[2020] JMSC Civ 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV06495

BETWEEN	**SAED HABIB MATTAR**	**CLAIMANT**
AND	**JAMES SALMON**	**DEFENDANT**

IN OPEN COURT

Mikhail H.R. Williams instructed by Taylor, Deacon & James for the claimant

Aon Stewart instructed by Knight, Junor & Samuels for the defendant

June 21 and 22, 2017; April 3 and 17, 2020

Sale of Land – Verbal agreement for sale of land - Whether valid agreement for sale – Whether elements of a valid tenancy agreement as part of sale agreement - Whether sufficient acts of part performance by party – Equitable remedy of specific performance – Circumstances where previous order may be varied or revoked

D. FRASER J

BACKGROUND

[1] The claimant contended that he entered into an oral agreement for sale with the defendant, pursuant to which the latter was put into possession of premises situate at 19 Grosvenor Terrace, Kingston 8, St. Andrew (hereinafter referred to as "the subject premises") with a monthly rental until a formal agreement for sale of the subject premises was completed. The defendant has however failed to pay the full purchase price and rent as agreed, while continuing to reside at the subject

premises. The claimant therefore sought to recover possession of his property as also rental arrears.

[2] The defendant agreed that there is an oral agreement for sale between the parties. He however categorically denied that he ever entered into possession as a tenant. He contended that in furtherance of the oral agreement for sale, he has paid a deposit, was put into possession, made instalment payments, expended significant sums and did work on the property, all such acts being done as an owner. The defendant accordingly counterclaimed for an order for specific performance of the oral sale agreement or in the alternative, damages for breach of contract.

[3] I have considered all of the evidence, law and submissions in this trial. I shall however only refer to those aspects which are necessary for the court to arrive at a determination of the claim.

THE CLAIM

[4] The claimant filed a fixed date claim form and affidavit in support on November 21, 2012 seeking the following relief:

(1) An order requiring the defendant to vacate premises located at 19 Grosvenor Terrace, Kingston 8, St. Andrew; registered at Volume 1399 Folio 324 of the Register Book of Titles forthwith.

(2) An order that the defendant pay to the claimant the sum of US$163,755.00 being rent due for the subject premises as at November, 2012 and continuing;

(3) Interest on all sums found to be due to the claimant.

[5] The affidavits of the defendant and his witness Canute Saddler were filed on July 01 and 05, 2013 respectively. However by order dated July 10, 2013 the matter was converted to proceed as if commenced by claim form. The claimant filed particulars of claim on August 23, 2013, in which he claimed the orders mentioned

above and arrears of rent in the sum of USD$177,255.00 as at November 2012 and continuing.

[6] The exhibits admitted into evidence were:

(1) Cancelled Certificate of Title Vol. 733 Fol. 50 – Ex. 1;

(2) Certificate of Title Vol. 1399 Fol. 324 (replaced Ex. 1) – Ex. 2;

(3) Letter written by Arthur Hamilton to James Salmon dated March 03, 2000 – Ex. 3;

(4) Letter to defendant demanding performance signed by Arthur Hamilton dated June 01, 2000 – Ex. 4;

(5) Receipt dated May 31, 2001 in the sum of US$25,000.00 payment received from Joy Robertson – Ex. 5;

(6) Receipt evidencing payment received from Jimmy Salmon in the sum of US$4,900.00 dated March 15, 2001 – Ex. 6; and

(7) Witness statement of Paula Fletcher as amended – Ex. 7

THE ISSUES

[7] The three primary issues that arise for determination are:

(1) Whether there is/was a valid and subsisting oral lease agreement between the parties for the defendant to pay rent to the claimant at a monthly sum of USD$1,500.00? If so is the claimant entitled to arrears for rent and recovery of possession of the subject premises?

(2) Whether there is an enforceable oral agreement for the sale of the subject premises based on sufficient acts of part performance by the defendant?

(3) If the court finds that an enforceable oral agreement for sale exists between the parties is the defendant entitled to the equitable remedy of specific performance or alternatively, damages for breach of contract in lieu of specific performance?

THE EVIDENCE

The claimant Saed Habib Mattar

[8] The claimant's witness statement states that in the latter months of 1999, an oral agreement was reached with the defendant for him to rent the subject premises for US$1,500.00 pending the formalization of an agreement for sale between the parties. The rent was calculated monthly. He said the property was to be sold for US$250,000.00 the then Jamaican equivalent for which was J$10,000,000.00. The expected completion date was agreed to be the end of January 2000. The defendant was let into possession upon his down payment of J$1,000,000.00 in November 1999. This down payment was received from the defendant by Mr. David Gray and paid over to the claimant. The claimant gave no details as to how, when or under what circumstances he received this sum from Mr. Gray.

[9] The claimant also stated that having received no further payments after the initial down payment, he attempted to make contact with the defendant but to no avail. Letters marked exhibits 3 and 4, addressed to the defendant at the subject premises, were sent by the claimant's attorneys-at-law. The first was dated March 3, 2000 after the defendant had been put into possession and some four months after the oral agreement between the parties had been reached. This letter identified arrears of rent from October 1999 to January 2000 and requested immediate payment of rental monies owed. Another letter was sent to the defendant dated June 1, 2000 making a further demand for outstanding rent for the period October 1999 to May 2000.

[10] There was no response to any of these letters exhibited at the trial. The claimant said that he formed the view that the defendant was no longer interested in

purchasing the subject premises, and set off the defendant's down payment against what he termed, arrears of rent for 16 months. This was with a view to the resumption of the sale of the property at some later date. In paragraph 17 of his witness statement, the claimant stated that there was no agreement for sale in respect of the subject premises based on his periodic receipt of funds and in his view the subject premises was under a rental agreement. He therefore took no steps to cause the defendant to vacate the property.

[11] The claimant acknowledged that in early 2001 his sister had received payments of USD$4,900 (Exhibit 6) and USD$5,000 from the defendant and that she had issued receipts to the defendant, for the purchase of the subject premises, because she did not know much about the agreement between the parties. The claimant viewed these sums as "small amounts" and considered them to be rental payments from the defendant.

[12] Talks resumed between the parties in May 2001 with a view to the formalization of the oral agreement for sale. At that time, the defendant paid the claimant USD$25,000.00 (the relevant receipt in that sum dated May 31, 2000 became exhibit 5.) It was the position of the claimant that in May 2001 there were no arrears of rent and that the defendant had "overpaid" to the tune of USD$4,900.00. The claimant said the payment of USD$25,000.00 was to be treated as "the initial payment towards the defendant's purchase of the property." He stated that the rental agreement remained and at no time had he ever been asked by the defendant to review the rental agreement pending completion of the sale.

