



[2023] JMCC Comm 42

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00445 (Formerly Claim No. SU2020CV02064)

BETWEEN	GEORGE MILLER	CLAIMANT
AND	RALSTON SMITH	1ST DEFENDANT
AND	SEAN SMITH	2ND DEFENDANT

IN OPEN COURT

Ewan Thompson instructed by Ewan Thompson & Associates, Attorneys-at-Law for the Claimant.

Ravil F. Golding instructed by Lyn-Cook, Golding & Co., Attorneys-at-Law for the Defendants.

Heard: February 27 and 28, March 1 and 13 and September 28, 2023

Sale of Land - Stamp Duty Act - Meaning of “first executed” within the meaning of section 32 (3)(a).

Whether unstamped agreement for sale and unregistered vendor’s mortgage are enforceable in equity - Whether equitable mortgagee is entitled to possession of mortgaged Property on default by equitable mortgagors - Whether purchasers and equitable mortgagors of land entitled to an order of specific performance commanding the vendor and equitable mortgagee to register transfer of property to them - Exercise of inherent jurisdiction to make declaratory reliefs as to parties’ status in relation to the property in lieu of order for specific performance.

C. BARNABY, J

INTRODUCTION

[1] This claim and the counterclaim have as their concern the sale of land part of Seven Corners in the parish of St Elizabeth, which is comprised in Certificate of Title

registered at Volume 1196 Folio 301 of the Register Book of Titles to the Claimant businessman, George Miller. A hotel, formerly called Chariots Hotel and now known as the Santa Crest Hotel sits on the land and together will be called “the Property”.

[2] The Property was sold to the Ralston Smith and Sean Smith, father and son respectively, businessmen and the Defendants herein, who were put into possession and have remained so to date, pursuant to an oral agreement between the parties.

[3] Subsequent to the oral agreement which saw the Defendants being put in possession of the Property, the parties are said to have executed a written agreement for sale and an instrument titled *Mortgage Under the Registration of Titles Act*. It is agreed that the latter instrument, which will hereafter be called “the Mortgage” was signed on 5th December 2011. It is duly stamped and admitted in evidence accordingly.

[4] It is the Defendants’ case that a written agreement for sale was also executed by the parties on 5th December 2011 and while the Claimant gave evidence to that effect in his witness statement, he stated on cross examination that it was executed by him on 14th March 2012. He could not recall whether the Defendants were present for its execution on that date. In any event, no written agreement for sale was admitted in evidence as the requirement under the **Stamp Duty Act** that instruments of that character be sufficiently stamped to enable admission was not satisfied. The court is therefore without the benefit of the specific terms of that or any other written agreement for sale.

[5] The absence of a written agreement for sale notwithstanding, the parties are *ad idem* that a sale price of One Hundred and Fifteen Million Dollars (\$115,000,000.00) was agreed by them for the Property, which was to be discharged by way of payment of a Thirteen Million Dollars (\$13,000,000.00) deposit by the Defendants to the Claimant; with the balance of One Hundred and Two Million Dollars (\$102,000,000.00) being secured by way of a vendor’s mortgage, the terms of which are comprised in the Mortgage. The Defendants made payment towards the deposit of Thirteen Million Dollars (\$13,000,000.00) over the course of several months and completed the same on 14th

March 2012. It is also common to the parties that the Defendants took possession of the Property in December 2010.

[6] It suffices to say here, that the Defendants have not in fact been registered on the Certificate of Title as proprietors of the Property, nor has the Mortgage been registered. While the Defendants made payment towards the discharge of the mortgage, they have fallen into arrears. It is these two matters which have given rise to the parties' competing claims.

[7] It is the Claimant's contention that the Defendants had an obligation under the sale agreement to pay a portion of the stamp duty but that they failed to make their contribution towards the payment of the tax. In consequence, while the agreement for sale has been lodged with the Stamp Office, title to the Property has not yet been transferred to the Defendants because of this failure to pay. Further, that the Defendants have defaulted in their mortgage payments and are in arrears.

