000.00 and the Claimant can only confirm payment of J$35,000,000.00 to it directly, in addition to US$850,000,00 paid in respect of the discharge of the mortgage.

[53] The Claimant refers to a letter dated 17 December 2018 in which the 1st Defendant acknowledged that it had made payments totalling $150,000,000.00 inclusive of the US$850,000.00 paid in respect of the Sevens Mortgage.

[54] The Claimant claims that a balance of J$339,025,000.00 is due and owing under the three Agreements.

The Defence to the specific performance/ breach of contract claim against the 1st Defendant

[55] In his Affidavit on behalf of the 1st Defendant at paragraph 28, Mr Colin Karjohn averred that pursuant to the 1st and 2nd Agreements the 1st Defendant paid a sum of $35,000,000.00 to the Claimant directly in addition to the sum of US$850,000.00 (which at that time amounted to J$115,000,000.00) for a total of J$150,000,000.00.

[56] Mr Karjohn explains that although the Mortgage had been paid in full, the three caveats remained the transfer tax and Stamp duty had not been assessed and paid. The monies to be paid over to the government had not been paid and a meeting was called to address the shortfall. It was at this meeting held on 5th December 2018 that it was agreed that the 1st Defendant would sell another parcel of property to the Claimant to enable the Claimant to use the funds to settle the Caveats, transfer tax and stamp duty. This agreement he says, was captured in the 3rd Agreement for Sale.

[57] Mr Karjohn alleges that thereafter Mr Thompson started expressing a desire to have monies paid to him directly and indicated that "*the agreements could not work and he would not go ahead with the sale as he needed the monies directly*". Mr Karjohn refused to agree with this and the result was a stalemate. In his affidavit Mr Kinghorn supports the version of events given by Mr Karjohn.

[58] Mr Dabdoub submits that this version of the first two agreements, followed some time later by the third to cover a shortfall, does not accord with the documentary evidence because all three Agreements were prepared on the same date as evidenced by the document date at the footer of all three Agreements 10-15-2018. This of course is not conclusive because we have no evidence as to the document numbering or dating system employed by Mrs Kinghorn and this could be an errant remnant from the earlier drafts of the 1st and 2nd Agreements for Sale. However, Mr Ishamel Thompson's evidence is also that the three Agreements were prepared on or about the 15th October 2018 and executed on the same date. It should be noted that none of the Agreements are dated or have a date of execution.

[59] If the Claimant's version of events is correct the correspondence subsequent to the purported date of preparation of the Agreements is rather curious because there are a number of references to the agreement to purchase 2 parcels of land even as late as the Claimant's letter to the Chief Financial Officer of the 1st Defendant dated 4th December 2018 which states:

> *We hereby confirm that Hasheba Development Company Limited, has agreed to sell 2 parcels of land of the captioned property to the Petroleum Company of Jamaica Limited.*
>
> *This receipt is to acknowledge further payment of Five Million dollars ($5,000,000.00) by way of wire transfer on Tuesday, December 4, 2018 To Hasheba Development Company, CIBC First Caribbean Bank, etc .*

[60] The first reference to the purchase of 3 parcels of land that I have observed is the letter on behalf of the Claimant dated 17 December 2018, addressed to the 1st Defendant which references the meeting of the 5th December 2018. Mr Karjohn relies on this letter to support his assertion that the sale of third parcel was introduced at that meeting and this resulted in the preparation of the 3rd Agreement for sale.

[61] The Eight Hundred and Fifty Thousand United States Dollars (US$850,000.00) paid to discharge the mortgage approximates to One Hundred and Fifteen Million Jamaican Dollars (J$115,260,000.00) (at US$1.00=J$135.60). Mr Karjohn asserts that the 1St Defendant paid an additional Thirty-Five Million Dollars ($35,000,000.00) to the Claimant. There is a dispute between the parties as to whether the Thirty-Five Million Dollars ($35,000,000.00) was paid pursuant to the 1st and 2nd Agreements, as the 1st Defendant asserts, or whether it was paid (mainly) pursuant to the 3rd Agreement for sale as asserted by the Claimant. Mr Dabdoub argued that Twenty-Five Million Dollars ($25,000,000.00) (17 Oct 2018) was the further payment in that amount required by the 3rd Agreement plus one monthly payment of Five Million Dollars ($5,000,000.00) (3rd December 2018) as was also required. He said that there was an initial payment of Five Million Dollars ($5,000,000.00) prior to the execution of the Agreements on or about 27th September 2018.

