



[2021] JMSC Civ. 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 06149

BETWEEN	BARRINGTON HEMANS	CLAIMANT
AND	DEAN TENANT	DEFENDANT

IN OPEN COURT

Wentworth Charles instructed by Wentworth S. Charles & Company for the Claimant

Hugh Wildman instructed by Hugh Wildman & Company for the Defendant

Heard: November 25 and 26, 2020; February 18, 19 and May 28, 2021

*Land Law - Breach of Contract - Specific Performance and Damages. Oral Agreement - Claimant alleges that the oral contract was later reduced to writing for the purpose of transfer of title - Whether the unavailability of the written contract is fatal to the claim. Whether there are sufficient acts of part performance - Whether these acts are referable to an oral agreement for the sale of land or to a tenancy.*

A. THOMAS J.

## INTRODUCTION

[1] The Claimant Mr. Barrington Hemans claims against the Defendant Mr. Dean Tenant specific performance of an oral agreement for the sale of land registered

at volume 1264 folio 46 of the Register Book of Titles. He also seeks damages. In the Particulars of Claim, he alleges that:

Between 2000 and 2001 he entered into an oral contract with the Defendant to buy premises at 114<sup>1/2</sup> Constant Spring Road, Strata lot 21 on the Strata Plan, numbered 544 (hereinafter referred to as the Apartment). He paid in full the agreed sale price of \$5 million dollars between 2001 to 2002 and was put in possession of the premises. On the 17<sup>th</sup> of April, 2002 he was taken by the Defendant Mr. Tenant to the offices of attorney-at-law Mr. Robin Smith for the purpose of effecting the transfer of the title to the property to him. They both signed the transfer in the presence of the secretary to Mr. Robin Smith. Sometime in 2003 Mr. Smith died. He was assured by the Defendant that if the transfer they signed at Mr. Smith's office could not be located he, the Defendant would sign a new transfer. He continued to occupied the property through family members and friends between 2002 to 2004 and in 2004 he rented the property through an agent. He has been in possession of the property from April 2002 to the 27<sup>th</sup> of September 2015. In late September 2015 Mr. Tenant reneged on the sales agreement, indicating that he wanted to take back the apartment and return the Five Million dollars (\$5,000,000.00). On the 27<sup>th</sup> of September 2015, the Defendant took possession of the premises, giving his tenant notice to leave. He, the Claimant, subsequently lodged a caveat against the title to the property.

## **THE DEFENCE**

- [2] In his Defence the Defendant Mr Tenant denies that that he entered into an oral agreement to sell the said property. He denies that the Claimant paid him any money towards the purchase of the property nor did he agree to transfer the property to the Claimant. The Defence further alleges that the Defendant gave the keys to the apartment to the Claimant to act as his agent for the rental of the apartment. The maintenance fee was being paid by the tenant.

### **The evidence of the Claimant**

[3] In his evidence in chief the Claimant states that he has known the Defendant since 1995 as the Defendant was in a relationship with his sister who bore him three children. He states that sometime between 2000 and 2001 he lent the Defendant Sixteen Thousand Five Hundred Pounds (£16,500.00). This sum was loaned to the Defendant in cash. He explains that he did not request a receipt from the Defendant, as due to the nature of their relationship, he trusted him.

[4] Mr. Hemans asserts that sometime in 2002 the Defendant told him that he, the Defendant will have to sell the apartment he owned at Oakland on Constant Spring Road [the Apartment] in order to repay the money he borrowed from him. He says that the Defendant further suggested to him that maybe he could buy the apartment as he thought it would be best to keep the property in the family. Mr. Hemans further states that he accepted the offer of the Defendant and they thereupon agreed on a sale price of Five Million Five Hundred Thousand Jamaican Dollars (JMD \$5,500,000).

[5] Mr. Hemans contends that by verbal agreement the sums of money that he loaned the Defendant over the period 2000 to 2002 were converted into payment on the apartment These loans he said consisted of:

Two Thousand Pounds (£2,000.00) to assist the Defendant in the furnishing of a bar in his house; Six Thousand Five Hundred Pounds (£6,000.00) to assist the Defendant in the purchase of a Mercedes Benz; Seven Thousand Pounds (£7,000.00) to Tropical Shipping Kingsland High Road, Dalston England; Moneys paid to suppliers on behalf of the Defendant; Moneys sent to Steve Rose either to pay the electrician or other workmen who worked on house that the Defendant owned at Junior Avenue in the Charlton Community in Jamaica.

[6] He says that he recorded paying the Defendant in excess of Seventy-Five Thousand Pounds (£75,000.00). However, this does not reflect all the money he gave him. He also says that at no time did the Defendant give him a receipt for

these payments but he did not insist on any receipt as he considered the Defendant as family and trusted him to complete his side of the agreement.

- [7] Mr. Hemans further states that in 2002 after he had completed the payment for the apartment, both himself and Mr. Tenant came to Jamaica and he was taken by Mr. Tenant to the offices of Mr. Robin Smith, Attorney-at-law. He testifies that he was given a document by Mr. Smith's secretary to complete in order for the title to be transferred to him. He paid a retainer of Twenty Thousand Dollars (\$20,000.00) to effect the transfer. He was given information by the secretary in relation to his and Mr. Tenant's obligation to pay stamp duty and transfer tax. He also alleges that he made enquires of Mr. Tenant with regards to his portion of taxes and Mr. Tenant told him that he was trying to put it together and also assured him that he had no need to worry as since he already paid for the property, it was his.
- [8] Mr. Hemans says that he thereafter returned to England while Mr. Tenant remained in Jamaica. He states that a few months passed and he, having not heard from Mr. Robin Smith nor his secretary, sought assistance of UK based attorneys, Stennett and Stennett to make contact. It was then that he discovered that Mr. Smith had died in September 2002 and that the transfer could not be located.
- [9] He states that he was however not worried as he had the keys to the apartment and either he or his family members would stay at the apartment when they travelled to Jamaica. He also asserts that when he informed Mr. Tenant that Mr. Smith had died and that the documents were in the possession of Mr. Smith's executors he assured him that everything would be done to complete the transfer.
- [10] It is also Mr. Hemans' evidence that sometime in 2004 while he was in England he decided to rent the apartment which had been locked up for months at a time and was not used on a regular basis by himself or family. He says that during that time Steve Rose would check on the property and pay maintenance and utility bills on his behalf, and Mr. Rose would stay at the apartment from time to time. Mr.

Hemans states that since 2004, for 11 years up to 2015, the apartment was managed and rented by the mother of his children Donna White who acted as his agent. Ms. White was also responsible for paying the maintenance, which included the property tax, over the period. The receipts were issued in the name of the Defendant as he was advised by the property management that it had to be issued in the name of the registered owner.