[8] In light of what the Claimant describes as the Defendants' failure to pay their portion of the stamp duty in breach of the parties' agreement for the sale of the Property, and their wanton disregard of their responsibility under the mortgage, he claims the following relief:

- (i) The sum of Fifty Million Nine Hundred and Eighty-Two Thousand Four Hundred and Ninety One Dollars and Ninety Four Cents (\$50,982,491.94), being arrears of mortgage due from the Defendants up to June 2020.*
- (ii) Recovery of possession of the said property registered at Volume 1196 Folio 301 of the Register Book of Titles from the Defendants.*
- (iii) An order that the Claimant be released from the mortgage.*
- (iv) Costs*
- (v) Attorneys-at-law costs*
- (vi) Such further and other reliefs as this Honourable Court deems just*

(sic)

[9] The Defendants deny that the Claimant is entitled to any of the relief sought and counterclaims for the relief below:

- i) A declaration that the Claimant is in breach of his contractual obligation to register the transfer and the mortgage.*
- ii) A decree of specific performance commanding the Claimant to transfer the property registered at Volume 1196 Folio 301 of the Register of Titles to the defendants*
- iii) Damages for breach of contract*
- iv) An order that the Claimant prepare and furnish the defendants with a statement of the mortgage account*
- v) Costs*

(sic)

[10] Substantively, it is the Defendants' defence and claim, which were reduced to the Amended Defence and Counterclaim of the 1st and 2nd Defendants filed 1st November 2022, that while the Claimant is the registered proprietor of the Property, they hold the fee simple in equity as purchasers; and that the Claimant has wrongfully and in breach of contract failed and refused to transfer the Property to them since March 2012 when they paid for the Property in full and requested that it be transferred.

[11] It is also the Defendants' contention that the Claimant's failure or refusal to submit the agreement for sale and Mortgage for assessment for stamping within thirty (30) days of their respective dates has caused a penalty to be incurred; and that the Claimant's failure or refusal to stamp and register the agreement for sale and Mortgage, has wrongfully prevented them from becoming the registered proprietor of the Property and made it impossible for them to raise money on the security of the Property to effect repairs and/or sell the property, subject to the mortgagee's interest or to refinance their mortgage.

[12] While the Defendants admit that they are in arrears under the mortgage and have not made timely payment of the instalments which became due, they deny that they have consistently defaulted in making the agreed payments and put the Claimant to strict proof of the sums said to be owed.

[13] The Claimant and the 1st Defendant gave evidence at the trial which took place over three (3) days, which concluded with delivery of oral arguments on 13th March 2023, when judgment was reserved.

ISSUES AND SUMMARY CONCLUSION

[14] The issues which are set out below and which have been ordered as they have for convenience, are in my judgment, dispositive of both the claim and the counterclaim.

- i. What is the date of “*first execution*” of the parties’ written agreement for sale for the purpose of the **Stamp Duty Act**?
- ii. Did the Claimant have a contractual obligation to register the transfer of the Property to the Defendants and register the Mortgage?
- iii. Is there an enforceable agreement between the Claimant and the Defendants for the sale of the Property?
- iv. Is the unregistered Mortgage enforceable?
- v. Is the Claimant entitled to the substantive relief sought on the claim?
- vi. Are the Defendants entitled to the substantive relief sought on their counterclaim?

[15] On consideration of the foregoing issues, and for reasons set out subsequently I find that the Claimant’s claim for mortgage arrears up to June 2020 and for an order for recovery of possession of the Property should be granted but that the request for an order that he be released from the Mortgage should be dismissed. I also find that the reliefs sought on the Defendants’ counterclaim should be dismissed.

i.

What is the date of first execution of the agreement for sale executed by the parties for the purpose of the Stamp Duty Act?

[16] Pursuant to section 76(1) of the **Stamp Duty Act** (hereinafter called “the SDA”),

Any contract or agreement for the sale of any equitable estate or interest in any property, or for the sale of any estate or interest in any property

except land or other property locally situated outside Jamaica, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share or property of or in any ship or vessel, shall be charged with the same ad valorem duty as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold and in lieu of the duty payable on such conveyance.