[13] At paragraph 10 of his witness statement, the claimant said he fell into arrears with his mortgage payments on the subject premises sometime in the early 2000's. The defendant was sent a letter by the claimant's attorneys in an attempt to spur further payments and the resumption of discussions regarding the sale. The claimant indicated that the defendant did not respond to the letter, but having been told by the claimant that the outstanding balance of the mortgage was $1,400,000.00, the defendant paid it, resulting in the discharge of the mortgage in May 2006.

[14] The claimant said that this mortgage payment was to be set off against the arrears of rent as the defendant remained in the subject premises. In cross examination the claimant disagreed with the suggestion that there was no agreement between himself and the defendant to treat this payment that was made regarding the arrears of the mortgage as payment for outstanding rental to him.

[15] The claimant said that he has never considered the subject premises to be anything more than a rental property and whilst he was willing to sell it, he continued to pay property taxes because it had not yet been sold. He further stated that in or about 2004 after the passage of Hurricane Ivan, the defendant told him that the wall behind the house had been damaged and repaired and resulting from that, some work had been done to a neighbour's property at a cost of $1M. The claimant said he would have preferred to have been told about the work before it was carried out; however he did not object, as at the time the defendant was in arrears with his rent yet again. The claimant calculated that as at the time of giving his statement in July 2014, the defendant was indebted to him for approximately 97.02 months of rent, for a total of USD$145,530.00. In arriving at that sum, the claimant said he had taken into account the $1M that the defendant claimed to have spent to repair the wall because although there was no proof of the sum spent, he noted work had been done on the wall.

[16] The claimant acknowledged that the defendant claimed to have paid sums totalling J$2,165,000.00, with additional sums paid to David Gray and that the defendant had also lodged a caveat against the title to the subject premises. The claimant however stated that he had only received sums totalling J$1,500,000.00 and US$34,900.00 and admitted that the mortgage had been discharged to the tune of $1,400,000.00. These sums he said were in respect of a new purchase price of $21,000,000.00 which he had communicated in a letter to the defendant to which there was no response. Responding to questions from the court the claimant explained that the parties had engaged in further discussions concerning a change in the sale price in 2006. The sum of $21,000,000.00 was offered by the claimant to which the defendant counter offered $17,000,000.00. There was

however no evidence of an acceptance by the defendant or an agreement at any other figure than the original purchase price.

[17] In the court's calculation, the claimant's evidence of payments received to include the balance paid on the mortgage would total US$34,900.00 and J$2, 900,000.00. However the sum of $1.4M acknowledged to be paid by the defendant on the claimant's behalf to clear the mortgage on the subject premises was not viewed by the claimant as "received" by him.

[18] Concerning the issue of rent, in cross examination the claimant admitted that there was no agreement as to the date each month upon which this rental would have become due. The claimant said that he had rented the subject premises before and agreed that in renting a property it would be a requirement that both parties would be settled on when the rental is due. He disagreed that receipts would have been conclusive proof of his receipt of rental payments. He indicated that in some instances he had issued receipts to tenants as proof of receipt of rent but later denied that he said this. He then admitted that he had never issued rent receipts to either a previous tenant or the defendant for their occupation of the subject premises. In fact, there was no evidence in the trial that the claimant had issued or caused receipts to be issued in proof of rental, purportedly paid by the defendant.

[19] In cross examination the claimant also insisted that the verbal agreement was not solely for the sale of the subject premises. He testified that the rental agreement had not been reduced to writing and denied the suggestion that he was not being truthful when he alleged that he had a rental agreement with the defendant in respect of the subject premises.

[20] The claimant at first admitted in cross examination that all payments that were made by the defendant or on his behalf to him, or any person on his behalf, were in respect of the purchase of the property. He however later denied this when that position was directly suggested to him.

The claimant's witness Mr. David Gray

[21] The claimant called Mr. David Gray as a witness. Mr Gray indicated that he had known the parties and the subject premises for many years. He said in his witness statement that he introduced the defendant to the claimant and in effect brokered the deal between them. He discussed with the defendant the purchase price and the desire of the defendant for immediate possession if he purchased the property. Mr. Gray said he discussed the payment of rent until completion of the sale with the defendant. He stated that they agreed upon USD$1,500.00 monthly. Mr. Gray indicated that he then conveyed the outcome of his discussions to the claimant who also agreed. It was then that the parties were introduced to each other by Mr. Gray.

[22] Mr Gray said that it was in his presence that the parties agreed that the house would be sold to the defendant for the sum of $10,000,000.00 (equivalent of US$250,000.00) with completion in three months. They also agreed that the subject premises would be rented to the defendant pending completion of the sale for US$1,500.00 monthly.

[23] Mr Gray indicated that the defendant paid $1,000,000.00 by cheque as a down payment to him in November 1999. The claimant who lived in the USA had returned to that country and Mr Gray stated that the defendant was given the keys by him. In early 2000 the witness said he received the sum of $500,000.00 from the defendant's sister which he paid over to the claimant. He stated that there were no further payments made to him by the defendant.

[24] In cross-examination, Mr. Gray said he was acting as Mr. Mattar's agent as the latter resided outside of the jurisdiction. Mr. Gray accepted that before the claimant came into the picture, when he was discussing the terms of the sale with the defendant, the only thing he would have discussed at that time would have been the sale price concerning the subject property. He said when the discussions were completed between the claimant and the defendant the only thing that was

discussed was sale price and completion date, nothing else. He indicated that he had not made notes of the discussions that took place between the claimant and the defendant concerning the sale. It was suggested that he had received the sum of $1,500,000.00 as a deposit which he denied.

[25] On re-examination Mr Gray said the conclusion of discussions he referred to were the discussions between the three of them, not any other arrangement made after but at that time — on or around 1998/1999 based on his recollection. He also sought to clarify an aspect of his evidence by explaining that when he said there was no agreement for rental, he meant that there was no agreement amongst the 3 of them for any rental. He said that the claimant himself made an arrangement when he was not there. He further testified that he was not present when the agreement for rent was made, he got a call from the claimant in that regard. He indicated to the court that the "terms" he was referring to in paragraph 5 of his witness statement were the sale price of US$250,000.00 and the completion in three months, not rent.

The defendant Mr James Salmon

[26] The defendant in his witness statement stated that in October 1999 he was approached by David Gray with respect to the purchase of the subject premises. Mr. Gray acted as the agent of the owner of the subject premises. The defendant expressed an interest in purchasing the subject premises having seen it.

[27] A verbal agreement for sale was arrived at between the claimant through Mr. Gray and the defendant in October 1999, for the sale price of $10,000,000.00. The defendant said in paragraph 7 that he paid a deposit of $1,500,000.00 to David Gray in the presence of Canute Saddler. The defendant was let into possession in November 1999.

[28] The defendant stated at paragraph 8 of his witness statement that in November 1999 he had paid Mr. Gray the sum of USD$3,000.00 as a personal loan. This sum was to have been paid to the claimant by Mr. Gray as a part of the purchase price. Mr. Saddler was to pay money to Mr. Gray which was to be applied towards the purchase price. The court however notes that the claimant does not account for this sum.