[62] The Thirty-Five Million Dollars ($35,000,000.00) is not fully explained on either party's version, because one does not end up with a round figure that matches the deposits in either case. Mr Dabdoub's use of the "*further payment*" of Twenty-Five Million Dollars ($25,000,000.00) requirement of the 3rd Agreement does not explain the treatment by the parties of the provision for an initial deposit of Thirty-Two

Million Nine Hundred and Sixty-Two Thousand Five Hundred Dollars ($32,962,500.00) which should have been prior to that Twenty-Five Million Dollars ($25,000,000.00.)

[63] In any event, it is not necessary for me to resolve this issue. The undisputed commercial objective of the parties was to have the sale and purchase of three properties using a scheme which would provide the Claimant with the opportunity to use the deposits to remove the three caveats and the mortgage. The three parcels were each subject to these same encumbrances and it would be artificial and not in keeping with the evidence to treat each of the agreements as a wholly independent agreement.

[64] The 1st Defendant has admittedly not paid the total deposits required under the three Agreements. Its defence is that the Claimant indicated a clear intention not to proceed with the contracts and the Claimant relies on this alleged anticipatory breach.

[65] Mr Kinghorn in his submissions referred to the writers of Cheshire Fifoot and Furmston, Law of Contract 15th edition at page 550 of their work where they explain the concept of anticipatory breach and the right to repudiate the contract as follows:

> *"Repudiation in the present sense occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due in the future. In the words of Lord Blackburn:*
>
> *Where there is a contract to be performed in the future, if one of the parties has said to the other in effect 'if you go on and perform your side of the contract I will not perform mine, that in effect, amount so saying, I will not perform the contract". In that case the other party may say, 'you have given me distinct notice that you will not perform the contract, I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary, I will sue for Damages but at all events I will not go on with the contract.*

[66] This view is supported in the cases including **Woodar Investment v Wimpey Construction** [1980] 1 All ER 571 in which Lord Keith of Kinkel highlighted the principle that in deciding the issue of repudiation, the guiding principle is that

enunciated by Lord Coleridge CJ in *Freeth v Burr* ((1874) LR 9 CP 208 at 213, [1874–80] All ER Rep 750 at 753):

> *'In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract.'*

[67] Reference was also made by Mr Kinghorn to Lord Justice Etherton's statement in the English Court of Appeal decision in **Eminence Property Developments Limited v Heaney** [2010] EWCA Civ 1168 at paragraph 61:

> *…So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it "perspicuous". It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.*

[68] Lord Keith of Kinkel in **Woodar Investments v Wimpey Construction** [1980] 1 All ER 571also highlighted the fact that the matter is to be considered objectively—per Bowen LJ in *Johnstone v Milling* ((1886) 16 QBD 460 at 474):

> *'The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract.'*

[69] It is therefore necessary to analyse the conduct of the Claimant which is being relied on by the 1st Defendant as amounting to an anticipatory breach of the contract. This is mainly contained in Mr Karjohn's affidavit where he states the following at paragraph 36:

> *36 That Mr Thompson indicated at that meeting that the Claimant was indebted to a number of persons and was almost bankrupt. He indicated that the position taken of using the proceeds from this Agreement to address the outstanding Caveats and the Transfer Tax and Stamp Duty was untenable. He said it could not work.* ***He asked that the monies be paid over to him*** *to do "a cash flow" business. Present at that meeting was Mr Thompson his sons, Mr Kinghorn, myself and Mr Godfrey Boyd. (emphasis supplied)*

[70] Part of the difficulty with the evidence on behalf of the 1st Defendant is that it frequently conflates Mr Thompson with the Claimant. Mr Kinghorn in his affidavit avers as follows:

> *16. That during the lifetime of Mr Thompson, there was no issue in respect of the progress of the Agreement in the final stages.* ***Once Mr Thompson was directly obtaining funds from the 1st Defendant*** *he was happy.*
>
> *…..*
>
> *19.* ***That Mr Thompson amicable posture changed once the 1st Defendant indicated that it was not in order for him to get any further sums directly*** *as there were outstanding caveats to be cleared on the property. …*
>
> *20.* ***That I pointed out to Mr Thompson on numerous occasions that the basis of him receiving these sums*** *was by virtue of special condition 1 of the three agreements.* ***That clause allowed for him to get the benefit of some of the purchase money directly*** *for the purpose of clearing off the caveats and the mortgage. (emphasis supplied)*

[71] It is to be noted that there is no evidence that monies were paid to Mr Thompson directly in a personal capacity. In fact, the position advanced by the 1st Defendant was that $25,000,000.00 was paid to the Claimant directly by the 1st Defendant.

[72] It is therefore not clear whether it is being asserted that Mr Thompson said that the Claimant would not honour the Agreements unless monies were paid directly to "him", that is, Mr Thompson, in a personal capacity. Neither is it clear whether the 1st Defendant is asserting that Mr Thompson indicated that any monies paid to the Claimant would not be used to discharge the caveats, pay stamp duty and transfer. Whether he made any of these representations is a matter of fact which would not be appropriate for me to decide outside of a trial. However, in any event, it is unnecessary at this stage for me to consider the truth or falsity of the assertion that he made any of these statements because even if he did make any of these statements attributed to him, I find that the defence of anticipatory breach is unsustainable.

[73] I find that a reasonable person in the position of an innocent party, which the 1st Defendant claims to be, could not have concluded that the Claimant "*has clearly*

shown an intention to abandon and altogether refuse to perform the contract." I note that Mr Karjohn averred that Mr Thompson said, *inter alia "the agreements could not work and **he** would not go ahead with the sale as **he** needed the monies directly*". However, the reasonable innocent party in the positon of the 1st Defendant could not reasonably construe the position of the Claimant as being communicated by Mr Thompson to be, that the Claimant wanted to be paid the remainder of the payments pursuant to the contract, but it was making it clear that it would not deliver the properties free from the caveats or other obligations pursuant to the terms of the agreements. That would be nonsensical in the context of a commercial transaction.

[74] Important to my analysis of whether anticipatory breach avails the 1st Defendant, is the fact that although the Agreements provided for the deposits to be used to discharge the encumbrances and pay the stamp duty and transfer taxes, the primary obligation of the Claimant at the conclusion of the process – that is, the core obligation at the root of the contract - was to deliver the Properties free of the encumbrances, as provided for in the contract.

[75] In **The Hermosa** [1982] 1 Lloyd's Rep 570 at 572-3, Donaldson LJ, giving the judgment of the Court of Appeal, summarised the law on renunciation referred to the case of **Woodar** (supra) and considered that the following propositions can be taken from it:

> *(a) Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of a refusal to perform contractual obligations in a respect or respects going to the root of the contract.*
>
> *(b) The refusal must not only be clear, but must be absolute. Where a party declares his intention to act or refrain from acting in a particular way on the basis of a particular appreciation of his obligations, either as a matter of fact or of law, the declaration gives rise to a right of dissolution only if in all the circumstances it is clear that it is not conditional upon his present appreciation of his obligations proving correct when the time for performance arrives.*
>
> *(c) What does or does not amount to a sufficient refusal is to be judged in the light of whether a reasonable person in the position of the party claiming*

to be freed from the contract would regard the refusal as being clear and absolute?

[76] I find that even if the words attributed by Mr Thompson were in fact used, applying the test in **Woodar** and the other authorities hereinbefore referred, they did not reasonably amount to a clear and absolute declaration of an intention not to complete the Agreements. For the reasons indicated above I find that the defence based on an anticipatory breach is without merit.

[77] I should also note that it is doubtful whether the allegation that Mr Thompson demanded payments be made to him personally lends itself to the application of the indoor management rule. This rule permits a party acting in good faith and without knowledge of any irregularity dealing with a company to assume that the company's internal procedures have been complied with as laid down in the case of **Royal British Bank v Turquand** (1856) 6 E&B 327.

