[2016] JMSC Civ. 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV O1446

BETWEEN	**MARK KITSON**	**1ST CLAIMANT**
AND	**OLGA KITSON**	**2ND CLAIMANT**
AND	**ALCOVIA DEVELOPMENT COMPANY LIMITED**	**DEFENDANT**

Mr. Charles E. Piper Q.C and Miss Petal Brown for Claimants instructed by Charles E. Piper & Associates.

Mr. E.D. Davis and Mr. Stewart Panton for the defendants instructed by E.D. Davis and Associated.

Heard: 18th to 21st January 2016, 29th January 2016 and 29th July 2016

Sale of apartment facilitated by claimants' relative - No express terms regarding capacity in which relative acted – Defendant challenges validity of sale agreement executed by claimants - defendant and claimants' relative enter separate agreement with different terms from agreement executed by claimants - Repossession by Defendant for breach of agreement with relative - whether relative acted as agent for claimants - whether defendant liable in trespass and breach of contract - Parol Evidence

CORAM: DUNBAR-GREEN, J

BACKGROUND

[1] The claimants were at all material times resident in the United Kingdom and the purchasers of an apartment in a complex known as Tranquillity Cove, Tower Hill, in the parish of St. Mary, Jamaica, for which the defendant company was the developer.

[2] In their bundle of agreed documents, the parties exhibited an undated letter in which the defendant had confirmed the agreement for sale with the claimants, including a provision for the payment of half costs. It was also indicated that the formal agreement for sale would be prepared by the defendant's attorneys-at-law.

[3] By letter of 3rd November 2006 the defendant's then attorneys-at-law, Messrs. Bishop & Wiggan, sent the claimants an Agreement for Sale which they were requested to execute. The Agreement stated that the defendants were liable for half costs in relation to transfer tax, stamp duty, and registration fee. Those requirements were consistent with the terms of the undated letter.

[4] Mr. Eric Carr, a relative of the claimants, facilitated the claimants' purchase of the apartment. His role is central to the dispute between the parties. According to the defendant, the purchase price of US $225,000.00 was a reduced and unescalated price, on the understanding that the claimants would pay the full costs for transfer tax, stamp duty, registration fees, legal fees and other incidentals. The defendant said the purchase price and associated terms were agreed orally with Mr. Carr, who had negotiated the purchase of three apartments for himself, the claimants and one other person, respectively. These terms were purportedly set out in letter agreements dated 2nd April 2007 and 25th April 2007 (Exhibit 1, pp. 18-20).

[5] In the Statement of Facts and Issues, at paragraph 6, the defendant said it had executed the Agreement for Sale but that there was a separate oral agreement on closing costs.

[6] At paragraph 8, the defendant states:

> *By Agreement dated April 25, 2007 by the parties and letter dated April 2, 2010 (sic) from Mr. Eric Carr to Mr. Errol Duncan…Mr. Carr purported to be the duly authorised agent for the claimants for the purposes of negotiating, agreeing, securing and purchasing of…apartment no. 10E.*

[7] At paragraph 10, it is stated:

> *"The costs payable by the claimants which was (sic) provided for orally and in writing, was (sic) paid in full… Issues remain as to the closing costs… to be paid by the claimants."*

[8] Throughout the period 22nd October 2005 to 24th March 2010, the claimants made payments on their account. Some of the funds had been sent to Mr. Carr for him to pay on their behalf, towards the purchase price. They were put in possession in December 2007, even though the payments had not been completed.

[9] On taking possession, the claimants partially furnished the apartment and thereafter entered into a management agreement whereby 10% of the rental proceeds would be paid as a management fee and the balance used to pay down the purchase price on the apartment and pay for maintenance and insurance. There was a dispute as to whether the defendant had been the rental agent. The claimants said the agreement was with the defendant but this was denied. The defendant said the apartment was rented by a separate entity, Tranquillity Cove.

[10] There was subsequently a dispute between the parties as to the payment of the various costs and the apartment was never transferred to the claimants.

[11] By letter dated 9th February 2009, the defendant wrote to the claimants advising that the management agreement had been terminated and that it had taken temporary 'ownership' of the apartment until their debt was settled. The claimants were also informed that the rent would not be used to settle their debt, only to cover the maintenance and insurance obligations.

[12] The claimants contended that in or about February 2010 (at the expiration of the tenancy which was existing at the time), the defendant re-took possession of the apartment, refused them access to the apartment and their furniture and appliances, refused to account for rental collected and refused to complete the sale.

[13] The claimants subsequently paid the disputed sums, stamped the executed Agreement for Sale and Instrument of Transfer, and instituted action against the defendant.

The Claim

[14] By way of Claim Form filed 30th March, 2011, the claimants sought the following reliefs:

i) A declaration that the claimants are the absolute beneficial owners of all that parcel of land part of Harmony Hall part of Tower Hill in the parish of Saint Mary being the Strata lot numbered eleven on Strata Plan numbered Two Thousand Three Hundred and Sixty-Five and a Six Undivided 1/157 shares in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1415 Folio 155 of the Register Book of Titles.

ii) An order for Specific performance of an Agreement for Sale between the claimants as purchasers and the defendant as vendor, executed by them during the year 2006 under which the defendant agreed to sell to the claimants Strata Lot No. 11 registered at Volume 1415 Folio 155 of the Register Books of Titles.

iii) An injunction restraining the defendant from selling, charging, renting or otherwise dealing with the said lands registered at Volume 1415 Folio 155 of the Register Book of Titles.

iv) An order for possession of the said lands registered at Volume 1415 Folio 155 of the Register Book of Titles together with all of the claimants' furniture and fittings placed therein by the claimants.

v) Alternatively, damages for detinue and/or conversion for any of the claimants' furniture and fittings which may have been damaged or removed from the said apartment by the defendant, its servants or agents.

vi) An order that the defendant account to the claimants for all sums collected for rental of the said land and an Order for the payment by the defendant to the claimants of such sum as upon the taking of account the Court may adjudge to be due to the claimants in respect of rental unlawfully earned by the defendant from the said apartment.

vii) Alternatively, an order that the defendant pays to the claimants damages for loss of earnings arising from the claimants' inability to rent the said apartment as a result of the defendant's conduct.

viii) Special Damages in the sum of J$806,431.25; US$6,978.98 and £670.71.

ix) Damages for breach of contract and/or for trespass.

x) Interest on all sums found to be due at the average lending rates of the National Commercial Bank of Jamaica Limited calculated from November 1, 2008 to the date of payment or at such other rate and for such period as to the Court may seem just.

xi) Costs and Attorneys-at-Law costs.

xii) Such further or other relief as to Court may seem just.

The Defence

[15] The defendant disputed the legitimacy and legality of the stamped Sale Agreement and relied on the two letter agreements, signed by Mr. Carr. The defendant pleaded, among other matters, that Mr. Carr was the claimants' agent and was at all material times authorised to act on their behalf in relation to the transaction. It was also pleaded that the defendant did not sign the Sale Agreement and also that the defendant had barred the claimants from the premises because they had refused or failed to pay various costs in full.

[16] By way of Counter-claim the defendant claimed against the claimants:

a.	Transfer Tax	-	$1,890,000.00
b.	Stamp Duty	-	$756,000.00
c.	Registration fee	-	$70,875.00
d.	Legal costs	-	$354,375.00
e.	GCT (Legal Cost)	-	$62,015.25

[17] The Counter-claim was abandoned in the course of closing submissions.

The Evidence

[18] In the course of the trial there was copious evidence, including several documents, much of which had no real bearing on the important question of whether Mr. Carr acted as an authorised agent of the claimants when he purportedly varied the terms of the agreement between the parties. That is the core of the dispute between the parties and the answer will ultimately determine the amount which the claimants were liable to pay under the contract and whether the defendant had acted lawfully when it repossessed the apartment based on the sums which it claimed to be outstanding. I will therefore recount that aspect of the evidence in some detail.