[17] Section 32 of the SDA, so far as is relevant states:

- (1) *Save where other express provision is by law made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty, without penalty, provided that this is done before the expiration of fourteen days after the instrument is first executed; if fourteen days have so expired there shall be a penalty of ten dollars, and also by way of further penalty, where the unpaid duty exceeds ten dollars, of interest on such duty, at the rate of five per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.*
- (2) ...
- (3) *In the case of such instruments hereinafter mentioned, as are chargeable with ad valorem duty, the following provisions shall have effect-*
 - (a) *the instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed, or after it has been first received in Jamaica, in case it is first executed at any place out of this Island, unless the amount of duty is uncertain, and the opinion of the Commissioner with respect to the amount of duty with which the instrument is chargeable, has, before such expiration, been required in writing;*
 - (b) *if the opinion of the Commissioner with respect to any such instrument has been required the instrument shall be stamped in accordance with the assessment of the Commissioner, within four-teen days after notice of the assessment;*

(c) *if any such instrument executed after the coming into operation of this Act, has not been, or is not duly stamped in conformity with the foregoing provisions of this subsection, the person in that behalf hereinafter specified, shall incur a fine of ten dollars, and in addition to the penalty payable on stamping the instrument, there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the Minister, or of the Court, Judge, or arbitrator, before whom it is produced.*

(4) ...

(5) *The expressions “executed” and “execution” with reference to instruments not under seal, mean signed and signature.*

A conveyance is among the instruments identified as being chargeable with *ad valorem* duty.

[18] The common evidence is that a written agreement for sale of the Property was entered into between the parties. There is no evidence before the court that the agreement was made under seal and there is no dispute between the parties that it was executed by their signing and signature of the same.

[19] There is also no doubt among the parties, and correctly so, that the **SDA** would require an agreement for the sale of property to be stamped with its proper *ad valorem* duty. There is a dispute however in respect of the date on which the parties' agreement for sale was “*first executed*” within the meaning of section 32 (3)(a) of the Act, which would have implications for liability to the Revenue for the payment of fine and penalties for delay in stamping the agreement for sale.

[20] No authority was cited by any party as to the meaning of the term “*first executed*” but I find assistance in the decision **Terrapin International Ltd v Inland Revenue Commissioners** [1976] 2 All ER 461. While that case was concerned with deeds delivered in escrow and therefore factually distinguishable from the instant case, it well

makes the point - together with the dictum of Lord Reid in **Wm Cory & Son Ltd v Inland Revenue Comrs** [1965] 1 All ER 921 which concerns the chargeability of conveyances or transfers on sale under section 54 of the UK Stamp Act, 1981 which is the equivalent of section 76(1) of the **SDA** - that an agreement or contract for the sale of property becomes chargeable to the *ad valorem* duty as soon as it has legal effect. It seems to me that where the concern is a written agreement for the sale of property, execution of the instrument by both purchaser and vendor will be required to give legal effect to the instrument. Consequently, it is my judgment that the date on which an agreement for sale of property is “*first executed*” within the meaning of section 32 (3)(a) is the date on which it is executed by both purchaser and vendor.

[21] Although the Claimant gives the date for the signing of the Mortgage as 5th December 2011 in his Particulars of Claim, he is silent there on the execution date of the agreement for sale. In his reply to the Defendants’ averment that the agreement for sale was signed on the same date as the Mortgage, he says as follows:

*... [t]he Claimant agrees that the Agreement for Sale and the mortgage deed were signed on December 5, 2011, but says that the agreement did not come into effect on the 5th December 2011, because the Defendants did not pay the further deposit of Six Million Two Hundred and Eighty Two Thousand Dollars (\$6,282,000.00) which should have been paid on signing as per paragraph 1 (b) of the “how payable” clause of the Agreement for Sale. Further, **special condition No. 1** of the Agreement for Sale, expressly stated that, “it is a condition precedent to the coming into effect of this Agreement for Sale that the same shall first be signed by the Vendor and the Purchasers and the further deposit paid.”*

[Emphasis in the original]

[22] The Claimant had earlier stated at paragraph 16 of his Particulars of Claim that the Defendants never paid their portion of stamp duties for the agreement for sale as agreed by contract; and that the said agreement, although submitted to the Stamp Office and assessed for Stamp Duty and Transfer Tax, remained unstamped for that reason. This

allegation was denied by Defendants in their Amended Defence and Counterclaim at paragraph 15. They went on to say that “[t]he Claimant is there making reference to a purported agreement wrongfully/falsely dated the 14th day of March, 2012 for the purpose of avoiding stamping penalties.”

[23] The Claimant’s Reply to Amended Defence and Defence to Counterclaim states this in reply.