- [11] The Claimant Mr. Hemans maintains that from April 2002 to the 27<sup>th</sup> of September 2015 he was in effective possession of the property, and neither he nor his tenants were interfered with by Defendant despite the fact that the Defendant returned to Jamaica in 2009. He asserts that it was in late 2015 that the Defendant, Mr. Tenant told him that he was going to take back the apartment and give him back his Five Million Five Hundred Thousand Dollars (\$5,500,000.00). Prior to 2009 while living in the UK the Defendant was employed to his business but since his return to the Jamaica he had to remove his name from the books of his business.
- [12] Mr. Hemans asserts that the Defendant told him that the rental he collected over the years would account for any interest he would have been entitled to on the \$5.5 million dollars. He states that on the 27<sup>th</sup> of September 2015 Mr. Tenant gave his tenant notice to vacate the apartment and threatened her with the disconnection of the electricity. She moved out at the end of October 2015. He says that he paid maintenance and property tax up until October 2015. He further states that a new tenant has been living in the apartment since April 2016 whom he did not rent the apartment to.
- [13] He says, Mr. Tenant introduced Ms. Burgher to him as the secretary of his family lawyer with whom he had done transactions with from time to time and told him that they would be doing the transfer at Mr. Smith's office. He also says that he paid the sum of \$20,000.00 at Mr. Robin Smith's office and got a receipt. This receipt was admitted into evidence. He asserts that he maintained his children by sending money through Western Union or other times whenever he visited Jamaica he would give money to their mother directly.

- [14]** Western Union slips of monies that he sent from England to Donna White were tendered and admitted into evidence. He states that he exhibited them because Mr. Tenant has said in his affidavit that he rented the property to send his children to school but that rent could never have sent his three (3) children to school. He says also that he received receipts from hardware stores for repairs to repair the apartment over the period 2002-2015. Those receipts were also admitted into evidence.
- [15]** He mentions that he got the keys to the apartment in 2002 from Mr. Tenant at the apartment. Once he got the keys he took possession of the apartment, then he went to England with the keys. His next visit to Jamaica was in 2003. He states that since 2015 the Defendant rented the property and has been collecting a rental there from of Fifty Thousand Dollars (JMD \$50,000.00)].
- [16]** He says that Mr. Tenant was formerly employed by him at Hemans West Indian Bakery in the UK. He also says that Mr. Tenant told him that he was taking back the apartment and returning his money because in 2009 he removed his Mr Tenant's name from the books of his company New Sun Splash Retail Ltd. He says Mr. Tenant was employed part-time to the company two years prior to 2009 and was paid a salary of one Hundred and Thirty-Two Pounds (£132.00). He also says that the reason Mr. Tenant stopped working at his establishment was because he came back to Jamaica in 2009 and he has not seen him in England since then.
- [17]** On cross examination Mr. Hemans states that his sister is the mother of Mr. Tenant's three children. He had a bakery in England called New Sun Splash Ltd. He and someone in that bakery had a falling out, the matter went to court and the court ruled against him and he had to pay money. He denies that he went into financial ruin after that. He denies that he and his sister had a falling out after that. He says that he does not know of Mr. Tenant being very affluent in England running a very successful tailoring shop.

- [18]** He insists that a part of the cost of Mr. Tenant's Mercedes Benz was paid for by him. Mr. Tenant gave him cash and he gave him a cheque to pay for that car. A part of it was a loan. He does not know how many vehicles Mr. Tenant purchased. He asserts that it was not burdensome for him to send money via the money transfer method to Ms. White for his children. He denies telling Mr. Tenant that instead of him sending money to his children's mother, he Mr. Tenant could allow her to rent the apartment and he Mr. Hemans would pay him in England. He denies that it was pursuant to an agreement of that nature that Mr. Tenant gave him the keys to the apartment in England. He insists that he was given the keys to the apartment in Jamaica.
- [19]** He states that he was then making frequent trips to Jamaica and that at the time when Mr. Tenant took him to Mr. Smith's office, he was already in Jamaica. He says he has one brother and three sisters and that his father left property on the North coast for his children. He denies the assertions that he and his siblings had a falling out over his father's property. He rejects the suggestion that the reason Mr. Tenant took him to Mr. Robins Smith's office was to deal with his own family dispute. He states that he never met Mr. Robin Smith. He also states that when he went to Mr. Robin Smith he did not take any money to pay towards the purchase price of the property as he already paid for the property in England.
- [20]** He says that he did not sign a sales agreement at Mr. Robin Smith's office and that he did not make any payment towards the property in Jamaican. He then says that a sales agreement was signed by himself and Mr. Tenant at Mr. Robin Smith's office but it was never witnessed in his presence. The transfer tax was to be paid by Mr. Tenant, approximately \$190,000. He says that the price in the sales agreement was Seventy-Five Thousand Pounds (£75,000.00) which was Five Million Five Hundred Thousand Dollars (JMD \$5,500,000.00). and that Mr. Robin Smith was acting as the lawyer for both himself and Mr. Tenant.

- [21]** Mr. Hemans further states that in 2002 when Mr. Tenant and himself went to Mr. Robin Smith's office at the same time to sign the transfer, all the transactions for the property were conducted on that one occasion before Mr. Smith died. He says learned of his death in 2002. Mr. Smith died very shortly after he signed the agreement. He states that no lawyer took over the transaction in place of Mr. Smith and that he did not come back to Jamaica to go to Mr. Smith's office because Mr. Smith's office was not in operation. Mr. Bert Samuels was the executor for Mr. Smith. He says he was given a copy of the title by Mr. Bert Samuels. He went to Mr. Samuels about putting the title in his name and he also spoke to Mr. Tenant about transferring the title in his name.
- [22]** Mr. Hemans states that he spoke to Mr. Smith's secretary who is now named Mrs. Burgher after Mr. Smith's death on the telephone from England and in Simone Jennings's office. She did not tell him who witnessed the sales agreement or whether she had sent the sales agreement to the stamp office. He did not think it was necessary to find out because Mr. Robin Smith died and it was no longer in her possession.
- [23]** He states that he and his children's mother Ms. Donna White are no longer together but he is still in touch with her. When she was in charge of renting the property the rental was Fifty Thousand Dollars (JMD \$50,000.00) per month. He admits that when he got the apartment Mr. Tenant's furniture were there. He insists that he paid Mr. Tenant some money in England but that was before and not during the time the property was rented. He denied that over the entire period he only paid Mr. Tenant sum total of Nineteen Thousand Pounds (£19,000.00).
- [24]** He says that purchases re: work on the apartment were done between Donna White and his daughter Ashley Hemans. He does not know of Donna White building a house at the time. When these purchases took place, the apartment was still being rented with Donna White as his agent. He disagrees that nothing major was done on the apartment. He states that he did not keep a copy of the documents signed at Mr. Smith's office. He says that he visited Mr. Smith's office



in the earlier part on 2002 but he does not remember the month. He also says that he visited Jamaica many times after that but he did not go back to Mr. Smith's office after he returned to Jamaica

**[25]** Mr. Hemans further states that he did not speak to Mrs. Burgher again until they spoke in Simone Jennings' office in 2015. He contacted her by telephone to meet him at Ms. Jennings' office. He did not ask her then about the sales agreement. When asserts that when he went to Mr. Smith's office, Ms. Burgher drafted the sales agreement and signed her signature on it. He has never visited the stamp office to find out about the sales agreement.

**[26]** He says that since he came back to Jamaica he has retained other lawyers in this matter. He did not instruct any of them to go to the stamp office to find out about the sales agreement. He insists that he received the title from attorney-at-law Mr. Bert Samuels and denies that it came into his possession, by it being left in the apartment by Mr. Tenant. He also says that he told Mr. Bert Samuels that he signed the sales agreement at Mr. Smith's office.