[78] Where a director or directors are acting for an improper purpose when they enter into an agreement, the ability of the contracting party to set aside the agreement will depend on general principles of agency and company law. If the contracting party has notice of the wrongdoing and if there is a case of knowing assistance in breach of duty by a director, the agreement may be set aside, see the United Kingdom House of Lords case of **Criterion Properties plc v Stratford UK Properties LLC and Others** [2006] 1 BCLC 729. It seems to me that the expression of a director that he intends to perform his duties for an improper purpose ought not to ground a claim for anticipatory breach by the Company of which he is a director.

[79] In the English Court of Appeal case of **Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. and another [**1964] 2 Q.B. 480, Willmer L.J. while acknowledging the general principle as to the Director's authority in representing the company also referred to a number of cases of unusual transactions and noted that in none of those cases were the plaintiffs in a position to allege that the person with whom they contracted was acting within the scope of such authority as one in

his position would be expected to possess the Court. The principle which can be extracted from his judgment is that where an agreement entered into by a director is unusual, a person contracting with the company through that director is put upon inquiry as to whether the necessary power has been delegated to that director. In my view, a similar principle ought to apply in respect of unusual representations by a director. All the statements attribute to Mr Thompson on which the 1st Claimant rely are highly unusual in the context of an arms-length commercial transaction.

[80] Mr Thompson was only one of several directors and had no legal right to demand that payments due to the Claimant under the Agreements should be made to him personally or in his personal capacity. It would be patently clear to the 1st Defendant that it would be highly irregular and improper for Mr Thompson to be receiving the payments due to the Claimant in his personal capacity if that is what he was requesting and accordingly it is doubtful whether his assertion in this regard could bind the Claimant

[81] Furthermore, a representation by Mr Thompson that the Claimant required the remainder of the payments (whether to be paid to him directly or to the Claimant) but would not honour its obligations under the contract would also be such a highly unusual representation that the 1st Defendant ought to have been put upon enquiry as to whether Mr Thompson was representing the position of the Claimant.

[82] Other than the alleged oral statement attributed to Mr Thompson, there is no documentary or other evidence confirming that the words attributed to him reflected the Claimant's position. I would have thought that if the 1st Defendant was going to use the alleged statement to ground the termination of the Agreements on the basis of anticipatory breach, for the avoidance of any doubt. Having regard to the fact that "*Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of a refusal to perform contractual obligations in a respect or respects going to the root of the contract*" Counsel for the 1st Defendant could have simply sent a letter to the 1st Defendant asking it to confirm that its position is as represented by

Mr Thompson, that is, that it did not intend to perform the Agreements according to their fundamental terms.

[83] Mr Kinghorn's submission was that the defence of the 1st Defendant went further than just the issue of the anticipatory breach, He submitted that the Claim for specific performance cannot succeed because "*the Claimant is not, and cannot show the Court, that it is in a positon to carry out its fundamental obligation of giving title to the property to the claimant.*"

[84] The 1st Defendant's case was that a number of obligations of the Claimant remain unfulfilled including:

1. *The removal of the three caveats;*
2. *The payment of Transfer Tax and Stamp Duty in respect of the 3 agreements;*
3. *The obtaining of subdivision approval;*
4. *The provision of infrastructure.*

[85] Mr Kinghorn submitted that the relevant law on the area is as stated by Gareth Jones in the book Specific Performance in which he stated that:

> *"An applicant for Specific Performance must be able to show that he is ready and willing on his part to carry out those obligations which are in fact part of the consideration for the undertaking of the Defendant that the Plaintiff seeks to be enforced"*

Counsel submitted that the 1st Defendant has served on the Claimant a notice making time of the essence and the Claimant has failed or refused to comply with the obligations stated in the notice.

[86] As it relates to the approvals, Mr Dabdoub stated that the Claimant is relying on the fact that there is subdivision approval granted by the Clarendon Parish Council from 12th September 2013. This approval is exhibited to the affidavit of Ishmael Thompson filed 10th July 2020. Mr Thompson in this affidavit also avers that pre-checked plans were received for four acres and eight point nine seven (8.97) acres

of land the subject of the Agreements. However, by an affidavit filed 21st July 2020 Donovan Simpson the Commissioned Land Surveyor who prepared the pre-checked plans averred that that they are erroneous and need to be amended to reflect the exact square metres as designated in the Agreements.