Agreed Documents

[19] The parties agreed the following exhibits:

Exhibit 1

Receipt dated October 22, 2005 from Errol Duncan in respect of payment of US$30,000.00 representing the deposit on the apartment

Copies of receipts representing payments towards the purchase price

Payment Instructions to National Westminster to transfer the sum of £1,150.00 to Bishop & Wiggan Barristers and Attorneys-at-Law

Copy of the signature page of the Agreement for Sale with the signatures of Mark Kitson and Olga Kitson notarized by Standfords

Copy of the signature page of the Instrument of Transfer with the signatures of Mark Kitson and Olga Kitson notarized by Standfords

Letter dated November 3, 2006 from Bishop & Wiggan, the former Attorneys-at-Law for the defendant to the claimants

Agreement, dated April 2, 2007 between Mr. Errol Duncan, Managing Director of the defendant Company and Mr. Eric Carr

Agreement dated April 25, 2007 between Eric Carr and Mr. Errol Duncan

Letter dated June 18, 2007, from Robert McGregor, Quantity Surveyor, to the defendant

Copy of Certificate of Practical Completion dated June 25, 2007.

Copy of Receipt dated July 4, 2007 in the sum of $30,450.00 reflecting payment of the Surveyors Identification Report made to Ann-Marie Bishop, Attorney-at-Law

Copy of Invoice dated October 11, 2007 from INET in favour of Kimberly Williams

Copy of Certificate of Title registered at Volume 1415 Folio 155 of the Register Book of Titles issued to the Defendant on the 19th October, 2007 with Caveat No. 1646293

Copy of Electricity Bills from Jamaica Public Service Company Limited dated August 14, 2007; November 15, 2007 and December 17, 2007

Copy of Receipt dated January 2, 2008 and numbered 321 issued by Tracy Duncan on behalf of Alcovia Development Limited in the sum of $4,000.00 for payment of electricity and housekeeping

Copy of Invoice dated January 14, 2008 and numbered 4012 from Tamgram Furnishers to Mark Kitson

Copy of Payment Debit Advice dated January 15, 2008 from National Westminster from Mark Kitson in favour of Lucia Walser

Copy of Invoice from Vitsoe in favour of Mark Kitson

Copy Receipt dated February 6, 2008 and numbered 66340 from Fitting Services to Mark Kitson

Copy of Invoice dated April 10, 2008 and numbered 6645 from Greenfibers Eco Goods and Garments to Mark Kitson

Copy of Invoice dated May 14, 2008 from Crete Shipping Co. To Mark Kitson in the sum of $920.00 for consignee-Alcovia Developments in the care of Errol Duncan

Copy of payment instruments to National Westminster to transfer the sum of US$1,000.00 to Eric Carr on May 23, 2008

Copy of Receipt dated June 2, 2008 and numbered 384 issued by Tracy Duncan on behalf of Alcovia Development Company Limited in the sum of $1,550.00 for payment of electricity

Copy of Receipt dated June 9, 2008 and numbered 387 issued by Tracy Duncan of behalf of Alcovia Development Company Limited in the sum of $2,000.00 for payment of electricity

Copy of Receipt dated June 13, 2008 from Trans-World Shipping Services Ltd. in the sum of $18,250.00

Copy of Receipt numbered 2519672 dated June 13, 2008 from Kingston Wharves limited to Alcovia Development in care of Errol Duncan

Copy of Invoice dated June 20, 2008 from Aeromar Logistics totalling $125,017.22

Custom clearance documentation

Copy of Email dated June 22, 2008 from Olga Kitson to Tracy Duncan in respect of the rental of Suite No. 10E Tranquillity Cove

6 Photographs of fixtures and fittings installed in Suit No. 10E Tranquillity Cove by Mark Kitson in June 2008

List of Items installed into Suite No. 10E Tranquillity Cove by Mark Kitson

Copy of Receipt dated June 30, 2008 and numbered 399 issued by Tracy Duncan on behalf of Alcovia Development Company Limited in the sum of J$71,000.00 for service charge payments

Copy of Receipt dated June 30, 2008 and numbered 400 issued by the Tracy Duncan on behalf of Alcovia Development Company limited in the sums ofUS$500.00 and $4,000.00 for payment of electricity and outstanding bill

Email dated August 2, 2008 from Tracy Duncan to Mark Kitson and Olga Kitson

Email dated August 8, 2008 from Tracy Duncan to Mark Kitson and Olga Kitson

Email dated August 8, 2008 from Olga Kitson to Keisha (an employee of Alcovia Development Company Limited.

Email dated August 10, 2008 from Tracy Duncan to Olga Kitson

Copy of Rental Agreement sent under cover of email dated September 18, 2008 from Tracy Duncan to Mark Kitson

Email dated September 18, 2008 from Tracy Duncan to Mark Kitson

Copy of Rental Agreement dated October 3, 2008 between Alcovia Development Company Limited and Carlton and Dawn Duncan.

Email dated November 2, 2008 from Olga Kitson to Tracy Duncan

Copy of letter dated February 4, 2009 from Alcovia Development Company Limited to Mark Kitson and Olga Kitson

Email dated February 6, 2009 from the claimants to the defendant agreeing to the rental for a period of one (1) year commencing from November 2008 and to recover the outstanding balances of maintenance, insurance and balance purchase price, as well as agreeing to the Defendant's management of the Apartment in consideration of it being paid 10% of the rental, as a management fee;

Copy of letter dated February 9, 2009 from Alcovia Development Company Limited to Mark Kitson and Olga Kitson

Email dated February 17, 2009 from Mark Kitson to Tracy Duncan

Email dated February 26, 2009 from Tracy Duncan

Email dated November 12, 2009 from Mr. Kerry Bromfielf to Olga Kitson and Mark Kitson attaching Statement of Accounts for Suite No. 10E Tranquillity Cove

Email dated November 19, 2009 from Eric Carr to Olga Kitson

Email dated November 23, 2009 from Olga Kitson to Eric Carr

Copy of receipt dated December 4, 2009 issued by the Defendant to the First Claimant as being receipt No. 628 for $2,295.00 as being the "Final payment on Apt. # 10E sold..."

Copy of Receipt dated December 6, 2009 and numbered 629 issued by Tracy Duncan on behalf of Alcovia Development

Company Limited in the sum of $3,000.00 for payment of electricity

Email dated March 10, 2010 from Kerry Bromfield to Mark Kitson and Olga Kitson

Email dated March 14, 2010 from Kerry Bromfield to Mark Kitson and Olga Kitson

Email dated March 23, 2010 from Kerry Bromfield to Mark kitson and Olga Kitson

Copy of facsimile instructions dated March 24, 2010 from Mark Kitson (MPL Wealth Management) to Debbie Gray to transfer the sum of US$2,000.00 from Mark Kitson's account to Alcovia Development Company Limited

Copy of Transmission Report dated March 24, 2010

Email dated April 1, 2010 from Mark Kitson to Kerry Bromfield

Letter dated April 8, 2010 from Eric Carr, as the Claimants' agent, to the Managing Director of the Defendant

Letter dated April 8, 2010, from Johnson & Downer, Claimants' former Attorneys-at-Law, to Wilson, Franklyn, Barnes, Attorneys-at-Law for the Defendant

Statement of Account from Johnson & Downer, Attorneys-at-Law dated July 14, 2010 showing the costs associated with lodging the Caveat

Copy of Transfer Tax Certificate No. 100810023 and dated August 10, 2010 from the Tax Audit & Assessment Department