**[27]** He states that he did not ask Ms. Burgher for a copy of the document at the time he signed it because it was waiting for Mr. Robin Smith to witness it. She did not tell him to come back to the office after Mr. Smith returned. He agrees that he and Mr. Tenant used to have a very good relationship and used to share personal things together. He says that Mr. Tenant did not tell him that he was buying an apartment in England. He says that he does not know if Mr. Tenant owns an apartment in England. Mr. Tenant did not tell him that in order to have a reduced mortgage he should have his name on his payroll. That is not how he came to have his name as an employee. Mr. Hemans says that he does not know of Mr. Tenant working apart from when he was working for him part-time for 2 years. He also says that he does not know whether Mr. Rose has a mental problem as he knew Mr. Rose briefly while he was in England when he was introduced by Mr. Tenant to him. He also says he does not know of Mr. Tenant having an established business in Jamaica.

**[28]** Mr. Hemans states that he took the furniture that was in the apartment to his house. He states that the agreement was that the apartment was sold with the furniture. The sales agreement did not say that he was buying the furniture. He admits that his father left property for himself and his siblings. He denies having any discussion when he went to Mr. Robin Smith's office with Ms. Burgher about that property. He states that Mr. Samuels instructed his secretary to give him a photocopy of the title and that he has not gone back to Mr. Bert Samuels' office since.

**[29]** He denies having a discussion with the Defendant about him renting the apartment. He refutes the suggestion that he told the Defendant that he could rent the apartment through his children's mother and pay him in England as that was a more convenient way for him to maintain his children from England than to send the money through the money transfer. He says he has not gone to the stamp office to try to retrieve the sales agreement. Documents like the one he signed in Mr. Smith's office came to him in England and he signed them. On re-examination Mr. Hemans states that his father died in 2008 but he went to Mr. Smith's Office in 2002.

### **Mr. Steve Rose**

**[30]** The evidence of Mr. Steve Rose is that he was a friend of Mr. Tenant, whom he also knows as Diego for a long time before he met Mr. Hemans. He met Mr. Hemans in 2000. Mr. Tenant introduced Mr. Hemans to him as Tony during his time in England.

**[31]** Mr. Rose states that on his return to Jamaica in 2002. Mr Tenant asked him to stay at the apartment for him because it was empty and he did not want it to stay that way. He says Mr. Tenant would send moneys through Western Union to pay utility bills, maintenance and to pay the men who were working on his Mr. Tenant's house at 4 Junior Avenue. He says Mr. Hemans (Tony) also used to send money to pay these workmen. He also says that he stayed at the apartment for a year but he had to move as Mr. Hemans was going to rent out the apartment and that

during this time when Mr. Tenant came to Jamaica he never stayed in the apartment as he told him about all his dealings with Mr. Hemans.

[32] On cross-examination Mr. Rose states that Mr. Tenant was his good friend in Jamaica. He used to be at his home sometimes helping to wash his cars. He knows that Mr Tenant migrated to England before he bought the apartment. He admits that when he, Mr. Rose, attempted to go to England, for the first time he was not successful. On another occasion that Mr. Tenant came to Jamaica and brought him with him back to England.

[33] Mr. Rose states that while he was in England he worked with Mr. Tenant's girlfriend at a restaurant. He admits that he got into a little trouble with the law in England but when they were trying to send him back to Jamaica, it was not Mr. Tenant but his girlfriend that was helping him. He decided to return home from England after he ran into the problems with the law in England. He says that he is aware that Mr. Tenant bought a house in England while he was there. He states that while he was in England Mr. Tenant was not working, he was not doing tailoring, or selling nice clothes.

[34] Mr. Rose also says that when he met Mr. Hemans in England he owned a bakery. He knew that Mr. Hemans' sister was Mr. Tenant's girlfriend at the time and they had children together. He states that he knew that Mr. Tenant had a house in Jamaica as he used to work there. Mr. Hemans used to send money to him after he returned to Jamaica. He denies having mental problems in England or on his return to Jamaica. He divulges that sometime in 2015 he had difficulties sleeping at nights.

### **Ms. Veronica Burgher**

[35] Ms. Burgher states that she was employed to the offices of Robin Smith Attorney-at-Law, between 1990 to 2002. She confirms that Mr. Smith died on the 29<sup>th</sup> of

September 2002. She recalls Mr. Hemans and Mr. Tenant attending the offices of Mr. Smith sometime in 2002 for the purpose of a transaction regarding the sale of the apartment. She says that she knew Mr. Tenant to be a client of Mr. Smith before he brought Mr. Hemans to the office to do the transfer. She states that when Mr. Tenant told her what he wanted she called Mr. Smith on the telephone who spoke to Mr. Tenant. She says that Mr. Smith then gave her instructions and as a result of which she prepared a sales agreement and a transfer between Mr. Tenant and Mr. Hemans for the sale of an apartment at Oakland Apartments which was signed by the parties and witnessed by her. She recalls Mr. Hemans making a payment of Twenty Thousand Dollars (JMD \$20,000.00) for a retainer and she gave him a receipt. That receipt was tendered and admitted into evidence.

**[36]** She states that the agreement for sale was signed by both parties. This was sent to the Stamp Office for assessment. The assessment was received by her office. She further states that the parties were advised of the sum and when it should be paid. Both parties promised to make payment, but failed to do so before the death of Mr. Smith.

**[37]** On cross examination Ms. Burgher states that the agreement was done in April 2002. It was not stamped at the stamp office; it was only assessed. She does not recall the sum it was assessed at. She says that the document was returned to her in less than a week. She kept it at the office on a file created for Mr. Tenant and Mr. Hemans. She testifies that the actual agreement was typed up on her computer but she does not now have access to that computer. She maintains that Mr. Tenant and Mr. Hemans came to the office together once. Other times she spoke to them on the phone. She says that the last time she saw the document she got back from the stamp office was in 2002 before the office was closed. It would have been at Mr. Smith's office before he died. She maintains that the title to the] apartment would have been there also, and that she did not give that title nor any document relating to this transaction to anybody.

- [38]** When asked to describe Mr. Tenant's physique Ms. Burgher says that Mr. Tenant is of medium built, and not very clear in complexion but says she is not good at assessing height. She also says that when Mr. Smith returned to the office he spoke to her about this matter and Mr. Smith was the one who witnessed the transfer. She states that she does not remember if there was any down payment referred to in the sales agreement. She admits that it is the norm that a closing period would be mentioned in a sales agreement. She does not recall what the date was in that agreement. She does not recall whether there was any reference to furniture in the sales agreement. She also says that Mr. Smith spoke with Mr. Tenant on the phone and he advised her as to what was to be done. Based on that advice she prepared the transfer and the sales agreement.
- [39]** Ms. Burgher says that as far as she knows a transfer was prepared, as the cash was already passed and all that was to be effected was the transfer. She cannot remember the sale price from 2002. She wrote a receipt for the retainer fee. Mr. Tenant was always a client of Mr. Smith. When she received the assessment, she informed Mr. Smith and he instructed her regarding the sum each party should pay. She says she communicated that information to Mr. Hemans and Mr. Tenant via telephone.
- [40]** She states that no one took over Mr. Smith's practice after his death. After Mr. Smith's death Mr. Bert Samuels came and instructed that the office should be closed. She did not give Mr. Samuels any document. After Mr. Hemans came to the office she never saw him there again. She says no Justice of the Peace signed the agreement. After she prepared the agreement none of the parties sent any more money to pay her. She told Mr. Hemans his cost which she believes was Eighty-Nine Thousand Dollars (JMD \$89,000.00).