The defendant later stated that he saw a newspaper advertisement for the auction of the subject premises in which he was living. He got in touch with the National Commercial Bank Jamaica Limited to pay off the arrears of mortgage in the sum of $1,500,000.00. It will however be recalled that the claimant in his evidence said that it was he who had contacted the defendant and given him the balance to be paid which was $1,400,000.00.

[29] The defendant further indicated in his witness statement that up to 2001, payments towards the purchase price had been made as follows:

(a) In November 2000 Canute Saddler paid $600,000.00 to David Gray. This was evidenced by a letter dated November 28, 2000 accompanied by a statement of account from Canute Saddler to David Gray.

(b) In December 2000 a payment of USD$26,000.00 was made towards the purchase price by Canute Saddler to David Gray.

(c) In March 2001 two payments of USD$5,000.00 and USD$4,900.00 were made to the claimant's sister Glenna.

(d) In May of 2001 Joy Robertson paid to the claimant at a restaurant in Miramar, Florida, USA the sum of USD$25,000.00 which was receipted by the latter.

(e) In 2001, Paula Fletcher paid $500,000.00 to the claimant.

(f) The sum of $1,500,000.00 was paid to the National Commercial Bank in order to settle the balance owed of the mortgage on the subject premises.

(g) The sums paid towards the purchase price total $7,550,200.00.

(h) The defendant had also paid all of the taxes on the subject premises up to 2014.

[30] Having outlined the sums that he stated he had paid to the claimant, the defendant indicated at paragraph 19 of his witness statement that he called the claimant to close and that he had the money at the time. The court notes however that he never gave a date for nor did he indicate the content of that conversation. The next paragraph of the defendant's witness statement states that the defendant lodged a caveat in 2006. There is therefore an unexplained time lag in which it is evident that the sale was neither completed nor were any further payments made by the defendant. At paragraph 25 of his statement he maintained that no rent was agreed between the parties, but that he fully understood that having taken possession, interest was payable on the balance purchase price.

[31] He also indicated in his statement that he paid $1,100,000.00 to replace a collapsed wall at the rear of the premises and a further sum in excess of $300,000.00 was paid to neighbours to repair damage to their premises from the collapsing wall. He also stated that he replaced awnings at a cost of $120,000.00, replaced interior doors and locks costing approximately $40,000, debushed the premises, painted the house every year since 2001 at a cost of approximately $100,000.00 per year, repaired leaks to the roof cause by Hurricane Ivan at a cost of approximately $30,000.00 and did significant repairs to the premises costing approximately $950,000.00. He also claimed that he had been paying the property taxes up to and including the years 2013 and 2014. The court notes that the claim was filed against him in 2012.

[32] In cross-examination Mr. Salmon agreed that in October 1999 he did not have US$250,000 to pay for the property. He also indicated that based on Mr. Saddler's introduction of Mr. Gray to him, at first he thought that Mr Gray owned the property and so he was making payments to Mr Gray. He contended that it wasn't until the meeting between himself, Mr. Gray and Mr. Mattar in 2000 to 2001 and he realised that Mr, Mattar had not gotton all the money, that he stopped paying Mr. Gray and paid Mr. Mattar. This is however inconsistent with his witness statement in which he indicated in paragraph 3 that when he was approached by Mr. Gray, Mr. Gray represented that he had the authority to act as agent for and on behalf of the property's owner Saed Mattar. It is also inconsistent with paragraph 7 of his witness statement in which he stated that in November 1999 he paid $1,500,000 to Mr. Mattar's agent Mr. Gray and was put into possession of the property.

[33] He stated that in the early 2000s Mr. Ransford Braham represented him in negotiations with Mr Mattar in relation to the sale of the property. He said that he insisted of Mr. Mattar to make an agreement for sale eventually and this was before the meeting Ransford Braham had to make an agreement for sale. (It is not clear to which meeting he was referring.) The court notes that there is no indication in the defendant's witness statement that Mr. Braham was ever involved in negotiating the terms of an agreement for sale between the parties.

[34] He denied that he intended to stay in the property without paying Mr. Mattar any money and maintained that he never saw exhibits 3 and 4, both of which refer to arrangements for rent. He contended that the last time anything was paid toward Mr. Mattar for the property was in 2001 when the $500,000 was paid by his sister. He indicated that when he discovered that Mr Gray was not paying over everything to Mr Mattar, he did not do anything in relation to Mr. Gray, but he just started to pay to Mr. Mattar. He indicated that what he said he paid on the purchase price included all of what he had paid to Mr. Gray.

[35] Significantly, however in paragraph 25 of his witness statement he referred to the letter from Myers Fletcher & Gordon (exhibit 3) in which the agreement to purchase

the premises was referenced as well as to amounts payable for rent, though he maintained in cross-examination that it was the first time he was seeing that letter and he had made no such arrangement.

[36] He also agreed that Mr. Saddler who he said made several payments to Gray and Mr. Charlton whom he indicated he had borrowed money from to pay off the mortgage, had not provided statements and were not witnesses in the matter.

THE SUBMISSIONS

[37] In summary counsel for the claimant submitted as follows:

i) In order for the defendant to succeed on the claim for specific performance as set out in his counterclaim, he must provide evidence of the sale agreement or such unequivocal acts of part performance which point to no other agreement but that concerning the oral agreement for the sale of land. It is a longstanding principle that a land transaction will not be upheld in a court of law unless it is evidenced by a sufficient memorandum in writing, as per section 4 of the Statute of Frauds of 1677, which remains the law in Jamaica;

ii) A valid tenancy between the parties exists only in the following circumstances:

(1) by implication;

(2) by acts of part performance;

(3) by oral agreement; and

(4) by estoppel

iii) Meanwhile, it is trite law that the characteristics of a binding lease include:

(1) the presence of a landlord;

(2) the presence of a tenant;

(3) the right of exclusive possession;

(4) the term of the lease not being greater than the term held by the landlord;

(5) the term is fixed or determinable by either party;

(6) the landlord usually reserves the right to collect rent;

(7) the landlord retains the reversion;

(8) the subject matter must be land or an incorporeal hereditament.