Copy of Instrument of Transfer incorrectly stamped- (Instrument No. 522780) dated August 10, 2010

Copy of Credit Card Receipt dated August 10, 2010 in the sum of $992,250.00

Agreement for Sale dated August 10, 2010, along with Revenue Receipt

Agreement for Sale (submitted at trial)

Instrument of Transfer, along with Revenue Receipt No. 766636 and Transfer Tax Receipt No. 1100903143 both dated

September 3, 2010 from the Tax Payer Audit & Assessment Department

Email dated October 6, 2010 from Mark Kitson to Kerry Bromfield

Letter dated August 12, 2011 from Johnson & Downer to Wilson

Copy of letter dated August 24, 2011 from Wilson Franklyn Barnes, Attorneys-at-Law to Johnson & Downer, Attorneys-at-Law

Letter of authorization dated May 30, 2012 from Olga Kitson

Invoice No. 533277 regarding the lodgement of Caveat No. 1646293

Letter dated April 15, 2013 from Hugh Wilson, Attorneys-at-Law, to Johnson & Downer, former Attorneys-at-Law

Invoice dated January 7, 2015 from Tranquillity Cove, showing outstanding maintenance fee for Apartment 10E, at US$11,555.50

Exhibit 2:

Email dated November 12, 2009 from Olga Kitson to Mrs. Tracy Duncan

Investment Report for the period December 31, 2009 to March 31, 2010 showing investment account statement prepared by Mary Anthony Kitson – MPL Wealth Management

Online Receipt dated March 3, 2010 for airfare from www.jetblue.com in the amount of US$445.98 from Olga Kitson

Email dated March 3, 2010 from Carlton Leisure to Mrs. Olga Kitson for purchase of airline tickets to New York

Email dated March 4, 2010 from expedia.com to Mark Kitson with travel confirmation to Jamaica showing costs summary

Email dated March 11, 2010 from bookings@avis-europe.com to Mark Kitson with booking confirmation for rental of motor car

Copy of Guest Folio dated March 14, 2010 from Spanish Court Hotel to Mark Kitson

Copy of visa card transaction dated March 14, 2010 in the amount of US$295.60 in favour of Spanish Court Hotel

Email confirmation booking of hotel from expedia.com dated march 11, 2010 in the amount of £117.71 for Mark Kitson

Letter dated April 15, 2010 from Wilson Franklyn Barnes, Attorneys-at-Law to Johnson & Downer, Attorneys-at-Law

Investment Report for the period June 30, 2010 to September 30, 2010 showing investment account statement prepared by Mark Anthony Kitson – MPL Wealth Management

Interim Statement dated July 14, 2010 from Johnson & Downer, Attorneys-at-Law

Memorandum dated July 28, 2010 faxed to Ms. Debbie Gray/Suzanne Christie (Adam & Company Limited) from Mark Kitson – MPL Wealth Management

Transmission Verification Report dated July 28, 2010

Investment Report for the period September 30, 2010 to December 31, 2010 showing investment account statement prepared by Mark Anthony Kitson – MPL Wealth Management

Memorandum dated October 4, 2010 faxed to Ms. Linda Hutchon/James Tyers (Adman & Company Limited) from Mark Kitson – MPL Wealth Management

Transmission Verification Report dated October 4, 2010

Email dated October 4, 2010 from Mark Kitson to Ms. Linda Hutchon

Memorandum dated December 31, 2010 faxed to Mr. Linda Huchon/James Tyers (Adam & Company Limited) from Mark Kitson/Richard Dawes – MPL Wealth Management

Transmission Verification Reporter dated December 31, 2010

Investment Report for the period December 31, 2010 to March 31, 2011 showing investment account statement prepared by Mark Anthony Kitson – MPL Wealth Management'

Memorandum dated March 7, 2011 faxed to Ms. Linda Hutchon from Mark Kitson – MPL Wealth Management

Transmission Verification Report dated March 7, 2011

Email dated June 19, 2012 from Virgin Atlantic Airways to Mark Kitson with receipt for ticket

Photocopy of first two pages of the United Kingdom Passport of Mark Kitson

Exhibits 3-6:

Statements of Legal Costs from Attorney-at-Law

Exhibits 7-9:

Splinter Titles

Exhibit 10:

Strata Application and Certificate of Approval

Evidence of Mark Kitson

[20] Mr. Kitson's Witness Statement filed 8th May, 2015 along with amplification, was ordered to stand as his evidence in chief. He was cross-examined.

[21] Mr. Kitson said he had met with his cousin, Eric Carr, and the defendant's Managing Director, Mr. Errol Duncan, in March 2005. Following discussions and a site visit, he and his mother agreed to purchase apartment 10E for US$225,000.00.

[22] He was aware that numerous consultations had taken place between his mother and Mr. Carr regarding the intended development but denied that there was an agency agreement between them.

[23] Numerous payments were made towards the purchase between 2005 and 2006, commencing October 11, 2005. The deposit and other payments were sent to the bank account of Mr. Carr to be paid by him to the defendant. Several receipts were issued (see Exhibit I: pages 4-11).

[24] In November 2006, Mr. Kitson received a letter from the defendant's attorneys-at-law, Messrs. Bishop and Wiggan. The letter contained an undated and unsigned Agreement for Sale, an Instrument of Transfer (signing page only) and wire transfer instructions for payment of US$2,196.00 representing half the legal fees in addition to US$20.00 for the transfer fee (See Exhibit I, p. 16). He said those funds were remitted to the attorney, Ms. Bishop, in February 2007.

[25] In June 2007, he and his mother attended upon the offices of Mr. Kentish of Stanford's Solicitors, United Kingdom, and had the Sale Agreement and Instrument of Transfer executed, witnessed and notarised. Those documents were returned to the defendant's attorneys-at-law.

[26] In August 2007, he received a copy letter from Robert McGregor, Quantity Surveyor, enclosing a Certificate of Practical Completion for the apartment, dated June 25, 2007. He also received a receipt from the defendant's attorneys-at-law for the payment of sums for the Surveyor's ID Report. (See Exhibit I: Document 21, for Certificate of Practical Completion)

[27] Sometime in August 2007, he became aware of a dispute between the defendant and its attorneys-at-law so he decided not to make any further payments on the purchase price.

[28] The Certificate of Title for the apartment was issued on 19th October, 2007.

[29] Mr. Kitson took possession of the apartment in December 2007 and shipped appliances, fixtures and fittings. Mr. Carr had also shipped two ceiling fans, a washing machine and a tumble dryer from the United States of America, on the claimant's behalf. The items were installed in the apartment on or about June 2008.

[30] In about June 2008 the claimants entered into an agreement with the defendant, through Miss Tracy Duncan, to rent the apartment for a management fee of ten percent of the monthly rental and for the balance of the proceeds to pay for maintenance, insurance and pay down the outstanding balance of US$27,245.44. (See email dated 22nd June, 2008 in Exhibit I).

[31] By letter dated 4th February 2009, the defendant communicated that the balance on the purchase price had increased to US$39,089.05 due to the application of an interest penalty of 17%. It was also indicated that the defendant would be renting out the apartment for a minimum of one year, commencing 1st November 2008. The letter read, in part, "as soon as you have paid the outstanding balance, you can assume collection of the rental and the payment of the maintenance fees." (See Exhibit I, pp. 67-68).

[32] On 9th February 2009, Mr. Duncan and his wife, Tracy Duncan, informed the claimants that the 10% charge to manage and organize the tenancy was null and void as the defendant had assumed ownership until settlement of the claimants' debt. (See Exhibit I, pp. 70 – 76).