**[41]** On re-examination Ms. Burgher states, she left Mr. Smith's office that very day that Mr. Samuels came. She learnt that he was the executor and that he needed to close down the office and he took the keys from her.

### **Evidence of the Defendant**

**[42]** The Defendant Mr. Tenant, states that sometime in 2001 he was talking to the Claimant Mr. Hemans about his apartment in Jamaica and he asked why he had the property locked up for so long and why he did not rent it. He says Mr Hemans suggested that he rent the property to him, his children's mother would collect the rent and use it to look after her children here in Jamaica and he would in turn be paid in England the equivalent of the rent.

**[43]** He further states that in the third week of June of that year, Mr. Hemans told him that he could rent the apartment for Thirty Thousand Dollars (\$30,000.00) per month and he, the Claimant, would pay the maintenance charges. He says that in June 2001, he gave Mr. Hemans the key and he gave him five thousand five hundred pounds, (£5,500). He further states that Mr. Hemans gave him the following sums: In December 2003, Six thousand pounds (£6,000.00); Five Thousand Pounds (£5000.00) in 2006; In May 2010, One Thousand Pounds (£1000.00) and a further One Thousand Five Hundred Pounds (£1,500.00) Pounds in 2011.

**[44]** Mr. Tenants says that altogether he received Nineteen Thousand Five Hundred Pounds (£19,500.00) from the Claimant for rental of the apartment from July 2001 to October 2015 and when he totalled the rental the Claimant collected he has outstanding sums for him. He asserts that the last time he got rental sums from the Claimant was 2011. He states that the Claimant eventually rented the property for Fifty Thousand Dollars (JMD \$50,000.00) plus maintenance.

- [45] Mr. Tenant mentions that after the Claimant, Mr. Hemans stopped paying child support as his children became adults, Mr. Hemans told him that Ms. White would be lodging the rental sums in an account and he would repay him after he cleared up his outstanding debt for his business.
- [46] Mr. Tenant states that he subsequently informed the Claimant that he intended to sell the apartment so that he could inform his tenant. He says that the Claimant responded by saying that he thought that he would have been given the first choice for purchase since he rented the apartment for so long. He says he told the Claimant that he already had a buyer but later discovered that he placed a caveat on the title.
- [47] On cross examination, Mr. Tenant states that he bought the apartment in 1997 for Two Million Six Hundred and Fifty Thousand Dollars (JMD \$2,650,000.00). At that time, he was living in London. He admits that between 1997 and 2001 the apartment was locked up. He would stay there whenever he comes to Jamaica. He says that during that period, he paid the property tax and maintenance. He admits he has known Mr. Hemans for a long time and he is his brother in law. He also agrees that they had an excellent relationship. He states that it was in 2001 that he rented the property to Mr. Hemans and that he gave him the keys while they were both in England. He admits it was a verbal agreement but states that it was for a tenancy of Thirty Thousand Dollars (JMD \$30,000.00) per month. He says that Mr. Hemans gave him Five Thousand Five Hundred Pounds (£5,500.00) and he handed him the keys while they were both in England. Mr. Tenant agrees that when Mr. Hemans gave him that sum the apartment was not yet rented to anyone. He also admits that he and the Claimant both came to Jamaica in 2001.
- [48] Mr. Tenant denies the suggestion that Mr. Hemans informed him that the Five Thousand Five Hundred Pounds (£5,500.00) was a part of the purchase price for the apartment. He says that he cannot recall what the exchange rate was at the time. He says that to his knowledge, it was in 2003 that the Claimant commenced renting the apartment.

- [49]** He admits that from the time he gave the Claimant the keys and during the time the Claimant was in possession of the apartment, he, Mr. Tenant, never paid property tax or maintenance fee for the apartment neither did he go to the apartment during this period. He admits that all the plumbing and electrical repairs for the period were done by Mr. Hemans through Ms. White.
- [50]** He says that he only met Mr. Robin Smith twice. The first time was in relation to the purchase of a house that he owns at 4 Junior Avenue. He admits that he was the one that introduced the Claimant to Mr. Robin Smith's office in 2002 when he went with him to Mr. Smith's office. He denies that the purpose for visiting Mr. Smith's office at that time was to effect the transfer and asserts that that visit concerned the estate of Mr. Hemans's father. He admits that Mr. Hemans' father died in the year 2008.
- [51]** He says that he has never seen Ms. Burgher. It was his mother who directed him to Mr. Smith's office. When he went there he saw quite a few people. He called Mr. Smith to inform him that he was there, also when he went with Mr. Hemans he called to inform that he was there. He agrees that both himself and Mr. Hemans were in Jamaica 2001.
- [52]** Mr. Tenant states that when he and Mr. Hemans went to Mr. Smith's office on the 17<sup>th</sup> of April 2002 he did not have the certificate of title for the apartment in his possession. He maintains that the original was left in the Oakland apartment. He insists that he did not give the Claimant the keys and the duplicate certificate of title while they were both in Jamaica.
- [53]** Mr. Tenant admits making an application in 2015 to the Registrar of Titles stating that the title to the apartment was lost. He admits making a declaration in that application. He denies stating in the application that "the title for the apartment was locked away at his house at 4 Junior Avenue, St. Andrew, to which he alone had access". He denied saying in the Declaration that he "went in the drawer in 2015 and found that it was missing. Papers placed in the garbage bin for disposal were



collected the next day by the garbage collectors, the title may have been among the papers that were disposed of”.

- [54]** Mr. Tenant also admits that he applied for the cancellation of the said title but maintains that he never explained anything about the title in the form that he signed. Upon the application being shown to him he says that apart from his name and address he never said anything else in the application which he signed. The application was tendered by counsel for the Claimant and admitted into evidence.
- [55]** Having been shown Western Union receipts that were tendered on behalf of the Claimant and admitted into evidence, Mr. Tenant agrees that Mr. Hemans made maintenance payments to Ms. White between the period 2004 and 2015. He agrees that between 2002 and 2015, the cost for all repairs, plumbing and electrical, were paid for by Mr. Hemans and Ms. White. He admits that he told Mr. Heman’s tenant that he was going to sell the apartment and as a result she had to move out.
- [56]** On Re-examination, Mr. Tenant says that the first payment he received represented the rental cost for a period of time, though he did not specify the period. He says when her went with Mr. Hemans to the offices of Mr. Robin Smith, “Mr. Hemans wanted to get a lawyer for some land because he had a place and his father was ill and he wanted to sort some things out pertaining to his father’s circumstance.” He states that there was conversation between himself and the Claimant about the maintenance payments, were it was agreed that it would be paid for by the Claimant, and he was permitted to rent the apartment with all the furniture. He says he has not returned to Jamaica permanently, but has been back since 2014.