*Paragraph 15 of the Amended Defence is vehemently denied. The Agreement for Sale was dated 14th March 2021, because that is when it came into effect when the further deposit was paid as per special condition No. 1 of the Agreement for Sale. The Claimant will further say that **the Agreement for Sale was duly submitted to the Transfer Tax and Stamp Duty office on the 5th April 2012, as is evidenced by the official stamp from that department and this was well within the thirty (30) days after it came into effect on the 14th March 2012.** The Defendants are plainly misconceived.*

[Emphasis added]

[24] In the Claimant’s Witness Statement, which was admitted as his evidence in chief, in remarking that the Defendants were given early possession of the hotel for more than twelve (12) months before a formal agreement was signed he speaks of the “... *signing [of] the Mortgage and the formal Agreement for Sale in December 2011 and March of 2012...*” Whether the Claimant was now contending that the agreement for sale was “signed” in March 2012 as opposed to 5th December 2011 which he had agreed in his Reply to the Amended Defence and Counterclaim was put beyond doubt on cross examination. When confronted with the inconsistency between his pleadings and his evidence, the witness insisted that he had only signed one sale agreement and that he had done so on 14th March 2012 at the office of his attorney-at-law.

[25] An inconsistency as to the date of signing of the agreement for sale also appears on the case for the defence. Although the Defendants averred in their Amended Defence and Counterclaim that it was signed on 5th December 2011, after referencing negotiations

for the purchase of the property and the agreed purchase price arising from those negotiations, the 1st Defendant and sole witness for the defence stated as follows in his Witness Statement, which was accepted as his evidence in chief.

*6. On or around the 14th day of March 2012 an Agreement for Sale was signed to solidify the terms of our negotiation. A mortgage instrument was executed on the 5th day of December 2011 **and subsequently the Agreement for Sale on the 14th day of March 2012...***

[Emphasis added]

[26] When confronted with the inconsistency which appeared between averments in the pleaded case and his evidence in chief, the 1st Defendant admitted that he had only ever signed one sale agreement in relation to the Property and that the date for the signing of the Agreement for Sale in his Witness Statement would be true. However, he did not remember signing it on 14th March 2012.

[27] Some eleven (11) years had passed between the transaction which gave rise to the dispute and the trial of the claim, which could possibly have affected the memories of the parties as to the date of execution of the agreement for sale. I am prepared to give each witness the benefit of that possibility. I am nevertheless assisted by the documentary evidence in resolving the issue.

[28] A letter dated 14th November 2011 from Kleisha Rhoden, then attorney-at-law for the Defendants to Counsel Mr. Thompson was admitted in evidence pursuant to section 31E of the **Evidence Act** as part of the Claimant's case. It refers to the Property and states that the documents listed below were enclosed:

1. *Signed Agreement for sale in triplicate;*
2. *Mortgage Deed in triplicate;*
3. *Manager's Cheque in the amount of Five Million Dollars (\$5,000,000.00);*
4. *National Commercial Cheque in the amount of One Million Dollars (\$1,000,000.00). (sic)*

Mr. Thompson was also explicitly advised that the Defendants awaited their copies of the signed agreement for sale and the Mortgage Deed.

[29] Ms. Rhoden's letter of 14th November 2011 shows that the Defendants would have signed the agreement for sale ahead of the 5th December 2011; and it is clear from the anticipatory language used by Ms. Rhoden that the Defendants as purchasers signed the agreement for sale before the Claimant vendor. I therefore find that execution by each of the contracting parties was not contemporaneous.

[30] Also admitted in evidence as part of the Claimant's case was a letter dated 16th December 2011 from Mr. Thompson to Ms. Rhoden, referring to the correspondence of 14th November 2011. Mr. Thompson advised that the cheque for One Million Dollars (\$1,000,000.00) had not lodged by the Claimant on the advice of the Defendants that there were insufficient funds to clear it. Mr. Thompson then goes on to say:

This was primarily the reason I advised my client to delay signing the agreement for sale since the full deposit was not paid. The One Million Dollars (\$1,000,000.00) remains unpaid to date, hence your client has not paid the deposit in full.

[31] When Ms. Rhoden's letter was shown to the 1st Defendant, he stated that he recalled both cheques referred to and admitted that they represented two further payments on the agreed deposit of the purchase price for the Property. He admitted that the cheque for One Million Dollars (\$1,000,000.00) was returned by the bank and that he had been so advised.

[32] From the documentary evidence, it appears to me that the signing of the agreement for sale by the Claimant was dependent on payment of the agreed deposit of Thirteen Million Dollars (\$13,000,000.00), One Million Dollars (\$1,000,000.00) of which remained outstanding on the 16th December 2011, some eleven (11) days after the 5th December 2011 which the Defendants give in their pleadings as the date of execution of the agreement for sale.