[33] On 4th December 2009, the claimants received a signed tenancy agreement which had commenced in November, 2008. The defendant was referred to as "Landlord". A statement of Accounts was also received from the defendant on November 12, 2009. (Exhibit I: page 61 – 63)

[34] Mr. Kitson said he was then advised by Mr. Duncan that he would have to pay all legal costs, duties and taxes in respect of the purchase of the apartment. He was told that he could contact the defendant's new attorney-at-law, Mr. Delano Franklyn, to begin the process of obtaining the Duplicate Certificate of Title.

[35] He showed Mr. Duncan a copy of the executed Agreement for Sale but was told that Miss Bishop should not have sent it to him. He was also told that at meeting in 2007, Mr. Carr had agreed that all taxes and legal costs would be borne by the purchasers.

[36] Mr. Kitson said he told Mr. Duncan that he and his mother had never agreed those terms and that Mr. Carr had no authority to agree those terms on their behalf, nor had he Mr. Duncan discussed those terms with them.

[37] Mr. Duncan told him that the tenancy had been extended until February 2010, and he could get possession at the expiration.

[38] On 7th December 2009, Mr. Kitson engaged the services of Mr. Stephen Johnson, attorney-at-law, and at about the same time he completed payment of the purchase price, interest and penalty.

[39] According to Mr. Kitson, when he visited Tranquillity Cove on 13th March 2010, to obtain the apartment keys, Mr. Duncan told him that he been advised not to give him possession. Mr. Duncan also told him that he, Mr. Kitson, had messed up and his purchase money would be returned.

[40] Following that conversation, Mr. Kitson said a caveat was placed on the title for the apartment.

[41] On 14th March 2010, he and his mother received an email from Mr. Kerry Bromfield inviting them to the annual strata meeting to be held on Sunday, April 4, 2010 at 2:00 p.m. (See Exhibit I pp. 84 – 85). This invitation was revoked on 23rd March 2010, but by then arrangements had already been made for his mother to travel to Jamaica.

[42] In April 2010, Miss Annmarie Bishop, with whom he had no conversation since 2007, telephoned to advise that the Sale Agreement and Instrument of Transfer were ready to be stamped.

[43] On 10th August 2010, he collected the executed Agreement for Sale and Instrument of Transfer and took them to the tax office in May Pen, Clarendon. He paid $425,250.00 for Stamp Duties and $567,000.00 for Transfer Tax. (See Exhibit I, pp. 92 – 95 and 110 – 111).

[44] On 30th August 2011, Mr. Kitson's attorney-at-law confirmed that the stamped Agreement of Sale and the purchaser's portion of registration fees had been transmitted to the defendant's attorney-at-law but that he had received a response expressing concern about the circumstances in which the documents had been stamped. (See Exhibit I, pp. 119 -120).

[45] Mr. Kitson said that he had explained the reasons for the delay when he attended the tax office and had been given certain instructions. As a consequence, he had

crossed out the year 2006 on page 9 of the Agreement for Sale and placed the current date on it (See Exhibit I, p. 00). The current date had also been placed on the Instrument of Transfer (See Exhibit I, p. 109).

[46] Mr. Kitson said that he had pulled apart the documents to make a copy and erroneously re-assembled the Agreement for Sale with the unsigned and undated page rather than the page on which he had made the changes at the tax office (See Exhibit 1, p. 99).

[47] Mr. Kitson denied that Mr. Carr was the claimants' agent and said he first saw the letter agreements relied on by the defendant, after the dispute arose in 2010.

[48] He said that the last time he had access to the keys for the apartment was in June 2008. Since then, he only had a supervised visit with his attorney-at-law, in June 2012. At that time, Mr. E. Duncan and Mr. Kerry Bromfield gave them access to the apartment.

[49] He had made no enquiry about the Agreement for Sale until 2010. It was then that he became aware that the defendant had signed it and realized then that the defendant was no longer being represented by Messrs. Bishop and Wiggan.

[50] He said the Agreement at page 100 of Exhibit I was the same Agreement he had stamped. It carried the signature of Errol Duncan and Tracy Duncan and the defendant's seal.

[51] He stated that on his visit to the apartment in 2012, some appliances and furniture were not there and denied that Mr. Carr had removed them on his behalf.

[52] He said that on his visit to Jamaica in March 2010, he had been barred entry to the apartment. The purpose of the trip was to obtain the keys to the apartment. The next time he returned to Jamaica was in 2012 to attend mediation in the case.

[53] He said that the items which had been purchased for the apartment were bought second-hand on eBay.

Evidence of Olga Rose Kitson

[54] The Witness Statement of Mrs. Kitson filed 20th April 2015, along with amplification, was ordered to stand as her evidence in chief. Her evidence, in large measure, corroborated her son's account.

[55] In 2008 on a visit to Jamaica, she met with Mrs. Tracey Duncan, a director of the defendant. At that meeting, they agreed the terms of a rental agreement. Mrs. Duncan confirmed their discussion by email dated 22nd June 2008, (See Exhibit 1).

[56] The apartment was rented to Mr. Carlton Duncan and Mrs. Dawn Duncan from 1st November 2008 for one year and then extended to February 2010. She was advised by Mrs. Duncan that the rental was US$1,650.00 monthly. Subsequently, the sales manager, Mr. Kerry Bromfield, advised that it was US$1,600.00 monthly.

[57] In March 2010, the claimants received an email invitation to a strata owner's annual general meeting scheduled for 4th April 2010. Whilst *en route* to Jamaica, via New York, she received an email sent on March 23, 2010 withdrawing the invitation. Mrs. Kitson said she had incurred expenses because she intended to attend the strata meeting. These were itemised at pages 12 and 85 of Exhibit I.

[58] In cross-examination, she said that she did not know Mr. Carr to be a realtor. He had told her that he was being paid US$5,000 for each client he brought in and family members were therefore encouraged to purchase apartments in the complex.

[59] She was aware that Tranquility and Alcovia Development were separate entities and that Tracey Duncan worked for and was a director of Tranquillity Cove. However, she was not aware that Tranquility was a management and rental company.

[60] In explaining her travel itinerary, she said it was cheaper to fly through New York to Jamaica and that she had chosen to spend a week in New York. Whilst there, she got disinvited to the strata meeting. She said the airline ticket was non-refundable and she disagreed with the suggestion that the main purpose of her travel was not to attend the meeting.

Evidence of Errol Duncan

[61] Mr. Duncan's Witness Statement filed 6th March 2015, along with amplification, was ordered to stand as his evidence in chief.

[62] He was at all material times a developer and managing director of the defendant company.

[63] In 2003, he sold a condominium to Mr. Eric Carr and since then they had been good business associates and social colleagues. It was in that context that he had told Mr. Carr about the development in Tower Hill, and he agreed to solicit potential purchasers for the units.

[64] The 1st claimant visited and was given the details of the proposed development by himself and Mr. Carr.

[65] He had offered to sell Mr. Carr three units at a discounted price, on condition that the purchasers would pay all closing costs including transfer tax, stamp duty, registration fees, legal fees and all incidental costs. The price offered was US$225,000.00 although the market value was US$350,000.00.

[66] Mr. Carr purported to be the duly authorized agent of the claimants for the purposes of negotiating, agreeing, securing and purchasing the apartments nos. 2E, 3E and 10E in Tranquillity Cove.

[67] He said at all times he acknowledged and recognised Mr. Eric Carr as the authorized agent for the claimants based on Mr. Carr's representation.

[68] Consistent with an oral agreement between himself and Mr. Carr, a sales agreement was prepared, and he understood that the claimants had agreed to be bound by that agreement as well as the terms agreed orally. By "sale agreement," he meant the letter agreements signed by Mr. Carr.