Accordingly, the claimant relied on the decision of Morrison J in ***Urban Development Corporation v Robert Hamilton T/A BJ Shoe Rental*** [2013] JMSC Civ 56.

iv) Pursuant to an oral agreement between the parties, the defendant was put into possession of the subject premises on the condition of payment of rent in the amount of USD$1,500.00 monthly, with an intention for the parties to later formalize the agreement for the sale. The written agreement for sale never materialized as the defendant never made good on his intention to purchase. Support for the foregoing is provided in exhibits produced to the court;

v) There was no valid or enforceable agreement for sale of the subject premises in effect between the parties, and the defendant has not produced any written document satisfying the legal requirements for sale of land. On the other hand, the claimant is able to prove *qua* documentary evidence, the existence of a binding and legal lease between the parties, which lease the defendant has breached (See: ***Actionstrength Limited v. International Glass Engineering*** [2003] UKHL 17.);

vi) In the absence of any sufficient memorandum in writing and in the absence of a valid agreement for sale, the possession of the defendant is evidence which goes towards the existence of a tenancy. Equally, the evidence of payment goes towards a tenancy and not an agreement for sale, and the subsequent,

ad hoc, inconsistent payments were evidence more consistent with the existence of a tenancy. As only a valid tenancy exists between the parties in the eyes of the law and equity, at the very least, the parties could only be said to have entered into a tenancy agreement with the future option for the defendant to purchase. It is submitted that this is not an unusual occurrence and is a common practice;

vii) The stipulation of payment of rent is more consistent with a finding that there was an agreed tenancy in place and not a binding and/ or legal agreement for sale, as in the case of the latter, a purchaser would ordinarily be put into early possession without stipulation of rental payments. In other words, a tenancy at will situation is more often than not consistent with a purchaser being put in early possession pursuant to an agreement for sale of land. The court should therefore find that the stipulation for payment of rent is credible evidence which goes to the fact that there was a legal lease and not an agreement for the sale of land. The claimant granted the tenant defendant exclusive possession of the subject premises and notwithstanding the failure to pay rent, the defendant acquiesced to the authority of the claimant and accepted the claimant as his landlord by his own conduct;

viii) The defendant cannot prove on a balance of probabilities any acts of part performance which establish unequivocal acts demonstrating that an agreement for sale was entered into by the parties. On a balance of probabilities, it is therefore open to this court to find that a valid tenancy existed between the parties of which the defendant is in breach and as a consequence, the claimant is entitled to recovery of possession.

[38] In summary counsel for the defendant submitted as follows:

i) In ***Steadman v Steadman*** [1974] 2 ALL ER 977, it was held that alleged acts of part performance had to 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;

ii) In equity, an oral contract for the sale of land may be specifically enforced despite the absence of a written memorandum, if the party seeking to enforce the agreement is able to show sufficient acts of part performance of the contract. The principle underlying the doctrine of part performance was that should one party to an agreement stand by and allow the other party to incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable. Using fraud in its older 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;

iii) In order to amount to sufficient part performance, the acts of the claimant must be such that they point unmistakably and only to the existence of some contract such as the oral contract alleged. Though of course, the acts of part performance need not show the precise terms of the oral contract. The terms of the oral contract must be proved by acceptable evidence, but effect to them can only be given if and when the acts of part performance establish that there must have been some such contract (See: ***Steadman v Steadman*** [1976] AC 536 at p. 540: per Lord Reid.). Counsel also relied on dicta from Sykes J (as he then was in ***Nation Hardware Ltd. v Norduth Development Co. Ltd et al*** Claim No 2005HCV02314 (jud. del. October 3, 2015);

iv) In order to distil whether there was a lease agreement, ordinary contract principles would apply. (See: ***Keith Garvey v Richardo Richards*** [2011] JMCA Civ 16: per Harris JA paras. 10-12.) If, as the claimant contends, there was a lease agreement between the defendant and himself then the court must question its terms. (See: ***Street v Mountford*** [1985] UKHL 4). The definition of a lease in ***Street v Mountford*** identifies the essential elements of a lease as

being exclusive possession, determinate term, term less than that of grantor and a payment in the nature of rent;

v) By the claimant's own evidence, he admitted that there was no discussion concerning how much the rental should be. Applying the law, the court cannot make a contract between parties where none exists. The evidence in this case is woefully lacking and ought not to cause the court to find that the essentials of a lease as extrapolated under ***Street v Mountford*** have been satisfied;

vi) There is abundant evidence of part performance on the part of the defendant to include, being put into exclusive possession, the making of several payments in respect of the subject premises to the defendant and/ or his duly authorized agent, constructing a concrete wall to the rear of the premises to replace the previous one, paying neighbours for repair of their premises due to damage caused by the collapsing wall, replacing awnings, replacing interior doors and locks, de-bushing the premises, painting the house every year since 2001, repairing leaks to the roof which was caused by Hurricane Ivan and significant repairs to the premises;

vii) The court is also pointed to the fact that all of the receipts issued by or on behalf of the claimant to the defendant in respect of payments received speak to them being a payment as deposit or towards purchase of the property in issue. It is even more telling that when the house went into foreclosure it was the defendant who took out a loan in order to clear the mortgage arears of the claimant in respect of the subject premises;

viii) The claimant's own witness Mr. Gray has admitted that he was acting as the claimant's agent in the circumstances and any payment he received from the defendant would have been given to the claimant. Mr. Gray was pellucid that at no time when the defendant was put into exclusive possession of the subject premises was he aware of any rental agreement between the parties. Curiously enough though, he says it was some time after that the claimant called him and

spoke to him about rental; however the details were never made known to him. In light of the foregoing, the court should exercise its discretionary power to grant specific performance in favour of the defendant and any sums which the court accepts as being due and owing by the defendant in respect of the sale of the property for JA$10M should be paid by the defendant accordingly.

LAW AND ANALYSIS

Issue 1: ***Whether there is/was a valid and subsisting oral lease agreement between the parties for the defendant to pay rent to the claimant at a monthly sum of USD$1,500.00? If so is the claimant entitled to arrears for rent and recovery of possession of the subject premises?***

[39] In ***Urban Development Corporation v Robert Hamilton T/A BJ Shoe Rental*** [2013] JMSC Civ 56, Morrison J at paragraph 28 considered that in ***Street v Mountford*** [1981] A.C. 809, the question was whether the agreement between the parties intituled "licence agreement" created a tenancy or a licence. He noted that "The House of Lords…held that where residential accommodation had been granted for a term at a rent with exclusive possession, where the grantor did provide neither attendance nor services, the legal consequence was the creation of a tenancy. Thus despite the rubric of "licence agreement" on its true construction, the agreement had the effect of creating a tenancy."

[40] In ***Street v Mountford*** Lord Templeman stated at page 818 that:

> There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.

He continued at page 821 to outline that:

> *In Errington v. Errington and Woods [1952] 1 K.B. 290 and in the cases cited by Denning L.J. at p. 297 there were exceptional circumstances which negatived the prima facie intention to create a tenancy, notwithstanding that the occupier enjoyed exclusive occupation. The intention to create a tenancy was negatived if the parties did not intend to enter into legal relationships at all, or where the relationship between the parties was that of vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy.*

Then at page 826 – 827 he indicated:

> My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office.

[41] The things on which the parties agree are that i) in late 1999 there was discussion of the subject premises being sold by the claimant to the defendant for $US250,000.00 with the Jamaican equivalent then being J$10,000,000.00, and ii) further to those discussions the defendant was placed into possession of the subject premises in either October or November 1999 and that he paid a deposit of $1,000,000.00. The claimant maintains that there was an oral agreement for the defendant to rent the premises for $US1,500 per month pending the formalisation of the agreement for sale between them,. The defendant on the other hand contends that the oral agreement was only for the sale of the subject premises at a cost of $10,000,000.00.