## The Issues

[57] Both parties have admitted that there was an oral agreement between them as it relates to the Apartment in issue. However, in light of certain points raised by Counsel for Defence which will be noted in a later segment, the issues to be determined are:

- i. Whether the Claimant's failure to produce the written agreement referred to in his evidence, defeats his Claim;
- ii. If the answer to (i) is in the negative, whether there are sufficient acts of part performance on the part of the Claimant to point to the existence of an enforceable oral contract for sale of land
- iii. If the answer to (ii) is in the affirmative, whether the Defendant has breached the contract;
- iv. Whether the Claimant is entitled to Specific performance and or Damages.

## Whether the Absence of a written agreement Defeats the Claim

[58] Mr. Charles submits that, notwithstanding the absence of a written agreement for the sale of the apartment in this case, the effect of the Claimant's testimony is that there was an oral agreement supported by acts of part performance. He therefore submits that the oral contract is enforceable notwithstanding its noncompliance with the Statute of Frauds. He also points out that the Defendant has not pleaded the Statute of Frauds and as a consequence, it is not relevant in the instant case. (He relies on the case of **Steadman v Steadman [1976] A.C. 536.**)

[59] However, Mr. Wildman mentions the fact that Mr. Hemans states that he had a written agreement with the Defendant, and makes the point that throughout he proceedings, Mr. Hemans has not been able to produce any evidence of that written agreement". He submits that:

“The purchase of land has special features governing the sale and purchase, which has to be reduced into writing.” and that

“It is inconceivable that the Claimant would not have retained a copy of that sales agreement, executed at Mr. Robin Smith’s office for himself, as evidence of the purchase of the apartment” or “seek to retrieve a copy from the Stamp Office, which is the institution in law to register all such agreements. That is part of the burden of proof which rests on the Claimant to show that there was a contract. Neither the Claimant nor Mrs. Burgher, his witness, could account for this alleged sales agreement. No explanation has been proffered for the absence of the alleged sales agreement.”

### **Discussion**

**[60]** It is established law that for the purposes of the statute of frauds as it relates to the sale of land, there ought to be a memorandum in writing containing the essential terms of a contract. However, it is a “cardinal rule of pleadings in that, in order to be relied upon, the Statute of Fraud must be pleaded” (See *Harley Corporation Guarantee v the Estate of Rudolph Daley and ORS* [2010] JMCA Civ 46) In the instant case, the statute of fraud has not be pleaded by the Defendant despite his Counsel raising in his submissions that the Claimant is relying on a written contract that has not been presented to the court.

**[61]** Additionally, the doctrine of part performance was established in the court of equity to prevent a party to an oral agreement, relying on the Statue of Fraud and the absence of a memorandum in writing, from fraudulently refusing to perform the agreement in circumstances where the other party would have performed acts in relation to the agreement by which he incurred expenses or prejudiced his position. It requires the court to examine the surrounding circumstances, including payments of money, to see if they pointed to some oral contract consistent with the alleged contract (See *Steadman v Steadman* [1976] AC 536).

[62] It seems to me that Mr. Wildman is seeking to place undue emphasis on this written agreement when the case of the Claimant, as revealed in the pleadings and the evidence, is that the original agreement between the parties was an oral agreement and the purpose of the written agreement was to give effect to the transfer of the land to him in accordance with the oral agreement which was already concluded, under which he had paid the complete purchase price and as a result was put in possession.

[63] Therefore, in my view the contract the Claimant is seeking to prove is not the written agreement but the oral agreement. He is seeking to establish that by conduct subsequent to the conclusion of the oral agreement, the Defendant, by taking him to the attorney's office for the preparation of the written contract to effect the transfer, did acknowledge the existence of the oral agreement. That is, the oral evidence of the conduct parties later seeking to reduce the terms of the concluded oral agreement in writing amount to supporting evidence of the existence of the previous oral agreement.

[64] In the case of **Steadman v Steadman** (Supra) the court stated that:

*"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its other and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud. It must be remembered that this legislation did not and does not make oral contracts relating to land void; it only makes them unenforceable. And the statutory provision must be pleaded; otherwise the court does not apply it. So it is in keeping with equitable principles that in proper circumstances a person will not be allowed 'fraudulently' to take advantage of a defence of this kind. There is nothing about part performance in the Statute of Frauds. It is an invention of the Court of*

*Chancery and in deciding any case not clearly covered by authority I think that the equitable nature of the remedy must be kept in mind” (See the Judgment of Lord Reid at page 540).*

- [65] My understanding of the law is that even in circumstances where it is contended that there was a written agreement but the party seeking to prove the existence of the contract is unable to produce the written document, but is able to produce, evidence of part performance referable to the existence of an oral agreement, equity will normally step in to do justice between the parties.
- [66] The aim of the court is to prevent a party from using the Statute of Frauds to perpetrate a fraud on another party. I therefore agree with the position of Mr. Charles that Defence Counsel’s submission as it relates to the absence of the written agreement is contrary to settled principles of law as (i) It has not been pleaded and (ii) A party, does not have to produce a written agreement where there is part performance referable to the terms of an oral agreement. I therefore find that the absence of documentary evidence of a written agreement does not defeat the Claim.

### **Whether there are sufficient acts of Part Performance referable to an oral contract for the sale of land**

#### **Submissions**

- [67] Mr Charles submits that the evidence points to the Claimant being put into exclusive possession by the Defendant, by virtue of the oral agreement for the purchase of the apartment, the Claimant having completed payment. Relying on the case of **Steadman v Steadman** (Supra) he submits that

“alleged acts of part performance must be considered along with the surrounding circumstances and, if they pointed on a balance of probabilities to some contract between the parties and either showed the nature of or

were consistent with the oral agreement alleged, then there was sufficient part performance of the agreement”.

- [68] Relying on the case of **Maddison v Alderson (1883) 8 App. Cas. 467**, he accepts that any alleged acts of part performance must be unequivocal and must have relation to the agreement being relied upon, and to no other. He is of the view that in the instant case there is sufficient evidence for the court to find that there were acts of part performance referable to the oral contract. That is the Claimant, having completed payment and being put in possession of the apartment by the Defendant by handing him the keys. He also points to the evidence that the Claimant was in exclusive possession of the apartment through his agent, Donna White over the period 2002 to 2015, without any reference to the Defendant. He also relies on the case of **Mattar v Salmon [2020] JMSC Civ. 48**.
- [69] However, Mr. Wildman submits that Mr. Hemans’ has failed to satisfy this court, on a balance of probabilities, that he and Mr. Tenant had a contractual agreement for the sale and purchase of Mr. Tenant’s apartment and that “*The entire thrust of the evidence points in one direction, which is inconsistent with a sales agreement and consistent with a tenancy arrangement*”.
- [70] He also submits that “according to the evidence given by the Claimant, this agreement would have subsisted for some 14 years, without any steps being taken to complete the agreement. This is not consistent with the existence of a contract which is complete and certain. On the contrary, what it does indicate is the certainty of the lease agreement entered into with the Defendant for the benefit of the Claimant’s baby mother, Ms. White.”
- [71] He asserts that this view is supported by “questions that remain unanswered”, such as “what was to become of the Defendant’s furniture, which was inside the apartment”.
- [72] He is of the view that this case turns essentially on credibility. He made reference to the remittance receipts indicating that Mr. Hemans was sending funds to

Jamaica to Ms. Donna White to maintain his 3 children stating that “*those receipts do not in any way, negate the assertions of the Defendant that, the arrangement between himself and the Claimant existed, and by virtue of that, the Claimant was paying the Defendant money on behalf of Ms. White for the use of the apartment*”.