[69] The full amount of the purchase price was paid by December 2009 but the claimants had failed to pay maintenance and insurance. Mr. Carr therefore permitted

Tranquillity Cove to assume responsibility for collecting the rent, in 2010 and all rents collected were used to offset arrears in maintenance and insurance. Mr. Carr also authorized the removal of appliances from the apartment. At no time did the defendant take possession of the claimants' furniture or fittings.

[70] Mr. Duncan said the apartment was no longer rented and the claimants were in sole possession.

[71] He said that the monthly maintenance cost was US$335.00 and the claimants had failed to pay from March 1, 2013 to January 7, 2015. The arrears amounted to US$11,155.50.

[72] Mr. Duncan denied offering or paying Mr. Carr US$5,000.00 to secure the sale with the claimant.

[73] In relation to the Sale Agreement relied on by the claimants, Mr. Duncan said, "the back page seems to have my signature" but he maintained that he had refused to sign the agreement and that it had remained unsigned and unstamped.

[74] Mr. Duncan said the apartment was rented by Tranquillity Cove and he had nothing to do with its management. The Tranquillity Cove office was managed by Tracey Duncan, at the time.

[75] He also said that he never prevented the claimants from entering the property.

[76] In cross-examination, he agreed that the titles were not issued before 19th October 2007, but explained that at 2nd April 2007 he was able to prepare the document containing the three (3) titles because he had been given information on how to determine the volume and folio numbers which would be assigned to the splinter titles.

[77] He denied that he gave Messrs. Bishop and Wiggan instructions to prepare the Agreement for Sale and could not say whether one had been sent to the claimants.

Mr. Karl Spence

[78] The Witness Statement was ordered to stand as his evidence in chief. He was of no assistance because he said that he knew nothing of the transaction between Alcovia Development and the claimants.

Mr. Eric Carr

[79] Mr. Carr's Witness Statement filed 6th January 2015, along with amplification, was ordered to stand as his evidence in chief.

[80] He said that in 2003 he bought a condominium from the defendant and years later agreed with Mr. Errol Duncan that he would solicit potential purchasers for some new units in Tranquillity Cove.

[81] In a conversation with Mrs. Kitson she had asked him to handle the transaction on her behalf, akin to being her agent. Consequent on those instructions, he went to Mr. Duncan and offered to purchase one of the units on Mrs. Kitson's behalf. On that representation, Mr. Duncan accepted the offer and gave him "a deal."

[82] He had handled all the affairs in negotiating, securing and purchasing the unit on behalf of the claimants. His great business relationship and social association with Mr. Duncan secured a special deal for three units, including one for the claimants. The deal was that the claimants would pay US$225,000 which was a highly discounted rate. This was conditional on the claimants paying the purchase price and all the closing costs, inclusive of transfer tax, stamp duty, registration fees, legal fees and all other costs incidental to the sale. An Agreement for Sale was prepared by the defendant in those terms.

[83] Mr. Carr testified that due to the claimant's failure to pay all of the purchase price and various costs, he relinquished the apartment to the defendant. The company assumed the responsibility to pay maintenance fee and insurance from rental of the apartment.

[84] Mr. Carr said that he collected the key to the apartment from the defendant in 2008, and handed it over to the claimants, who since have had access to the apartment.

[85] He said that he had negotiated and acted as he did because of the clear and oral instructions of Mrs. Kitson that he should act as their agent to secure and purchase the apartment, at a deal.

[86] He knew only of three ceiling fans, a new stove top, an inductive cooker, a microwave, a two--door refrigerator, and new washing machine and dryer being placed in the apartment. He had instructed that the refrigerator, microwave, oven and inductive cooker be removed.

[87] Mr. Carr said he had authorised the rental of the apartment, in consultation with Mrs. Kitson. He had given Tranquility Cove permission to handle the rental transaction for a management fee of ten percent.

[88] In cross-examination, he said that he had instructed Mr. Bromfield to remove the appliances from the apartment because the tenant had his own.

[89] He had not seen the agreement for sale neither did he forward one to the claimants.

[90] He said he declared orally to Mr. Duncan that he was the agent and later signed a document. He also said that none of the documentation which had been created between himself and the defendant, in relation to the apartment, had ever been shared with the claimants and he was unaware of the initial agreement between the parties (exhibit 1, pp. 2-3).

[91] Mr. Carr recognised his signature on the letter agreement dated 2nd April 2007 but he did not know on whose instructions it was prepared. He could not recall who was present when he signed it nor could he identify with certainty the other signature on the document.

[92] Mr. Carr admitted that the transfer on his unit had not been done, nor had he paid stamp duty and transfer tax. When confronted with paragraph 28 of his Witness

Statement where he said “I paid closing costs for the unit I bought”, he said he meant to say that he would be willing to pay but not that he had done so.

Undisputed Facts

[93] The following facts were not in dispute:

i. the parties agreed to the sale and purchase of apartment Lot 10E;

ii. the full purchase price was paid;

iii. the claimants were given possession in December 2007;

iv. the claimants installed appliances and changed some fittings in the apartment;

v. there was a management agreement for rental of the apartment; and

vi. Mr. Carr made payments on the claimants’ behalf.

The Issues

[94] The central issues arising in this case were:

i. whether a valid and enforceable agreement existed between the parties;

ii. the terms of agreement in relation to payment of costs and incidentals; and

iii. whether Mr Carr was the claimants’ authorised agent for the purpose of the transaction.

Analysis

Agency

[95] The defendant implored the Court to consider the rules of agency as set out in the **Halsbury’s** and the dictum of Longmore LJ in **Pharmed Medicare Private Ltd. v Univar Ltd** [2002] EWCA Civ 1569 viz: “... if a buyer puts forward his employees as being persons with whom a seller can contract and the buyer subsequently performs the

contracts so made, those employees will be regarded as ostensibly authorised to make further contracts."

[96] The defendant submitted that the carrying out of various tasks by Mr. Carr, on behalf of the claimants, including making payments, numerous communications and clearing goods, led the defendant to reasonably believe that he was an agent, with the ability to bind the claimants by way of his ostensible authority.

[97] Counsel for the claimants submitted that although agency may arise expressly or by implication, the facts of this case did not establish the existence of an agency relationship or ratification of Mr. Carr's actions.

[98] In my view, Mr. Carr's activities must be viewed in the context of his relationship as the claimants' relative and Mr. Duncan's trusted friend and seeming informal business associate. He could reasonably be seen as a trusted 'fixer' 'gofer' or 'middle person'. I have also considered that in none of their exchanges did either party refer to Mr. Carr as the claimants' agent. It was only Mr. Carr who presented himself in that capacity.

[99] I do not believe, in the circumstances, that Mr. Duncan did not consider it necessary for Mr. Carr to have obtained the authority and agreement of the claimants before agreeing to changes in the terms of their initial agreement and it would surprise me if a man of Mr. Duncan's experience would not have believed it necessary to have so satisfied himself.

[100] Mr. Carr's evidence that he was unaware of the initial agreement between the parties does not suggest that he was someone who was integrally involved in the formation of the terms on which the parties were to engage and his evidence that he did not send relevant documentation to the claimants suggests that he was on a frolic.

[101] The claimants would be liable for Mr. Carr's actions only if, by their general conduct, he had been held out to the defendant as someone who had the authority to negotiate terms on their behalf (see ***Swiss Air Transport Co Ltd v Palmer*** [1976] 2

Lloyd's Rep 604). I have seen no basis for finding that this was the case either at the time of the initial meeting between the claimants and Mr. Duncan or afterwards.

Furniture/Appliances

[102] The defendant, having unilaterally discontinued the management agreement and taken possession of the apartment (see exhibit 1 pp. 70-71 and the Defence), was acting on its own accord at the time the furniture was removed. Its actions cannot be taken as the claimants' because they no longer had control over their property and they had not agreed with the defendant or Mr. Carr to remove any furniture.