[42] The claimant relies in support of there being an oral agreement for rent on two letters written to the defendant on his behalf by his lawyers Myers, Fletcher & Gordon. Firstly, exhibit 3 dated March 3, 2000 in which it was stated that there was

an oral agreement between the parties for the purchase of the subject premises in the sum of US$250,000.00 with rental of US$1,500.00 per month from October 1999 to January 2000 by which time the full purchase price should have been paid. That letter acknowledged that JA$1,000,000 (US$25,000) had been paid as deposit but further indicated that no payments had been made for rent nor any further payments made on account of the balance purchase price. The letter concluded with a request for all amounts due for rent to be immediately paid over to the claimant and sought confirmation that the defendant was presently in a position to pay the balance purchase price in which event the formal agreement would be prepared for execution.

[43] Secondly exhibit 4 is a letter dated June 1, 2000 in which it was indicated that no response had been received to the letter of March 3, 2000. A demand was also made for rent for the months October to May 2000 with an indication that if rent was not paid within 10 days and an indication given of the defendant's preparedness to enter into a formal agreement for sale, the claimant would withdraw the offer to sell and his lawyers would advise him of the steps to recover possession.

[44] Despite relying on the contents of the letter of March 3, 2000 in his witness statement, the defendant denies receiving that letter and any knowledge of an agreement for the payment of rent and relies on the fact that there is an absence of any exhibited receipts for rent. He further relies on the fact that exhibit #5 receipt in the sum of $25,000.00 (the parties agree this was for US dollars) and exhibit #6 in the sum of $4,900.00 (also agreed to refer to US dollars) both speak to the sums being paid for purchase of the property rather than for rent.

[45] It is clear from the dicta of Lord Templeman in ***Street v Mountford*** that the *'grant of land for a term at a rent with exclusive possession*' constitutes a tenancy. There is no dispute on the issue of exclusive possession. I am however mindful of the fact that not every occupier who enjoys exclusive possession of land is a tenant and there are exceptional circumstances which negative the prima facie intention to

create a tenancy. These include where '*the parties did not intend to enter into legal relationships at all, or where the relationship between the parties was that of vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy.'*

[46] On a consideration of the evidence herein, the claimant has not proven to the requisite standard that he and the defendant intended to enter into legal relations so far as a tenancy agreement was concerned. The learned editors of Cheshire and Burn's Modern Law of Real Property, 17th ed., p. 194, define a lease as '*not only an interest in property- a legal estate or an equitable interest; it is also a contract between landlord and tenant*.'

[47] Counsel for the defendant relied on the case of ***Keith Garvey v Ricardo Richards*** which considered what constitutes a binding agreement. The court had this to say at paragraphs 10 - 12:

> [10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.
>
> [11] Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship. In **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK (Production) (**2010) 3 All ER 1 Lord Clarke, at paragraph 45, describes the applicable test to be as follows:
>
> > "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the

> terms which they regarded or the law requires as essential for the formation of legally binding relations. **Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."** (Emphasis added)
>
> [12] The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability."

[48] The claimant has said that he and the defendant orally agreed that the defendant was to pay the rent monthly until the sale was completed. However, while there is evidence of a deposit made on the purchase of the subject premises, there is no mention of any rent being paid, and the claimant admitted in cross examination that no date was agreed on which the rent should be due each month. There was also no evidence of any sums of US$1,500.00 having been paid nor any receipts being issued for rent. It was also the claimant who subsequently decided that he sums paid towards the deposit would be treated as rent.

[49] The two letters exhibits 3 and 4 sent by the claimant's attorneys to the defendant at the subject premises, refer to arrears of rent commencing in October 1999 with the rental amount being US$1,500.00 per month. I accept that the letters being drafted so soon after the alleged agreement, they represent powerful documentary support for its existence. I find the parties had an informal oral agreement, which is why the detail as to the date when rent would become due each month, a usual term of a tenancy, was not stipulated. It is noted that the letter of March 3, 2000 is consistent with the absence of a due date for rent as it does not indicate such a date. However I accept that there was an oral agreement for rent on the terms as indicated in the letter of March 3, 2000. Support for this conclusion is also obliquely found in the fact that the defendant admitted in cross-examination that in October 1999 he did not have US$250,000.00 to purchase the property. Given the fact that the defendant was given immediate possession, it is clear therefore that there was

a contemplation of the parties that there would be a period before ownership was supposed to pass to him when he would be enjoying possession. I find therefore that there was an agreement for rent that was expected to have been of short duration until January 2000.

[50] Unfortunately, the purchase was not concluded but the defendant has remained in possession and on his own admission has not made any further payment to the claimant of any nature since 2001. In his witness statement in which the defendant maintains that he only entered into an agreement for sale, he stated that he knew that he would owe interest on the balance purchase price. However, even if the court is wrong in finding that there existed a concluded agreement for rent between the parties in October 1999, the fact that the defendant has remained in the subject premises since then without having concluded its purchase, he would be at least have become a tenant-at-will. Received in evidence as exhibit…was a Notice to Quit that was served on the defendant in August 2012. However he has remained in the property. Therefore even if he is correct that he entered and remains as a purchaser in possession, fairness demands that he would be duty bound to compensate the claimant in rent for his years of occupation, the property still being owned by the claimant. This would be separate and distinct from any sums owed in respect of an uncompleted purchase, (less any sums that have been used to make improvements to the property), should the court find an agreement for the purchase of the subject premises also subsists. The question of whether the claimant is also entitled to recovery of possession will depend on the courts finding in relation to issue 2.

Issue 2: ***Whether there is an enforceable oral agreement for the sale of the subject premises based on sufficient acts of part performance by the defendant?***

[51] Counsel for the defendant contended that there is abundant evidence of part performance on the part of the defendant of an oral agreement for sale between the parties. The most important aspect being the entry into possession by the defendant of the subject premises. On the other hand counsel for the claimant contended that the defendant cannot prove on a balance of probabilities any acts of part performance which establish unequivocal acts demonstrating that an agreement for sale was entered into by the parties.

[52] S. 4 of the Statute of Frauds provides that:

> And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promises to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage, (4) or upon contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

[53] In ***Aubrey Faulknor v Pearjohn Investments Ltd and Another*** Suit No. C.L.1994/F-097 at page 12, F.A. Smith, J stated that "*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.*"

[54] In ***Nation Hardware Ltd. v Norduth Development Co. Ltd et al***, Sykes J (as he then was) stated at para. 22 that '...*part performance is predicated on the proposition that there is an oral contract between the parties and because there is an insufficient*

memorandum in writing, the proferror of the oral contract usually points to some conduct that is explicable (I hesitate to say only) on the basis that there must have been a prior agreement for the sale of land between the parties.'