[33] The 1st Defendant admitted in cross examination that the cheque for One Million Dollars (\$1,000,000.00) was returned by the bank in January 2012 but was unable to recall if it was only replaced by him in March 2012, or the date when it was paid. It is the Defendants' case however, that the sum of Thirteen Million Dollars (\$13,000,000.00) was in fact paid in full by March 2012.

[34] In all the foregoing premises I find it to be more probable than not that the Defendants executed the agreement for sale before 5th December 2011, and that the Claimant did so on 14th March 2012 when the agreed deposit of Thirteen Million Dollars (\$13,000,000.00) was paid in full by the Defendants. In the result, 14th March 2012 being the date by which each of the parties had executed the agreement for sale - which caused it to take legal effect and be liable for stamp duty - I also find that it was the date on which the instrument was "*first executed*" within the meaning of section 32 (3)(a) of the SDA.

ii.

Did the Claimant have a contractual obligation to register the transfer of the Property to the Defendants and register the Mortgage?

[35] The Claimant acknowledges that the Stamp Duty which has been assessed on the parties' written agreement for sale has not been paid. It is his submission that it was a term of the written agreement for sale that the Defendants would pay a portion of the assessed duties and that they failed to do so. He attributes his failure to stamp the agreement for sale to the Defendants' failure to honour their obligation in this regard.

[36] In seeking to rely on the terms of the written agreement however, the Claimant encounters an insurmountable difficulty. Pursuant to section 36 of the SDA, where an agreement for sale has not been duly stamped according to law, it "... *shall [not] be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.*" The sale agreement was not stamped; accordingly, it was not received in evidence.

[37] In any event, it is the Defendants' position that they were never notified of their share of the stamping costs of the agreement for sale and their moiety of the said costs. They say further that no request or demand was made for payment of any portion of stamping costs in respect of the agreement for sale dated 5th December 2021 and that sufficient monies, "[~~\$~~36,000,000.00 or [~~\$~~49,000,000.00 had been paid to the vendor" on the agreement and the mortgage to cover their obligations in those regards. I am unable to agree with any of these contentions of the Defendants.

[38] Firstly, I have already found that the agreement for sale was "*first executed*" within the meaning of the SDA on 14th March 2012 and became chargeable to *ad valorem* duty on that date.

[39] Secondly, as I endeavour to demonstrate below, documentary evidence received in the proceedings pursuant to section 31E of the **Evidence Act** shows that the Defendants, who were then represented in the transaction by an attorney-at-law was advised of the duty assessed on the agreement for sale, the amount payable by them and the date by which the sums were to be remitted to the Claimant's attorneys-at-law for payment to the Stamp Commissioner.

[40] It is the common evidence that One Hundred and Fifteen Million Dollars (\$115,000,000.00) was agreed as the purchase price for the Property, payable by of a deposit of Thirteen Million Dollars (\$13,000,000.00) and the balance of One Hundred and Two Million Dollars (\$102,000,000.00) being discharged by way of a vendor's mortgage. The vendor's mortgage was signed on 5th December 2011 and I have found that the deposit had been paid in full by 14th March 2012, which date I have found is the date of "*first execution*" of the agreement for sale.

[41] Although the Claimant stated in his Reply to Amended Defence and Defence to Counterclaim that the agreement for sale was submitted for assessment for transfer tax and stamp duty on 5th April 2012, no evidence in proof thereof was led. There are several correspondences which passed between the attorneys-at-law for the Claimant and Defendants in the transaction however, which shed light on the parties' obligations in

respect of the payment of the stamp duty assessed on the agreement for sale. These were admitted in evidence pursuant to section 31E of the **Evidence Act**.

[42] By letter dated 23rd March 2012, Mr. Thompson wrote to Ms. Rhoden to advise that the shortfall on the deposit was paid by the Defendants on 14th March 2012 and that he would be submitting the agreement to the Stamp Commissioner for assessment of transfer tax and stamp duty within the period required by statute. Ms. Rhoden was advised that the sum of One Million Seven Hundred and Twenty-five Thousand Dollars (\$1,725,000,00) was due from the Defendants for stamp duty.