The Disputed Sale Agreements

[103] Mr. Piper, for the claimants, submitted that the defendant's reliance on an oral agreement allegedly made by a self-proclaimed agent, was untenable and unenforceable in law. Counsel submitted that if the oral agreement were being relied on, the provisions of the **Statute of Frauds** (sections 4 and 17) had to be pleaded and evidence led to establish that the requirements for admissibility of such evidence had been met. Counsel relied on ***Park Traders [Jamaica] Limited*** v ***Bevad Limited & Transocean Shipping Ltd*** SCCA 1/98 delivered December 20, 2000; ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al*** [2010] JMCA Civ. 46; ***Goss v Lord Nugent*** (1833) 5 B & Ad. 58; and ***Hutton v Watling*** [1948] 1 All E.R. 803.

[104] As a matter of law a document which is relied on as a memorandum in writing for the purposes of the **Statute of Frauds** must contain the essential terms of the contract.

[105] Section 4 of the Statute of Frauds provides:

> *No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*

[106] In ***Park Traders [Jamaica] Limited*** v ***Bevad Limited & Transocean Shipping Ltd,*** the appellant relied on the sale agreement which it had executed but the first respondent insisted that the founding document should be a letter, which it argued was a memorandum in writing evidencing the oral agreement between the parties, pursuant to which the deposit had been paid. The respondent submitted that the letter satisfied the requirements of the **Statute of Frauds**.

[107] Cooke JA (Acting), as he then was, observed that "… even if there was an oral contract the executed agreement for sale would have entirely displaced any oral agreement…and was the contract by which the parties were to be bound." (pp12-13). His Lordship referenced **Salmon & Williams on Law of Contract** 2nd Edition, page 138 where the learned authors state:

> *… The subsequent writing in such a case is not merely evidential document for use in proof of a prior and subsisting unwritten contract; it is itself an operative contractual instrument constituting the authentic and final expression the new and substituted contract thereby entered into* ***Leduc v Ward*** *(1888), 20 Q.B.D. 475, 479-480… It makes no difference … whether the parties, when they entered into the prior verbal contract, intended or did not intend that any such substituted written contract should be entered into… (p.12).*

[108] In this case, I have before me an executed Agreement for Sale which contains all the essential elements that are required by the **Statute of Frauds**.

[109] At page 16 of Exhibit 1 is a letter dated 3rd November 2006 from the defendant's then attorneys-at-law, Messrs. Bishop and Wiggan, which refers to the enclosure of a Sale Agreement and an Instrument of Transfer (signing pages only).

As far as is relevant the letter states:

> *"We enclose herewith the flowing documents:-*
>
> *Sale Agreement (1-2 copies)*
>
> *Instrument of Transfer (signing pages only)*

Kindly sign the document and have same witnessed by a Justice of the Pease/Notary Public as appropriated. Do not date any of the documents and all original copies must be returned to us....

On receipt of the sign [sic] Sale Agreement we will forward to the Stamp Commission office for assessment… you will be required to pay your half cost Transfer Tax, half Stamp Duty and half Registration Fee in full within five (5) days of being notified by the Vendor or us. You must strictly adhere to this time frame as the Stamp Office will impose a One Hundred percent (100%) penalty on payments later than fourteen (14) days.

With respect to the half cost Attorney's Fees to prepare Sale Agreement and letters of possession, miscellaneous charges, splinter title for the unit, owners agreement and bearer's fees. Kindly forward the sum of Two Thousand One Hundred and Ninety Six Dollars plus US$20.00 for transfer fee. This sum is payable on signing of the Sale Agreement plus Instrument of transfer.

On completion we will forward to you the following documents:-

1. *Duplicate Certificate of Title for the unit (if available)*
2. *Registrable Instrument of Transfer (Gross Stamped)*
3. *Original transfer tax certificate.*
4. *Surveyors ID Report for the unit*
5. *Certificate of Practical completion for the united by the vendors architect...*

Please be advised that the purchase price, all of the purchaser's plus cost must be paid full at least fourteen (14) days prior to completion.

[110] Clause 7 of the Sale Agreement sets out the costs, as follows:

> *Costs: Transfer Tax, Stamp Duty and Registration fee, costs of obtaining a separate title for the Unit, costs of the vendors' attorneys-at-Law for the preparation of this Agreement shall be borne by the vendors and purchasers in equal shares. The cost of obtaining surveyors identification report in respect of the unit shall be borne solely by the purchaser. Each party shall bear the costs of their respective attorney-at-law in respect of the transfer of the title" see also item 8 (3) as well.*

[111] At page 119 of Exhibit 1 is a letter of 12th August 2011 from the claimants' new attorneys-at-law, Stephen Johnson, forwarding to the defendant's attorneys-at-law, the Agreement for Sale duly executed and stamped, transfer tax certificate and the registrable instrument of transfer. There was also a cheque for $35,437.50 being half cost for the registration fee. The defendant was requested to transfer the title, deliver up possession and account to the claimants for rent during the period of the defendant's possession.

[112] The defendant's attorneys-at-law responded on 24th August, 2011 raising concerns about the Sale Agreement, perceived irregularities with the stamping, and the assessment of duties and taxes four years after the year on the agreement, without penalty. The attorneys-at-law asked for reasons why the matter should not be brought to the attention of the Commissioner of Taxpayer Audit and Assessment Department (Exhibit 1, p. 120).

[113] The Court has taken note of the fact that the defendant's attorneys did not challenge the authenticity of the sale agreement.

[114] Mr. Duncan's evidence that the signature on the Agreement looked like his but that he had not signed the document, goes to his credibility. He offered no explanation which could lead to a conclusion that the signature was not his and I have seen no basis for believing him that it was not. The signature page carries the signatures of the

claimants, Mr. Kentish, the Notary Public, and signatures to the names of Mr. Errol Duncan and an attorney-at-law. It also carries the seal of the defendant company.

[115] I also see no basis for disbelieving the claimants that the Agreement was the same one which had been sent to them by the defendant's attorneys-at-law, which was notarised in the UK and returned.

[116] I also find nothing curious, as counsel suggested, about the claimants coming into possession of the executed documents in 2010, through Ms. Bishop, after the termination of her retainer with the defendant. It is apparent from the evidence that Bishop and Wiggan had originally acted for both parties, a practice on which the Court more than frowns but which established a basis for the attorney's correspondence with the claimants.

[117] The defendant itself seemed to have encouraged the claimants to be in correspondence with Bishop and Wiggan. In an email of 6th February 2009 to Mr. Errol Duncan and Tracy Duncan, the claimants seemed desperate for information about the status of the dispute between the defendant and its attorneys-at-law. According to the claimants, they were "completely in the dark with regard to the ongoing legal battle… since the dispute began over the past two years…" (exhibit 1, p. 69).

[118] The defendant's response was that there was nothing to report as the situation was "still up in the air." The defendant also told the claimants that what they decided to do was their decision and informed them that some purchasers had "settled with Ms. Bishop", while others went to their own lawyers or used the defendant's new lawyer, which the claimants were also welcomed to do (exhibit 1, p.71).

[119] At the time the claimants obtained a copy of the Agreement from Ms. Bishop, she had been in receipt of payments by Mr. Kitson, and I have no reason to doubt that she had been retained by the claimants at the time, even if other attorneys-at-law were in the picture.

[120] I also see no basis for upholding counsel's submission that the validity of the document should be called into question because it was Mr. Kitson and not his attorney who had stamped it, coupled with the signing page looking remarkably different from the rest of the Agreement, as if it were printed on a different printer, and Mr. Duncan's claim to have had no knowledge of the Sale Agreement.