[55] The approach to be taken to determine whether actions of a party amount to sufficient acts of part performance was outlined in ***Steadman v Steadman***. Firstly at page 981 it was stated that:

> You must first look at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract. A thing is proved in civil litigation by shewing that it is more probably true than not; and I see no reason why there should be any different standard of proof here

[56] At page 982 the court continued:

> In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable than not…

[57] Then at page 986 the court relied on a extract from Fry on Specific Performance and stated:

> A passage in Fry on Specific Performance, 6th Edn (1921), p 278, para 582 reads:
>
> > "The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged. In Chaproniere v Lambert ([1917] 2 Ch 356 at 361, [1916–17] All ER Rep 1089 at 1092) Warrington LJ cited a passage from Fry on Specific Performance 5th Edn (1911), p 291, para 580 (repeated in the sixth edition) which stated four conditions which had to be satisfied for there to be part performance: (1) 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; (2) they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; (3) the contract to which they refer must be such as in its own nature is enforceable by the court; and

> (4) there must be proper parol evidence of the contract which is let in by the acts of part performance, and Warrington LJ added ([1917] 2 Ch at 361, [1916–17] All ER Rep at 1092):
>
> 'Every one of those four conditions is essential to enable the act relied on to be treated as part performance. It is not sufficient to prove acts referable only to the contract alleged and no other. They must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.'
>
> That I take to be in full accord with the first of the four circumstances which Fry states must concur to withdraw a contract from the operation of the statute. The acts of part performance must be such that they point unmistakeably and can only point to the existence of some contract such as the oral contract alleged. But of course the acts of part performance need not show the precise terms of the oral contract (see Kingswood Estate Co Ltd v Anderson). The terms of the oral contract must be proved by acceptable evidence but effect to them can only be given if and when acts of part performance establish that there must have been some such contract. Until then a door is, so to speak, closed against them."

[58] Continuing at page 987 the court stated*:*

> Without a connection established by parol testimony the payment of the money would not begin to suggest or to establish either the existence of a contract or of a contract in relation to land.

Has the defendant proven sufficient acts of part performance?

[59] In light of the factors outlined in ***Steadman v Steadman*** the court has now to determine whether the defendant has proven sufficient acts of part performance. The court has examined the evidence and considered the following:

Monies Paid Towards Purchase of the Subject Premises

[60] It is the position of the defendant that he is able to demonstrate sufficient act(s) of part performance. His counsel has said that there is abundant evidence of this. Exhibits 5 and 6, receipts dated May 31 and March 15, 2001, (USD$25,000.00 and US$4,900.00) respectively, reflect payments made in respect of the purchase of the subject premises. The defendant paid a deposit to Mr. Gray, the claimant's agent. The parties however disagreed on the amount which was paid. Mr. Gray

has said that he received a $1,000,000.00 cheque from the defendant and the claimant said that he has received this sum from Mr. Gray. The defendant however contended that he paid $1,500,000.00 to Mr. Gray. He is however unable to prove that he paid that sum as Mr. Gray never gave the defendant a receipt and the defendant did not produce the returned cheque in this trial. In the circumstances, it is open on the facts for the court to find that the defendant paid at least $1,000,000.00 being 10% of the purchase price to Mr. Gray in 1999.

[61] The claimant said he received the further sum of US$5,000.00 paid to his sister (Sue Evelyn and not Glenna as said by the defendant) from the defendant. The claimant said he also received $500,000.00. Mr. Gray has said that he only received $1,000,000.00 from the defendant and $500,000.00 from the defendant's sister Paula Fletcher and he paid the entire amount to the claimant. The claimant has admitted to receiving these sums of money. Thus, on his evidence he would have received a total of $1,500,000.00 plus USD$34,900.00.

[62] The defendant said he has paid in total the sum of JA$7,550,200.00 to the claimant on account of the purchase price agreed, this included all the monies he allegedly he paid to Mr. Gray and that were allegedly paid by Mr. Saddler. The payment of monies as alleged by the defendant was as follows:

a) Downpayment of $1,500,000.00 in October or November of 1999;

b) In or about October 1999, he made another payment of $US3,000.00 to Mr. Gray;

c) Sometime in the 2000s he made arrangements to pay off mortgage arrears in the sum of $JA1.5M and borrowed $JA1.4M to assist with this payment;

d) In November and December 2000, further payments of JA$600,000.00 and US$26,000.00 respectively were made by Canute Saddler on the defendant's behalf to the claimant through Mr. Gray;

e) He then made 2 payments of US$5000.00 and US$4,900.00 (exhibit 6) to the claimant's sister in 2001;

f) On or about May 31, 2001, through his mother in law Joy Robertson, he paid to the claimant US$25,000.00 (exhibit 5) on account of the sale agreement; and

g) In or about 2001, he instructed his sister, Paula Fletcher to close an account that he had at JMMB and instructed her to give the funds being JA$500,000.00 to Mr. Gray, which she did on his behalf.

h) Payments said to have been made by Canute Saddler are unsubstantiated and therefore disregarded by the court.

[63] Based on the documentary evidence of receipts reflecting sums paid by or on behalf of the defendant, the sums accepted as received by the claimant and the evidence I have accepted I find the following sums were paid by the defendant:

a) The sum of JA$1,000,000.00 in October or November 1999 as a deposit on the purchase price of US$250,000.00 or the then Jamaican equivalent of $10,000,000.00. That was 10% of the sale price;

b) The sum of JA$1,400,000.00 to clear the balance of the mortgage due by the claimant. It is not clear when the money was paid but the mortgage was discharged in May 2006;

c) Two payments of US$5000.00 and US$4,900.00 (exhibit 6) to the claimant's sister in 2001

d) On or about May 31, 2001, US$25,000.00 (exhibit 5) paid to the claimant on account of the sale agreement through his mother in law Joy Robertson;

e) In or about 2001, JA$500,000.00 paid to Mr. Gray by his sister, Paula Fletcher.

[64] Apart from those sums, I do not find that any other sums were paid by or on behalf of the defendant to Mr. Mattar or to Mr. Gray on Mr. Mattar's behalf. A number of significant things should be noted about these payments. Firstly an initial deposit was paid which was clearly related to the purchase price of the house. This was clearly indicated in the letter dated March 3, 2000 which was exhibit 3. Secondly

the receipt for the sum of US$25,000.00 issued by Mr. Mattar dated May 31, 2001 stated it was *"Re Purchase of House 19 Grosvenor Terrace Kingston 8 Jamaica"*. Thirdly, less persuasive as to the purpose of the earlier payment of US$4,900.00 on March 15, 2001 is the receipt issued by the claimant's sister. Even though it stated that the sum was *"part payment for purchase of 19 Grosvenor Terr".* Mr. Mattar indicated that she did not know much about the business between the parties. No receipts were tendered in evidence in relation to the sum of US$5,000.00 also paid to the claimant's sister on 2001 or the sum of $500,000.00 paid by the defendant's sister also in 2001. However in keeping with the nature of the other payments, I am satisfied that these latter two mentioned payments were also on account of the purchase of the house.