[73] He also submits that “There is no evidence that the Claimant enquired of the Defendant about time for completion of the sale or that he contacted any counsel, during the 14 years to have the agreement completed”.

[74] He points out that the inference on the evidence given by the Claimant and his witness Ms. Burgher, is that Mr. Bert Samuels would have had possession of the title, and all other relevant information regarding the alleged sale. He points to the fact that Mr. Samuels is still a practising Attorney in Jamaica and takes issue with the fact that there was no evidence from Mr. Samuels. He is of the view that this is indicative of a lacks credibility on the part of the Claimant.

[75] Mr. Wildman states that Ms. Burgher described Mr. Tenant as “medium built, not very dark”. He submits that the court should note that the Defendant, in no way, shape or form, resembles the description given by Mrs. Burgher.

[76] Mr. Wildman also submits that the cases do not assist the Claimant as in the cases relied on “there was clear evidence of an oral agreement for the sale of property and there were compelling evidence of acts of part performance”.

## **Discussion**

[77] “*In respect of the sale of land, the doctrine of part performance was developed by the Courts of Equity to enable a litigant, who is unable to claim damages for breach of an oral agreement by virtue of the Statute of Frauds, to obtain a decree of specific performance in certain circumstances*” (See F.A. Smith, J In ***Aubrey Faulknor v Pearjohn Investments Ltd and Another*** Suit No. C.L.1994/F-097 at page 12).

- [78] The cases have established that four conditions must be satisfied for there to be a finding of part performance in relation to an oral contract. These are “(i) the acts of part performance must be such as not only to be referable to a contract such as alleged but to be referable to no other title; (ii) they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; (iii) the contract to which they refer must be such as in its own nature is enforceable by the court; and (iv) there must be proper parol evidence of the contract which is let in by the acts of part performance” (See **Chaproniere v Lambert** ([1917] 2 Ch 356 at 361, also **Steadman v Steadman** (supra))
- [79] In order to qualify as acts of part performance those acts must be unequivocal and referable to the existence of a contract. (See **Maddison v Anderson** (1883) 8 App Cas 467. and **Britain v Rossiter** (1879) 11 QBD 123.)
- [80] On this issue, Mr Hemans is contending that the agreement was for the sale of a furnished apartment, purchase price being Seventy-Five Thousand Pounds (£75,000.00), the equivalent of Five Million Five Hundred Thousand Dollars (JMD \$5,500,000.00). Mr. Tenant is contending that the agreement was for the rental of the apartment for Thirty Thousand Dollars (JMD \$30,000.00) per month, so as to facilitate an easy and more convenient means of remitting funds by Mr. Hemans to Ms Donna White, his children’s mother for their maintenance.
- [81] As is pointed out by Mr. Wildman the determination of this issue under consideration, essentially rests on credibility. I approach the resolution of this issue and all other issues in the instant case with the knowledge that the Claimant bears the responsibility to prove all the issues to be determined, on a balance of probabilities.
- [82] Both parties admitted that they had a long standing friendship and treated each other like family, as the Defendant had a relationship with the Claimant’s sister by whom he fathered children. Both parties admitted that in light of that relationship their business dealings have been informal. While denying that he agreed to sell



the Apartment to the Claimant, the Defendant accepts that he received moneys from the Claimant in relation to the possession of the apartment. Therefore, I find that the fact that neither party was able to produce any documentary evidence of the sums that they alleged were paid, speaks to the general approach of the parties in conducting business between them, due to the nature of their relationship, and in no way negates the existence of a contract.

**[83]** In light of the foregoing, I am obliged to examine the surrounding circumstances in order to determine the nature of the contractual relationship that was created between the parties, that is whether there were acts of part performance referable to a tenancy or a contract for the sale of land. Having considered the totality of the evidence I find that the evidence of part performance presented on the Claimant's case is consistent with his averment that he entered into an oral agreement with the Defendant for the purchase of the furnished apartment. I find that there was no serious contradiction on the Claimant's case as it relates to the material particulars. However, I find some serious contradictions on the Defendant's case which, contrary to the position taken by Mr. Wildman, are inconsistent with the existence of a tenancy agreement between the Claimant and the Defendant. I find the version of events presented by the Claimant to be more credible than that of the Defendant. The reasons for this conclusion are hereby noted in the ensuing discussion of the evidence.

**[84]** Whilst Mr. Hemans has no receipt or any other document evidencing the full payment of the purchase price for the sale of the furnished apartment, his evidence is that upon completion of his obligation as it relates to the payment of the purchase price the Defendant sought to honour his legal obligation under the oral contract by not only putting him possession but they also sought the legal services of the offices of Mr. Robin Smith, for the purpose of effecting the transfer of the title to Mr. Hemans. This, the Defendant has denied.

- [85] In the case of *Kingswood Estate v Anderson* [1963] 2 QB 169. it was found that the act of going into possession was sufficient to amount to part performance. Once there is some evidence of part performance, it is enough to allow the admission of parol evidence to prove the exact terms.
- [86] Ms. Veronica Burgher, who states that she was the secretary for Mr. Smith during that period and prior to his death, supports the contention of the Claimant. Mr. Tenant has not challenged the fact that Ms. Burgher was Mr. Smith's secretary at the time. The fact that he states that he never met her, in my mind, does not amount to a challenge. In fact, I find his evidence that he has never met Mr. Smith's secretary and that when he attended upon Mr. Smith, he went straight into his personal office, absolutely improbable and contrary to the practice of any professional operation or business that does not operate as a one-man business.
- [87] I find it rather unlikely that a client would be allowed to by pass the front line staff to enter the office of the owner, or manager without first of all having some interaction with the front line staff to at least find out whether the owner or manager is in office and for the owner or manager to be informed of the presence of the client, and for the client to be directed to the office of the said owner or manager This is especially in light of the inference drawn from Mr. Tenant's assertions, that the relationship between himself and Mr. Smith was strictly a professional one. The evidence of which I speak is Mr. Tenant's indication that he only met Mr. Smith twice, the second occasion being on the occasion that he claimed to have taken Mr. Hemans to that office to introduce him to Mr. Smith.
- [88] Essentially I find the evidence of Ms. Burgher to be more credible, that as Mr. Smith's secretary she was acquainted with Mr. Tenant, who was a client of Mr. Smith prior to April 2002. Essentially it is more probable than not that as the secretary to Mr. Smith she would have had some interaction with Mr. Tenant in his attendance upon the office of Mr. Smith.