[121] The law requires more than supposition to challenge the validity of the Sale Agreement. The defendant needed to have pleaded fraud, which it did not, or lead evidence of the acts or conduct of the claimants from which fraud may have be inferred (See ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al,*** ibid***)***

[122] The offer letter which the defendant's attorneys-at-law sent to the claimants contained the same terms as the executed Agreement for Sale. I therefore have no difficulty in concluding that the Agreement for Sale was valid and contained all the essential terms to which the parties had agreed. This is not a case in which fraud arose on the claim.

[123] I return now to examine the letters of 2nd April and 25th April, 2007 which were signed by Mr. Duncan and Mr. Carr, and purported to be agreements for the claimants to pay the full costs for all transfer and legal fees.

[124] Those letters were curious in both form and nature. The letter of 2nd April 2007 is addressed to Mr. Carr, suggesting it was written by the defendant, but the body begins "I Eric Carr hereby agree…." So, it appears Mr. Carr was writing to himself, on behalf of or in association with the defendant.

[125] The letter of 25th April 2007 is even more curious. It purports that Mr. Carr and other purchasers had met with Mr. Duncan and unanimously agreed to pay all costs for the transfer of their titles. This means that when he agreed such terms on 2nd April, Mr. Carr had been motivated to unilaterally sign off on them, three weeks and two days ahead of the meeting of April 25, without having had the benefit of collective deliberation with other purchasers.

[126] On the face of it, both letters, which were written on the defendant's letterhead, did not convey independent action on the part of Mr. Carr, as the claimants' agent, but rather that he was acting in tandem with Mr. Duncan, on the defendant's behalf.

[127] The letter of 25th April is curious for another reason. The subject matter is "Re: Meeting held on April 25, 2007 In Suite#14W with **then** Attorney Bishop & Wiggan" (my emphasis). The evidence is that the dispute between the defendant and Messrs. Bishop & Wiggan occurred somewhere between 2008 and 2010. The use of the qualifier "then" seems to be Freudian-like. The inescapable impression is that the letter was not a contemporaneous document and this is suggestive of a level of contrivance which comports with my findings elsewhere in this judgement about lack of credibility by Mr. Carr and Mr. Duncan.

[128] But even were the letters not in issue for the reasons I have stated, ***Goss v Lord Nugent*** [1824-34] All ER Rep 305 is authority for the proposition that extrinsic evidence is inadmissible to vary an Agreement for Sale which had been reduced into writing. This was also the decision in ***Hutton v Watling and Another*** [1948] 1 ALL ER 803 where parol evidence was inadmissible to prove an antecedent agreement with terms which were different from the agreement that the parties signed.

[129] In ***Hutton***, Lord Greene MR said:

> *"… if, on the true construction of this document, it is to be interpreted as containing the contractual terms and as being a true and complete record of those terms between the parties, he could not call evidence of an antecedent agreement, the object of which would be to vary or deduce something from those terms. In my opinion, once the document is construed and understood it is clearly only susceptible of the interpretation that it was intended by the signatories to be, and was represented to the purchaser to be, a true record of the contract and was accepted by the purchaser as such. Once that is ascertained, it appears to me that the idea of letting in parol evidence to prove an antecedent oral agreement different in its terms falls by reason of the ordinary rule." (p. 805)*

[130] These authorities establish that the documents being relied on by the defendant cannot be construed to extrinsically vary the Agreement for Sale which was duly executed by the defendant and the claimants.

[131] Counsel for the claimant pointed out that the letter of 2nd April, 2007, predated the Surveyor's Identity Report of 25th June, 2007. The import of this observation was that the Surveyor's Report had indicated that Splinter Titles were not yet issued, so it was suspicious that the letter of 2nd April referenced the volume and folio numbers.

[132] This matter goes to credibility. I believe Mr. Duncan that he was able to distinguish the various titles by his knowledge of the volume and folio on the copy of the duplicate certificate of title for the land. However, Mr. Carr, who flatly denied that the letter of 2nd April 2007 had predated the Surveyor's report, was being untruthful.

The Rental Agreement

[133] I have seen various correspondence between the claimants, Tracy Duncan and Mr. Duncan, over the period 22nd June 2008 and 9th February 2009, in relation to the rental arrangements.

[134] I have taken particular note of the email of 18th September 2008, in which Mrs. Duncan sent the claimants a draft rental Agreement for their review. That draft Agreement was on the defendant's letterhead and identified the claimants as landlords. There was also a signed rental agreement dated 3rd October 2008, on the defendant's letterhead, which identified the defendant as landlord. That agreement was for one year, commencing 1st November 2008 and it had the following words added in pen, "Extended until February, 2010". The rent was US $1,600.00 per month.

[135] Mr. Carr testified that he was the one who made the rental arrangement and he denied that it was with Alcovia. I have seen no correspondence which supports this assertion. As I have already observed, the various correspondence about rental were directly between the claimants, Mr. Duncan and Mrs. Duncan. I therefore do not find Mr. Carr to be a witness of truth on this matter and this finding lends support to my earlier rejection of the claim that he had been the claimants' agents.

[136] I turn to Mr. Duncan's denial that there was a management agreement between the claimants and Alcovia. He said the arrangement was with Tranquilty Cove. Other than the fact that Tracy Duncan was a director of Tranquility Cove and that she corresponded with the claimants about the rental of their apartment, there is no evidence of Tranquility Cove's involvement. None of the documents I reviewed bore the name Tranquility Cove or referred to it. I also believe the second claimant that she was aware of Mrs. Duncan's association with Tranquility Cove but did not know of it being a rental management company.

[137] Mr. and Mrs. Duncan were both directors of the defendant and they conducted aspects of the rental arrangements under the defendant's letterhead. This fact weighs in favour of a finding that their actions would have led the claimants to operate on the reasonable understanding that they had entered into a rental agreement with the defendant.

[138] In arriving at these conclusions, I have considered a letter of 9th February 2009, written on the defendant's letterhead, which reads, in part: "the 10% charge for me to manage and organise tenancy is now null and void **as Alcovia has now assumed ownership** until your debt is paid." (My emphasis). I believe that statement was a clumsy attempt to distinguish between Alcovia as landlord, consequent on repossession of the apartment, and Alcovia as the claimants' agent, acting through Mr. and Mrs. Duncan.

[139] I now turn to the reliefs sought.

Detinue and Conversion

[140] The claim is based on the claimants having had no access to their apartment and its contents since March 2010. Counsel submitted that the claim could not be particularised for the reason that the value of the equipment and furnishing was unknown because of the defendant's conduct with respect thereto and the use to which they were put by the defendant could only be assessed in general terms. Reliance was placed on ***AG & The Transport Authority v Burey*** [2001] JMCA Civ. 6 for that

proposition and the further submission that general damages of J$5,000,000.00 be awarded for detinue.