[65] While I understand the claimant's reasoning that he applied these payments to rent due, given that the defendant was not paying rent, it was not open to the claimant to unilaterally convert them to such use especially when they had been expressly paid and received on account of the purchase price. The sum paid to clear the mortgage is somewhat unique. While I find it provides powerful support for the fact of an oral agreement for sale as a tenant would not normally make mortgage payments on behalf of a landlord, as this sum was not directly received by the claimant and there is nothing to definitively indicate that it was paid towards the purchase price, I will in the final analysis reckon it as going towards the outstanding rent that had been due to the claimant, as I have found there was a rental agreement in place and that even if I am wrong on that a tenancy at will would have come into being by then.

Possession of the Subject Premises and repairs made to the premises.

[66] Up to the time the claimant filed this action the defendant had been in possession of the subject premises for over a decade. He entered into possession having paid a ten percent deposit towards the purchase of the property. During the period of occupation the defendant paid off the claimant's outstanding mortgage balance which is agreed evidence. I find that is consistent with the defendant seeking to

secure his interest in the property he was seeking to purchase which was in jeopardy of being sold by the mortgage company.

[67] There is also unchallenged evidence that the defendant over time carried out substantial repairs to and upkeep of the premises. While the sums are not agreed, it is accepted that the defendant replaced a collapsed wall at the rear of the premises and paid sums to neighbours to repair damage done to their premises due to damage caused by the collapsing wall. The defendant claims that the total sum for these repairs was JA$1,400,000 whereas the claimant said the defendant had told him the sums expended was J$1,000,000. The defendant in his witness statement also stated that he replaced awnings at a cost of J$120,000, replaced interior doors and locks costing approximately $40,000, and repaired leaks to the roof caused by Hurricane Ivan costing approximately $30,000. He also claimed that he repainted the house every year at a cost of $100,000.00 per year. While the court accepts that painting would have been done, it is not accepted that painting would have been done that frequently. I find a reasonably frequency for repainting would be one every five years. The defendant also maintained that he debushed the premises and also spent approximately $950,000.00 on repairs for which he had a receipt. However no such receipt was put into evidence. I accept all the sums stated by the defendant except the sum of $950,000.00 and the qualification made in relation to the painting of the premises. I note that the repairs done in particular are normally those done by owners and not by persons who are only tenants.

Analysis

[68] I find therefore that these acts by the defendant constitute unequivocal acts of part performance in support of the oral agreement for sale concluded between the parties in 1999. I find therefore that the parties had two oral agreements. One for rent at a rate of US$1,500.00 per month and also an agreement for the sale of the premises at a cost of US$250,000.00 which was the then equivalent of JA$10,000,000.00, which should have been completed by January 2000 but was

not. Though I find there were subsequent negotiations between the parties in relation to a change in the sale price of the Jamaican dollar figure of the sale price, with the claimant proposing $21,000,000 and the defendant $17,000, there was no concluded agreement that varied the terms of the initial agreement.

Issue 3: ***If the court finds that an enforceable oral agreement for sale exists between the parties is the defendant entitled to the equitable remedy of specific performance or alternatively, damages for breach of contract in lieu of specific performance?***

[69] In ***Arthur George McCook and Ors v Holden Hammond and Ano.*** (1988) 25 JLR 296, Downer JA stated that:

> "Equity permits part-performance to be a substitute for a written note or memorandum. The acts of part-performance are only intelligible if there was some prior agreement. The relevant section of the Statute of Frauds refers to a contract for sale or other disposition of land and the most frequent act of part-performance is where the purchaser is allowed to enter into possession of the land. The equitable remedy available to such a purchaser is specific performance so that a vendor is compelled to convey the land and deliver up the title or a purchaser is compelled to carry out the undertaking to purchase. See Rawlinson v Ames [1925] 1 Ch. 96 where a defendant who had given instructions to have alterations carried out on the plaintiff's flat was ordered to take up the lease; and Broughton v Snook (1938) 1 Ch. 505 where an executor was compelled to convey an inn to a purchaser who spent money on alterations.- See pp. 297-298."

[70] In accordance with my findings above, the defendant was both a tenant and a purchaser in possession. The Notice to Quit served August 16, 2012 showed an intention for the rental agreement to come to an end. However the defendant remained in possession and this action was brought. That Notice however did not terminate the agreement for sale. It made no reference to that agreement, no doubt because the claimant erroneously thought there was no subsisting agreement.

There was accordingly no indication that any notice given making time of the essence in respect of the oral agreement for sale. The sale agreement therefore subsists. The defendant remains a purchaser in possession who has proven significant acts of part performance. He has sought specific performance and indicated that he is prepared to conclude the purchase. He admitted in cross examination that the house is now worth more than JA$10,000,000. and indicated he was willing to pay interest on the balance purchase price owed. In those circumstances the defendant is entitled to an order for specific performance on terms I will shortly indicate. The claimant would therefore not be entitled to recovery of possession, if the defendant is willing and able to complete the purchase of the subject premises.

The oral order of April 3, 2020

[71] On April 3, 2020 the following order was made by the court:

(i) It is hereby declared that there is a valid and enforceable agreement between the claimant and defendant for the sale of the subject premises situate at 19 Grosvenor Terrace, Kingston 8, St. Andrew and registered at Volume 1399 Folio 324 of the Register Book of Titles.

(ii) It is hereby ordered that there be specific performance of the said agreement for sale.

(iii) It is hereby ordered that the defendant is required to pay to the claimant all sums owed on the purchase price, within 180 days of the date of this order to complete the sale. (The claimant is entitled to the sum of JA$10M, less the total sum of JA$1.5M and US$34,900.00 at the Jamaican equivalent, (at the time it was paid), already paid to him.)

(iv) Costs to the defendant to be agreed or taxed

[72] The order was made in those terms as initially the court had not considered that an oral rental agreement had been made out between the parties, as there was no

set date for rent to be paid and no payment specific to rent was ever made. However on reflection, the court determined that sufficient consideration had not been given to the documentary support for the existence of such an agreement, though that support was in the form of letters written on the claimant's behalf months after the agreement would have been made, and that even if the court was wrong that there had been such an agreement, the defendant must be liable to compensate the claimant, with interest for the use and occupation of the subject premises, while the purchase agreement remained uncompleted.