**[89]** Mr. Wildman has taken issue with her description of the Defendant. In my notes she described him as “not very fair” which I find to be a fair description of Mr. Tenant who is in fact not fair in complexion but dark. In any event Mr. Tenant has not denied that the date he in fact went to Mr. Smiths’ office with Mr. Hemans was April 2002. Additionally, there is no evidence that Ms. Burgher has any personal interest in this matter. It was not suggested to her that she was mistaken in her evidence but that she was lying. However, no basis has been put forward for this suggestion especially in light of the fact that Mr. Tenant admits that he was the person who introduced Mr. Hemans to Mr. Smith’s office. That is, there is no evidence that there was any interaction between Mr. Hemans and Ms. Burgher other than in a professional capacity, which was facilitated by the Defendant himself. I therefore see no reason why Ms Burgher would lie on behalf of Mr. Hemans against Mr. Tenant in circumstances where both parties were clients of her office.

**[90]** I note that Mr. Hemans on cross examination first responded that he did not sign a sales agreement in Mr. Smith’s office. I note however that was quickly corrected by Mr. Hemans who immediately after that response, stated that he did sign a sales agreement in Smith’s office. As I earlier indicated, this was supported by Ms. Burgher whom I find to be a credible witness. Essentially I do not find that there is any serious contradiction on the evidence of Mr. Hemans on this issue. I find both Mr. Hemans and Ms. Burgher to be credible witnesses.

**[91]** I accept their evidence that in April 2002 Mr. Tenant did take Mr. Hemans to Mr. Smith’s office for the purpose of effecting the transfer of the title to the apartment to Mr. Hemans, based on the previous oral agreement that existed between them. I accept the evidence of Ms. Burgher that based on the discussion between Mr. Smith and Mr. Tenant, and on the instructions of Mr. Smith, she prepared a transfer and sale agreement for the apartment from Mr. Tenant to Mr. Hemans.

**[92]** Mr. Tenant is contending that the purpose for which he took Mr. Hemans to Mr. Smith’s office was in relation to issues concerning the estate of Mr. Hemans’ father,

yet he admitted that Mr. Hemans father was still alive when they went to the office. That is, they went to Mr. Smith's office in 2002, yet he accepts that Mr. Hemans' father died in 2008. Additionally, I find it very instructive that on Mr. Tenant's evidence, he first went to Mr. Smith's office on the direction of his mother. Both Mr. Hemans and Mr. Tenant are Jamaicans. Therefore, if the purpose for Mr. Hemans going to Mr. Smith's office was in relation to his personal business, that is his father's estate, I do not perceive why there would be a necessity for Mr. Tenant to accompany him in circumstances where he could simply have provided him with the directions.

**[93]** I find that the Defendant was seriously discredited as it relates to how Mr. Smith's office could have come in possession of the title. His evidence that he left the title in the apartment was contradicted by evidence that he made an application for a lost title. I find that he lacks credibility when he states that he did not provide the information in the document which bears his name and address in circumstances where he admitted making an application for a lost title. This would have required some explanation on his part for which none was forthcoming.

**[94]** Nonetheless, my appreciation of Mr. Tenant's case is that a "tenancy for convenience" was created as both himself and Mr. Hemans resided in the UK and it was more convenient for Mr. Hemans to allow his children's mother to collect the rent for use towards the maintenance of the children while Mr. Hemans would refund the rental sum to Mr. Tenant in the UK, instead of sending it by remittance services to Jamaica. In refuting Mr. Tenant's contention, Mr. Hemans maintained that he was always sending money through Western Union or other times, whenever he visited, Jamaica, he would give money to their mother directly for the maintenance of his children. In support of this claim Mr. Hemans has submitted several Western Union receipts for sums remitted to Donna White which were tendered and admitted into evidence.

**[95]** However, having examined all of these receipts I do not find it necessary in the determination of the issues to refer to all the receipts presented. Nonetheless it is

notable that there were receipts for sums remitted for the years 2004 to 2010. When the Defendant was confronted with these receipts he could not challenge them but accepted that the Claimant was in fact sending money for the maintenance of his children. He however continues to maintain that an oral tenancy was created for this purpose.

**[96]** However, I find these receipts serve to not only establish consistency in the case of the Claimant but present very strong rebuttal to the case of the Defendant. The Defendant accepted that the apartment was rented to a third party in 2003. In light of this contention that the Claimant ceased paying rent to him since 2011, I would not expect to see the Claimant remitting any sums to Jamaica between 2003 and 2011, if rental sums were being collected from the apartment for the maintenance of his children.

**[97]** Additionally, the Defendant admitted that in 2001 he received an initial payment of Five Thousand Five Hundred Pounds (£5,500.00) which would have equated to Three Hundred and Fifty-Seven Thousand Five Hundred Dollars (JMD \$357,500.00). In light of the Defendant's admission that when he gave the key to the apartment to the Claimant in 2001, it was not yet rented and that the apartment was first rented in 2003, I find that it defies common logic and that it is quite incredulous that the Claimant would pay one year's rent in advance in circumstances outlined by the Defendant. That is, prior to his children's mother collecting even the first Thirty Thousand Dollars (JMD \$30,000.00) from the rental for their maintenance.

**[98]** In essence the Claimant would have placed maintenance money for his children for one year in the hands of Defendant, hoping that the apartment would be consistently rented and rent collected in time to meet the needs of his children, bearing in mind that the Apartment was not rented to the third party until the year 2003. This would, in my view, be nothing short of ludicrous. In any event this would be contrary to the terms of the oral agreement as alleged by the Defendant as the only inference from his evidence in terms of payment is that the Claimant

would be reimbursing him for the sums collected in rent by Ms. White and not paying him in advance.

**[99]** In the case of **Mattar v Salmon** [2020] JMSC Civ. 48, the defendant contended that he entered into an oral agreement with the Claimant for the sale of land and that in furtherance of that oral agreement, he paid the deposit and was put into possession. He later made further payments towards the purchase price and also expended significant sums on improvement work on the property. The court found that those acts constituted unequivocal acts of part performance under the oral agreement for sale between the parties.

**[100]** I find that the Defendants admission that during the period of his occupation the Claimant paid the property tax and maintenance fee, did all the plumbing and electrical repairs is significant in my determination of this issue. This is in addition to receipt dated the 29<sup>th</sup> of December 2006 in the name of Donna White evidencing the sum of Twenty-Seven Thousand Dollars (JMD \$27,000.00) for renovating the wall and gate at the front of the property.

**[101]** It is my view that these are expenses that are normally the responsibility of the landlord/owner. In his evidence in support of his contention that the oral agreement was for a tenancy there is no indication by Mr. Tenant that the responsibility for payment for these expenses was ever discussed. Additionally, there is no evidence of any attempt by Mr Hemans to recoup these expenses from the Defendant.