[141] In ***AG v Burey,*** Harris JA observed at paragraph 9 of the judgment:

> *The authorities show that an action for detinue lies not only where a person wrongly detains the chattel or goods of another but also where a person who has possession of such goods or chattels improperly parted with possession – see* ***Jones v Dowle*** *(1841) 9 M & W 19;* ***Ballett v Mingay****,* ***Rosenthal v Alderton & Sons.***

[142] Her Ladyship continued at para10:

> *In detinue where the chattel or the goods are not ordered to be returned or cannot be returned, the measure of damages is the loss emanating from the detention whether or not the chattel is ordered to be returned. Where the chattel is not ordered to be returned, the ordinary measure of damages is the value of the goods as well as the loss arising by reason of the detention of the goods. In conversion, the damages can only be recovered by way of consequential loss.*

[143] The advantage of a claim in detinue is explained at paragraph 11:

> *The remedy offered in detinue takes a claimant outside of the range of that which is afforded by conversion. It accords him a considerably larger remedy and a minimal larger right. In* ***General & Finance Facilities v Cooks Cars (Romford)*** *[1963] 1 W.L.R. 644, Diplock LJ speaking to the advantages a claimant enjoys in bringing an action in detinue, said at page 650:*
>
> *"… an action for detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; (2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) or return of the chattel and damages for its detention."*

[144] Her ladyship also explained how time runs for purposes of calculating damages:

> *… In detinue, time begins to run from the date of the refusal of the demand. Importantly, the act of the detention …continues to be wrongful by reasons of the appellant's failure to return it and the wrong continues until judgment – see* ***Rosenthal v Alderton & Sons Ltd.*** (para 12)

[145] Counsel submitted that ***AG v Burey*** provides a guide on how to assess damages in the instant case. I agree that ***AG v Burey*** establishes that the Court can make an award based on the value of the chattel or goods at the date of judgment. However, in ***AG V Burey*** expert evidence was led which gave the Court a basis on which to assess the value of the chattel.

[146] In the instant case, there was absolutely no evidence as to value of the appliances and furniture. Accordingly, no order is made as to their value. I have no reason to believe that they are not in storage, and will therefore order that they be returned, forthwith.

[147] The loss arising from the detention of the appliances and furniture was the deprivation of their use in the rental of the apartment. There was no evidence led as to the rental which would have accrued had the apartment been rented furnished as against unfurnished. The Court is therefore unable to make an assessment under this head.

Trespass

[148] It is not in dispute that at the time the claimants were barred from their apartment in March 2010, they had paid the purchase price in full. Soon thereafter they had also paid the full amount of the Stamp Duty, the Transfer Tax and half the Registration fees. Yet, the defendant acted, as if by decree, and dispossessed the claimants, on grounds that payments were outstanding. There was no opportunity for the claimants to clarify the calculation of fees. This was a clear violation of their rights as purchasers in possession.

[149] Counsel for the claimants submitted that damages for trespass should be the rental that would have been earned over the period they were barred from the premises. Counsel noted that the defendant provided no explanation for the variation in rental between that stated at pages 64, 77 and 78 of Exhibit 1. On that basis, Counsel used a rate of US$1,650.00 for seventy-one (71) months, commencing March 1, 2010 to the date of trial, January 31, 2016. This amounts to US$117,150.00. **Inverugie Investments Ltd v Hackett [1995] 1 WLR 713** was cited in support of the claim.

[150] In ***Inverugie Investments*** the plaintiff was wrongfully ejected from apartments which the defendant operated as a part of its hotel. In the opinion, delivered by Lord Lloyd of Berwick, the Privy Council referred to the "user principle" as coined by Nicholls L.J. in ***Stoke-on-Trent City Council v W. & J. Wass Ltd*** [1988] 1 W.L.R. 1406 and said the principle could be characterised as compensatory, restitutionary or a combination of both elements. (p. 718). Accordingly, a claimant need not suffer actual loss to be awarded damages for deprivation of the use of his property (p.718).

[151] The Privy Council determined that "…under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed." (ibid)

[152] The defendants were found liable to pay the plaintiff the going rate for the use of each of the apartments 365 days a year, even though income was not earned during periods of low levels of occupancy. (p.719)

[153] In the instant case, I find that rent for the period of dispossession was at the rate of US$1,600.00 monthly. The period of dispossession was March 1, 2010 to January 31, 2016 (the trial date herein). The claimants are entitled to the proceeds of rent for the period, at a rate of US$1,600 less insurance and maintenance owed for that period.

Special Damages

[154] It has been long been established that special damages must be strictly proved and figures ought not to be thrown at the Court as if plucked from the air (**Lawford Murphy v Luther Mills** (1976) 14 JLR 119,121). In considering these claims, I am guided by the principle that the particularity of proof must be tailored to the facts (**McGregor on Damages**, 12th ed. 1528).

Costs for Travelling and Accommodation

[155] The first claimant claims £640.41 for travel to and from Jamaica and hotel accommodation on or about March 12, 2010. He also claims US$181.58 for Avis car rental and a further US$295.60 for hotel accommodation. He told the Court that he had travelled to Jamaica to collect the keys to his apartment.

[156] The Court has considered that these expenses were not incurred on account of any action by the defendant because it was only on the first claimant's arrival that there was a discussion with Mr. Duncan, who informed him that he had been advised not to give up possession of the apartment. Accordingly, that claim is denied.

[157] The second claimant claims £443.80 for travel to and from Jamaica on or about 24th March 2010. She told the Court that she had travelled to Jamaica on account of an invitation to attend a meeting of the strata corporation but that *en route* to Jamaica, the invitation was rescinded.

[158] The Court notes that the email inviting the claimants to the meeting was sent on 14th March 2010 (see Exhibit 1, p. 84).

[159] The second claimant's booking confirmation with Carlton Leisure for her London to New York journey is dated 3rd March 2010, departing 24th March (See Exhibit 2, p.13). Clearly, this trip could not have been arranged as a consequence of the meeting invitation because the travel arrangements preceded the email invitation by eleven (11) days. Accordingly, this claim is denied. So too is the claim for US$445.98 for the return travel from New York to Montego Bay between March 31 and April 15. This travel

itinerary was also confirmed on 3rd March 2010, prior to the email invitation (See Exhibit 2, p.12).

Maintenance and Insurance

[160] This claim is for US$5,718.87. The Court considers that the claimants had an obligation to pay insurance and maintenance. There was no evidence that the funds they paid over had not been used for that purpose. Accordingly, the claim is disallowed.

Legal Costs

[161] The claim for $1,260,425.00 as legal costs, is denied. The Court was only provided with the attorney's statements of costs. There was no evidence of any payment being made. In any event I am of the opinion that this item can be dealt with when the parties get to the stage of taxing costs.

Other Claims

[162] The Counter-Claim having been abandoned and the Court having found that on a proper interpretation of the Agreement for Sale the claimants were liable only for half costs, the following claims will be allowed:

½ Stamp Duty (defendant's share)	J$212,625.00
½ Transfer Tax (defendant's share)	J$283,500.00

[163] Caveat registration fee of J$70,875.00 was also proved.

Specific Performance and Injunction

[164] In light of the finding that the Agreement for Sale and Instrument of Transfer are legal, it is unnecessary for the Court to make an order for specific performance and injunctive relief.

Interest

[165] The claimants submitted that interest should be calculated at the average lending rates of the National Commercial Bank of Jamaica Ltd.

[166] Following the settled approach, to which the Court of Appeal referred in ***Mcleod v Richards*** [2015] JMCA Civ 44 paragraphs 58 – 64, the claimants would need to lead evidence as to whether an award of interest at the commercial rate was appropriate and the rate at which an order for commercial interest could be made. As this was not done, the normal rate of 3% will be applied.

The Order

[167] Judgment is granted in favour of the claimants in accordance with the following order.

(a) The defendant is ordered to pay the claimant damages as follows:

(i) General Damages: US$115,200.00 less insurance and maintenance owed for the period March 2010 to January 2016.

(ii) Interest on General Damages at a rate of 3% per annum from January 2016 to the date of judgment.

(iii) Special Damages: J$503,200.00.

(iv) Interest on Special Damages at a rate of 3% per annum from the dates of payment to the date of judgment.

(b) The claimants are declared the absolute beneficial owners of that parcel of land registered at Volume 1415 Folio 155 of the Register book of titles.

(c) The defendant is to give up possession of the said lands registered at Volume 1415 Folio 155 of the Register book of titles to the claimants, forthwith.

(d) The defendant is to return the stored furniture and appliances to the claimants, forthwith.

(e) Costs to the claimants to be agreed or taxed.