[73] The court also noted on reflection that the balance purchase price due should have been stated in United States dollars, given that I have found the oral agreement for the sale and purchase of the property was expressed as being in US dollars or the then Jamaican equivalent. It is noteworthy that payments were made to the claimant in both United States and Jamaican currencies. This is significant as there has been significant devaluation in the Jamaican currency since 1999; by approximately JA$100.00 to US$1.00. As noted before, the defendant admitted that the subject premises is now worth more than JA$10,000,000.00. The change in outcome would also necessitate an adjustment to the order made on costs.

The power to vary or revoke the order of April 3, 2020

[74] In ***Petrojam Limited v Sea Ventures Shipping Limited, Worldwide Green Tankers, The owners and/or persons interested in the M/T Great News and Everol Bailey*** [2013] JMCC Comm. 16, Mangatal J examined the circumstances in which a court may vary or revoke its own order.

[75] The learned judge noted at paragraph 17 that:

> Rule 42.8 of the Civil Procedure Rules ("CPR") states:
>
> > "A judgment or order takes effect from the day it is given or made unless the Court specifies that it is to take effect on a different date."
>
> Notwithstanding this, Rule 26. 1(7) provides that:

> "A Power of the Court under these rules to make an order includes a power to vary or revoke that order."
>
> Whilst a judgment or order of the Court is to have immediate effect, unless otherwise stated by the Court, the Civil Procedure Rules have given the Court express power to vary or revoke such orders or judgment. The rule is not specific as to when or the circumstances in which the power can be invoked. As the rule does not have a temporal element to it, it would seem that a Court could revisit its order or judgment, with a view to revoking or varying it, between the time it was handed down and the date which it was sealed or otherwise perfected. This contrasts with the Court's general power to correct a clerical mistake or accidental slip or omission at any time (Rule 42.10 CPR).

[76] Mangatal J reviewed the English Court of Appeal decision of ***Stewart v Engel*** [2000] 1 WLR 2268 (CA) and the decision of the Supreme Court of England in ***In Re L and another (Children) Preliminary Finding: Power to Reverse)*** [2013] 1 WLR 634. Then after noting that there should be a careful balance between the court seeking to ensure that there was no miscarriage of justice and the fact that the power should not be lightly exercised, the learned judge outlined the following principles at paragraph 23:

> [23] In considering whether the overriding objective favours a variation or revocation of the original order, the following are some considerations which may be helpful in the analysis. As stated by Baroness Hale, "Every case is going to depend upon its particular circumstances."
>
> 1. The Court could consider whether there are any compelling reasons justifying the Court revisiting its orders or judgment. In the ***Engel*** decision, the decision of Neuberger J ***In re Blenheim Leisure (Restaurants) L td (no.3) The Times, 9th November 1999*** was cited as setting out justifiable instances of cases where the jurisdiction might justifiably be invoked. These include:
>
>   i Plain mistake on the part of the court
>
>   ii Failure of the parties to draw the Court's attention to a fact or point of law that was plainly relevant
>
>   iii. Discovery of new facts subsequent to the judgment being given

iv. If the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider.

2. …

3. Both Clarke L.J. and Baroness Hale in their respective judgments indicated that the Court should also consider whether any party had acted upon the decision to their detriment in deciding whether to grant or refuse the application.

4. ***In Re L and another***, Baroness Hale also pointed out that justice might require the revisiting of a decision, for no more reason than the judge having a carefully considered change of mind.

[77] ***In Re L and another (Children) Preliminary Finding: Power to Reverse)*** Baroness Hale also considered whether before the judge made a change in her order she should have permitted the parties to make submissions on that point. On that point at paragraph 30 Baroness Hale stated that:

> [T]he discretion must be exercised "judicially and not capriciously". This may entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision. The longer the interval between the two decisions the more likely it is that it would not be fair to do otherwise. In this particular case, however, there had been the usual mass of documentary material, the long drawn-out process of hearing the oral evidence, and very full written submissions after the evidence was completed. It is difficult to see what any further submissions could have done, other than to re-iterate what had already been said.

[78] It is clear from the authorities that the discretion to revoke or vary an order should not be lightly made. It is also clear that the overriding objective requires the court to seek to deal with cases justly. I considered whether it was desirable for counsel for the parties to make submissions on the issue but largely for the reasons that was not seen to be necessary in the case of ***In Re L and another (Children) Preliminary Finding: Power to Reverse)***, I did not consider it necessary either in this case. After careful consideration, I have formed the view that the previous order would not have done justice between the parties based on the reasons adumbrated in paragraphs 72 -73 above.

[79] The adjusted order now to be made therefore takes into account the fact that I have now found that a rental agreement for US$1,500.00 was made between the parties. The sums paid by or on behalf of the defendant to the claimant directly or through an agent I have found were towards the purchase price and will be deducted from the purchase price. Also to be deducted from the purchase price are the sums I have found that the defendant expended on the property being: $1.4M for the repair of the collapsed wall and repairs to the neighbours premises; replacing awnings at a cost of $120,000.00; Replacing interior doors and locks at a cost of $40,000.00; repairing leaks to the roof for approximately $30,000.00 and I find the sum of $400,000 for painting the house. These sum to JA$1,890,000.00. This should be added to the JA1,500,000 and US$34,900.00 paid to the claimant. For the reasons I earlier indicated the balance sale price of the house should be denoted in United States Dollars. I will use the initial exchange rate of JA$40 to US$1.00 to make the conversions. The Jamaican total is $3,390,000 which at JA$40 to US$1.00 equals US$84,750. Added to this should be the amount of US$34,900 for a total of US$119,250. Subtracting this figure from the sale price of US$250,000 leaves a balance of US$130,350.

[80] The sum of JA$1,400,000 paid to the mortgage company on the claimant's behalf, for the reasons previously indicated I will credit to rental. At the exchange rate of JA$40 to US$1.00 the rental of US$1,500 accounts for 23 1/3 months which I will round up to 24 months. Deducting those 24 months and then calculating rent due from October 1999 to the present, that would be a total of 212 months at US$1500.00 per month.

DIDPOSITION

[81] I therefore now make the following adjusted order:

i) The defendant James Salmon shall pay to the claimant the sum of US$318,000,00 with interest thereon at the rate of 1.5% per annum, being rent

due for 19 Grosvenor Terrace, Kingston 8 in the parish of Saint Andrew and registered at Volume 1399 Folio 324 of the Register Book of Titles.

ii) It is hereby declared that there is a valid and enforceable agreement between the claimant and defendant for the sale of the subject premises situate at 19 Grosvenor Terrace, Kingston 8, St. Andrew and registered at Volume 1399 Folio 324 of the Register Book of Titles.

iii) Subject to the defendant paying the sums owed as outlined at paragraph i) it is hereby ordered that there be specific performance of the said agreement for sale.

iv) It is hereby ordered that the defendant is required to pay to the claimant all sums owed on the purchase price, being US$130, 350.00 within 180 days of the date of this order to complete the sale.

v) In the event the defendant is unable to complete the sale within 180 days, the claimant is entitled to recover possession from the defendant.

vi) Each party to bear his own costs.