[87] Counsel submitted that it is not necessary for the Claimant to obtain additional subdivision approval in order to obtain Certificates of Title for the said three parcels of land sold to the 1st Defendant.

[88] Mr Dabdoub submitted further that because the three parcels of land are contiguous to the main road the Claimant can apply for a pre-check survey plan in respect of each parcel of land, and submit these to the Registrar of Titles who pursuant to the Registration of Titles Act will issue new certificates of title for the three parcels of land. He further submitted that a notation will also be made on the original certificate of title of the issue of new titles in respect to those three parcels of land situate on the main road.

[89] I am unable to determine whether Mr Dabdoub's submissions in this regard are correct, but I find that it does not matter. I have found that the 1st Defendant failed to make the payments required under the Agreements and it had no proper legal basis on which to have done so. By failing to make the payments it delayed the funding which pursuant to the Agreements was to be used to facilitate the removal of the Caveats and pay Transfer Taxes and Stamp duty. Therefore, the delay in the performance of these obligations can reasonably be directly attributable to the 1st Defendant. The service of the notice making time of the essence for the completion of these very obligations appears to be a contrivance which seeks to put pressure on the Claimant and to deflect the 1st Defendants role in the delay. It would be wholly unjust for the 1st Defendant to be able to successfully do this.

[90] As it relates to the other obligations of the Claimant, for a further subdivision approval (if necessary) and other infrastructure, these have to be viewed in the context of the Agreements as a whole. The time for obtaining further subdivision

approval must be considered in light of the Agreements as a whole. As I have previously found the obligation of the Claimant is to deliver the Properties with the appropriate approvals at the time of closing and handing over of duplicate certificates of title. The obligation for so doing is not accelerated simply because the Claimant is seeking the remedy of specific performance. What the Claimant is required to do is to demonstrate that it is ready and willing on its part to carry out those obligations which are in fact part of the consideration for the undertaking, when it is that those obligations are supposed to be carried out.

[91] At this stage there is an insufficient support for the argument that these obligations should have already been performed or are presently due to be fulfilled pursuant to the Agreements and that the Claimant is in breach of the Agreements. There is also insufficient evidence that the Claimant will not be able to fulfil all its obligations pursuant to the Agreements, provided that the 1st Defendant fulfils its obligations to pay over the necessary funds as it is contractually obligated to do.

[92] For these aforementioned reasons, I find that there is no legal or factual bar preventing the Claimant from obtaining the remedy of specific performance and that the alleged inability of the Claimants to perform its obligations under the Agreements on which the 1st Defendant relies do not provide a defence with merit.

Ruling on the admissibility of the affidavits filed on behalf of the defendants

[93] I have accepted Mr Dunkley's submission as to the wisdom of considering the contents of the affidavits filed on behalf of the Defendants for the limited purpose of determining whether they have a defence with merit which deserves an order for extending the time for filing of a defence. For the reasons I have indicated herein I find that as it relates to the claim for specific performance no defence with merit has been disclosed. I will therefore not extend the time for the filing of the affidavits for the purpose of defending that portion of the claim.

Defences to the claims for breach of fiduciary duty, conflict of interest and conspiracy to defraud

[94] It is patently clear that the claims in respect of these causes of action are predominantly fact based and the affidavits filed on behalf of the parties demonstrate that there are fundamental disputes as to the material facts as between the parties. The assertions by the Defendant's as to the circumstances which led to the 2nd and 3rd Defendants' representation of the Claimant and the advice given to it, is capable of amounting to a defence with merit if accepted by the Court. It is not necessary for me to dissect the factual allegations of the parties in the circumstances since it is clearly discernible on a reading of the multiple affidavits. Because the Defendants have produced sufficient evidence of a defence with merit in respect of these portions of the claim, notwithstanding my ruling in respect of the specific performance claim, I will however extend the time for the filing of a defence in respect of the other portion of the claim, the mechanics of this I will address in greater detail below.

Is the claim suitable for trial at the first hearing?