**[102]** It is therefore apparent that Mr. Hemans to the knowledge of Mr. Tenant was doing acts consistent with that of an owner to which Mr. Tenant demonstrated acceptance. Additionally, it stands to reason that if the payment of maintenance fees, property tax, repairs, electrical and plumbing work were being paid by Mr. Hemans the net value to him for the maintenance of his children would be less than the Thirty Thousand Dollars (JMD \$30,000.00) per month that was being collected for rent. These acts on the part of Mr. Hemans essentially demonstrate inconsistency with the existence of the tenancy as alleged by the Defendant

**[103]** Mr. Wildman has raised the point that the fact that there was no discussion about the furniture points to the existence of a tenancy. However, I am inclined to disagree with the suggestion. The evidence of the Claimant is that he removed the furniture from the apartment on taking possession as under the oral agreement he bought a furnished house. I accept this evidence. There is no evidence that Mr. Tenant objected to the removal of the furniture. There is no evidence that when he repossessed the house, he asked for the return of the furniture. There is no counterclaim before this court for the value or return of the furniture or the rent that the Defendant contends that the Claimant owes from 2011. In the case at bar I find that the Claimant has present sufficient and convincing evidence to establish acts of part performance referable only to the oral contract for sale for the apartment.

**[104]** Mr. Wildman has raised the issue that it is inconceivable that parties would let fourteen (14) years pass without seeking to enforce a sales agreement. However, one cannot ignore the special circumstances in this case. That is, the death of the attorney who was acting for both parties and the parties not being aware of any one taking over the operations of the office. The evidence of Mr. Hemans, which I accept, that he was convinced by the Defendant that he need not worry as the apartment was already his.

**[105]** Additionally, it is quite comprehensible that he would not be perturbed about the circumstances as he was already in possession and reaping the benefits from the rental income

**[106]** On the contrary, I find that this question would be more applicable to the Defendant who on his case was deriving no benefit from the alleged tenancy for four (4) years, that is between 2011 to 2015 and who was allegedly dispossessed of his furniture, yet he took no action for recovery of possession or rent. Notwithstanding the fact that the Claimant has initiated this claim against him he has filed no counter claim for of his furniture. In essence, I find that the evidence of this issue leans in favour of the case of the Claimant.

**[107]** Additionally, Mr. Tenant admits that he stated that in his defence that he gave the Claimant the key to act as an agent. This contradicts his evidence that the Claimant was not his agent but his tenant. In fact, his explanation in this regard is completely ridiculous that “the Claimant was acting as agent for himself” when on his own case his evidence points to Mr. Hemans residing in England and Ms. Donna White being in charge of the apartment in Jamaica. Therefore, on his own evidence Mr. Hemans, residing in England, was never functioning as an agent regarding the rental of the apartment.

**[108]** Essentially when I examine the evidence in totality I find that the Claimant has proven of a balance of probability acts part performance referable to the existence of an oral agreement for the sale of the apartment. These are his payment of the full purchase price and being put in possession of the apartment under the contract.

**[109]** Additionally, I accept the oral evidence of the Claimant as it relates to the terms of the contract. That the agreed purchase price was Five Million Five Hundred Thousand Dollar (\$5,500,000.00). I accept the evidence of the Claimant that he paid the full purchase price. I reject the evidence of the Defendant that he was only paid Nineteen Thousand Five Hundred Pounds (£19,500.00). This in light of the evidence of Ms. Burgher, which I accept, that when the parties attended upon her office, based on what was conveyed to her by the parties, it was her understanding that the purchase price had already been paid and the purpose for the parties’ attendance was to facilitate the transfer of the title to Mr. Hemans

**[110]** It is also of significance that based on her evidence, prior to giving her the instructions to prepare the sales agreement, it was Mr. Tenant who Mr. Smith spoke to and not Mr, Hemans Consequently the inference to be drawn is that Mr.



Tenant was the one that gave the relevant information to the attorney- at- law on which the instructions for the preparation of the agreement and the transfer was based. In light of this, the reasonable inference is that he did in fact convey the information at that time that the full purchase price had been paid and the parties were now interested in completing the agreement by having the title transferred to Mr. Hemans.

**[111]** Therefore, in all the circumstances I find that the Claimant has established that in 2001 himself and the Defendant Mr. Tenant entered into an oral agreement for the purchase of apartment registered at Volume 1264 Folio 46 of the Register Book of Titles, purchase price being Five Million Five Hundred Thousand Dollars (\$5,500,000.00). I find that he had completed payment under the terms of that the contract and was put into possession as the owner, awaiting the transfer of the title in his name. I find that the fact that there was no specific completion dated stated by the parties does not in the special circumstances surrounding the creation of the contract affect the certainty of the contract. That is the relationship of the parties, and the informal manner in which they normally conduct business. The inference drawn from the evidence is that once the full purchase price had been paid the Defendant would have completed his end of the bargain by putting the Defendant in possession and cause the transfer to be effected.

**[112]** The is gleaned from the fact that the full purchase price having been paid, the parties attended on the offices of an attorney-at –law to formally complete their arrangement. This was unfortunately interrupted during that period due to Mr. Smith’s death.

**[113]** I find that the Defendant having received full payment under the oral contract and having denied receiving this payment, it would render it fraud in the Defendant to take advantage of the contract not being in writing. I also find that the oral contract is of such that it is legally enforceable and by its nature there is nothing preventing it from being enforced at this stage. Consequently, I find that the Claimant is

entitled to Specific Performance of the contract for sale of the property registered at volume 1264 folio 46 of the Register Book of Title

### **Whether the Claimant is entitled to damages**

[114] The Defendant has not denied that he has repossessed the apartment since 2015 and that he intends to sell to a third party. This essentially is clear evidence pointing to a breach of the oral agreement. The Claimant is therefore also entitled to damages emanating from the breach. It is trite law that the general aim of the court in awarding damages is compensatory. That is, the court aims to place the innocent party, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one for sale of land, this principle normally leads to assessment of damages as at the date of the breach (See **Johnson v Agnew**, [1979] UKHL J0308-2).

[115] In light of evidence from both parties the breach would have occurred in late September, 2015 when the Defendant repossessed the apartment. Their evidence also shows that at the time of the breach Mr. Hemans would have been earning a rental income from the apartment of Fifty Thousand Dollars (JMD \$50,000.00) per month. The Defendant also admits that he has been receiving a rental income of Fifty Thousand Dollars (JMD \$50,000.00) per month since the repossession of the apartment. Therefore, the Defendant's breach caused loss to the Claimant of monthly rental income of Fifty Thousand Dollars (JMD \$50,000.00) per month from October 2015. I find that the Claimant is therefore entitled to an award in damages of Fifty Thousand Dollars (JMD \$50,000.00) per month from October 2015 to May 2021 (that is 68 months at \$50,000 per month) equating to the sum of \$3,400,000.00

### **Orders**

[116] Consequent upon my findings, I make the following orders:

1. The Claimant is granted specific performance as follows:
  - (i) The Claimant is entitled to repossession of the property registered at volume 1264 folio 46 of the Registered Book of Titles forthwith.
  - (ii) The sale of the property registered at volume 1264 folio 46 of the Registered Book of Titles to include the transfer of the title to Mr. Hemans is to be completed within 180 days of today, May 28<sup>th</sup>, 2021.
  - (iii) The attorney-at-law for the Claimant is to have carriage of sale
  - (iv) The Registrar of the Supreme Court is hereby empowered to sign any document to give effect to orders (i) and (ii) where any party fails or refuses to do so.
2. The Claimant is awarded damages in the sum of \$3,400,000.00.
3. Interest is awarded at the rate of 6% per annum, to be calculated on each annual sum.
4. Cost to the Claimant to be agreed or taxed.

.....  
**A. Thomas**  
**Puisne Judge**