[43] On 9th May 2012 Mr. Thompson again wrote to Ms. Rhoden and advised that assessment of duties with respect to the sale of the Property had been made. He asked that a manager's cheque payable to the Stamp Commissioner in the amount of One Million Seven Hundred and Twenty-five Thousand Dollars (\$1,725,000,00) which was said to represent the Defendants' half of the stamp duty on the sale be remitted to him by 17th May 2012. There is no evidence of a response from Ms. Rhoden.

[44] On 18th May 2012 Mr. Thompson wrote to Ms. Rhoden, further to his letter of 9th May 2012 to advise that he had not received the Defendants' portion of the Stamp Duty which he described as "*now due*". A letter from Ms. Rhoden dated 26th March 2012 where she had apparently advised that the Defendants were aware of their financial obligations and intended to fulfil them was also referenced, although a copy of the same was not supplied.

[45] That notwithstanding, a copy of a letter from Ms. Rhoden dated 21st May 2012 was admitted in evidence, which references Mr. Thompson's of 18th May 2012. She states:

Our clients are seeking an extension of ten (10) days within which to provide you with their portion of the duties and that they are making every effort to pay the same.

As it relates to the outstanding mortgage instalments, we have been informed that our clients are in discussions with Mr. Miller, your client regarding the same. Further, that your client has advised them to pay the

outstanding monies required to stamp the agreement for sale before they pay the outstanding mortgage instalments.

[Emphasis added]

[46] Mr. Thompson responded by letter dated 22nd May 2012 and references the above from Ms. Rhoden thus.

I observe that you are seeking and extension of ten (10 (sic) days for your client to pay their portion of duties.

Counsel should know that it is not in my powers to extend the time within which Government duties are paid. This a matter for the Stamp Commissioner. As I understand the practice, if duties are not paid by the due date, it attracts penalty. I think all Counsel should be aware of this practice.

You were duly notified by me as to the time within which your clients should forward payment and same was not received by me. It is therefore not my prerogative to extend time for making payment.

I can only hope that your client will provide the funds for stamping the agreement before it attracts penalty.

(sic)

[47] On the premises of the foregoing and contrary to the submission of the Defendants, I find that a request or demand was in fact made of them in respect of their portion of the duties assessed on the agreement for sale which I have found was “*first executed*” within the meaning of the SDA on 14th March 2012; and that liability in this regard was accepted by the Defendants who requested time to pay.

[48] As to the Defendants’ contention that sufficient monies had been paid to the Claimant on the agreement and the mortgage to cover their obligations in those regards, it is without evidentiary support and is not accepted.

[49] It is indeed the case that the purchase price of One Hundred and Fifteen Million Dollars (\$115,000,000.00) which was agreed for the Property had been made by 14th March 2012. This was achieved by payment of a deposit of Thirteen Million Dollars (\$13,000,000.00) by the Defendants to the Claimant and the balance of One Hundred and Two Million Dollars (\$102,000,000.00) being discharged by vendor's mortgage.

[50] There is also accounting evidence - which was agreed by the defence as earlier indicated - of payments being made by the Defendants to the Claimant outside of payments made in respect of the agreed purchase price. These payments commenced on 5th December 2011 on the execution of the Mortgage and continued up to 19th June 2020 when the claim was first initiated, in the High Court Division of the Supreme Court. These payments totalled Thirty-Six Million and Forty Thousand Seven Hundred and Thirty-Three Dollars and Fifty-Seven Cents (\$36,040,733.57) and have been agreed as payments on the mortgage account. There is in fact no evidence of these sums being paid on account of stamp or other assessed duties.

[51] It was further submitted on behalf of the Defendants that monies had been paid to the Claimant on account of the deposit on execution of the agreement for sale, from which their portion of duties should have been paid. In that regard, the Defendants refer, by way of example, to sections 3 and 18 of the **Transfer Tax Act** (hereinafter called "the TTA") and **Workers Trust and Merchant Bank v Dojap Investments** [1993] 2 2 All ER 370.

[52] While section 3 of the TTA imposes transfer tax on the transferor who is the Claimant in this case, section 18 of Act prescribes that it is the transferee who is responsible for paying the tax charged to the Commissioner.

[53] I take judicial notice of the fact that payment of stamp duty is usually shared between the vendor and purchaser equally on transactions for the sale of land. Pursuant to section 32(3) of the SDA however, where a conveyance has not been or is not duly stamped, the vendee or transferee, the Defendants in this case would be liable to penalty.