[95] Mr Kinghorn commended for the court's consideration the case of **Manfas Hay v Clover Thompson and Jonathan Prendergast** [2018] JMSC Civ 26 in which Master Hart-Hinds provided the following analysis of the relevance of CPR 8.1(4)(d) when considering the other subsections of that rule as follows:

> *[10] It seems to me that it would be an anomaly of Rule 8.1(4)(b) would have wider application than Rule 8.1(4)(d), so that, under the latter rule, only claims which were "unlikely to involve a substantial dispute of fact" could be brought by FDCF, but under the former rule it would not matter that a claim was likely to involve a substantial dispute of fact. In light of the wording of Rule 8.1(4)(d), it must have been envisaged by the drafters that for all claims brought pursuant to Rule 8.1(4), consideration would be given to the nature of the claim to be brought and the likely defence to such a claim, so that it would be permissible for proceedings to be brought by claim form instead of FDCF, or, for the proceedings brought by FDCF to be treated as if begun by claim form. In many cases I have considered, the courts have adopted the latter approach.*

[96] What is beyond debate is that the court under its case management powers has a discretion to treat a claim which on its face properly falls within CPR 8.1 (4) as if it was begun by claim form. One of the matters considered in exercising this discretion is whether there is a dispute of fact which would make the resolution of the claim better managed and the issues more clearly ventilated using the claim form procedure with Statement of case. A case referred to by Master Hart-Hines is **Ralph Williams and others v The Commissioner of Lands and Times Square West Holdings Ltd** [2012] JMSC Civ. 118. Where on a claim for possession of land pursuant to CPR 8.1(4)(b), Mangatal J at paragraph 9 stated that "*… I ordered the Fixed Date Claim Form by which the claim was initially commenced to continue as if begun by Claim Form since I was of the view given the nature of the claim, and the fact that there may be significant disputes as to fact, a Claim Form was the more appropriate procedure.*

[97] I am of the opinion that not only can the Court order that the entire claim commenced by fixed date claim form continue as if begun by claim form, but the Court can also order that a portion of the claim continue as if begun by claim form.

[98] In considering this issue it is helpful to appreciate that there are essentially two conjoined claims. One against the 1st Defendant for breach of contract and specific performance of three Agreements and the other against the 2nd to 4th Defendants for what I will describe for convenience only as, breach of duty. There is a slight overlap I have previously identified where there is, for example, a claim against all the Defendants for conspiracy to defraud the Claimant.

The Specific performance claim

[99] I have considered the written submissions of Mr Kinghorn that the Court ought not to make an order for specific performance on the first hearing of the fixed date claim form where the claim ought properly to be converted to a claim form. I have concluded that under the general case management powers of the Court, it is open to me to address the claim for specific performance on the fixed date claim form

procedure and to order that the remainder of the claim be dealt with as it begun by claim form. The portion of the claim applying for specific performance has been properly brought by fixed date claim form and the Claimant should not be penalised by having to wait for the determination of the entire claim if as the Court has found there is no defence with merit disclosed on this element of the claim. As a case management order it is manifestly sensible because it allows for the disposal of a major portion of the claim and narrows the factual and legal issues which will remain for determination. There is therefore an advantage in this course which is similar to that which obtains on the determination of a preliminary issue.

[100] Mr Kinghorn submitted that CPR 27.2(8) does not empower the Court to make an order for specific performance where the matter is defended and there are conflicting issues of facts to be tried. As it relates to the specific performance claim I have found that there are no disputes of fact that would make it inappropriate to resolve this element of the claim on the hearing of the fixed date claim form. As I have indicated earlier I have not found that the claim for specific performance is properly defended.

[101] Mr Kinghorn has also submitted that the case presented by the Claimant does not properly ground an order for specific performance for the reasons I have addressed earlier such as the existence of the caveats and the issue of the subdivision approval. I have found that these are not a bar to the remedy being sought.

Conclusion

[102] On the evidence before the Court as presented by the Claimant and having regard to the absence of properly filed evidence of the 1st Defendant, the Court having found that a defence with merit has not been shown the Court will grant the claim for specific performance pursuant to CPR 27.2 (8). I will also make consequential orders to effect the remedy of specific performance and I will hear further submissions from the parties as to the precise terms of those orders.

[103] I will also order that the claims for reliefs other than specific performance proceed as if begun by claim form and I will likewise give additional direction to the parties after hearing from them further on appropriate deadlines.