[54] While the **Dojap** case is distinguishable from the instant - being concerned with whether a deposit of 25% of the purchase price of land was a reasonable and forfeitable deposit - the learning it offers on the character of a deposit by a purchaser on a contract for the sale of land, and the application of the TTA mechanism in Jamaica is instructive. In delivering the decision of the Board, Lord Browne-Wilkinson said this at p. 373, paras. d-e:

... Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.

[55] Of the deposit and the statutory machinery, the following appears at paras. f-a:

As their Lordships understood from the submissions made in argument, formerly the normal practice in Jamaica was to require a deposit of 10%. This was changed by the introduction of a transfer tax by the Transfer Tax Act 1971. Under that Act a transfer tax of 7.5% is payable on a transfer of land on sale. Although the tax is ultimately payable by the transferor (s 3), under s 18 it is collected from the transferee, ie the purchaser. As from 3 April 1984, any contract for the sale of land must contain a requirement for the payment of a deposit of at least 7.5% and the purchaser is required to pay this sum to the Commissioner of Stamp Duty and Transfer Tax: s 18(4). The purchaser is entitled to recover from the vendor the amount of the tax so paid either by way of deduction from the purchase price or by action: s 18(1).

Their Lordships were told that in practice this statutory machinery is not followed. Since the tax has to be paid within 30 days of the date of contract (failing which interest is payable by the vendor), a vendor is concerned to see that the tax is paid promptly. Accordingly what happens in practice is that the contractual deposit is increased to at least 17.5% and is paid by the purchaser to the vendor. The vendor then pays the tax. It is apparently

this practice that has caused the departure from the previously customary deposit of 10%.

If the contract of sale in respect of which the transfer tax is payable is not in fact completed, there is no liability to pay the tax: if such tax has been paid and the contract goes off, the tax can be recovered by the vendor and, by virtue of s 16(1) of the 1971 Act, any amount so refunded 'shall be dealt with according to the rights of the parties to the contract (including any requirement of a deposit implied therein under s 18(4))'.

[56] In **Dojap**, among the justifications sought to be given for requiring a deposit of 25% is that it was determined by reference to payments which would have been made on completion of the sale, including payment of stamp duty. The bank accepted however that the 25% deposit required far exceeded the amount which would have been required to cover maximum out of pocket expenses attendant on completion of the sale. The Board therefore agreed with the Court of Appeal that the forfeitable deposit of 25% of the purchase price required by the bank was not reasonable. The Board did recognize however that it would not be unreasonable for a vendor to require an advance which was sufficient to discharge liability for transfer tax on or before completion.

[57] In this case, the deposit of Thirteen Million Dollars (\$13,000,000.00) represents just over eleven 11.3% of the purchase price for the Property and is One Million Five Hundred Thousand Dollars (\$1,500,000.00) more than the customary deposit of 10%. No issue has been raised in these proceedings as to its reasonableness and the question of forfeiture does not arise.

[58] While I take judicial notice of the fact that in this jurisdiction stamp duty and transfer tax are usually paid from the deposit, it has not been established on the evidence that the use of any portion of the agreed deposit of Thirteen Million Dollars (\$13,000,000.00) was intended by the parties to be used by the Claimant to pay the Defendants' portion of the stamp duty assessed on the agreement for sale. On the contrary, the exchange of correspondence between the attorneys-at-law who represented the parties in the transaction on the very question of the payment of stamp duties - the contents of which

were set out with particularity earlier in the judgment - show otherwise. It suffices to say here that on 18th May 2012 Mr. Thompson wrote to Ms. Rhoden to advise that the Defendants' portion of the assessed stamp duty was "*now due*", having requested by his letter dated 9th May 2012 that the purchasers should let him have the sums in hand by 17th March 2012. Days later, Ms. Rhoden by letter dated 21st May 2012 wrote on behalf of the Defendants to seek an extension of ten (10) days within which to provide their portion of the duties, which she advised they were making every effort to pay.

[59] The 1st Defendant admitted in cross examination that Ms. Rhoden's letter was written on behalf of the Defendants. When the contents of the letter relative to the payment of stamp duty and request for time to pay were read out to him and he was asked if he requested an extension of ten (10) days to pay purchasers' portion of the stamp duty through his attorney-at-law, he does not specifically deny it but said he did not remember that. When asked if he had any reason to believe that Ms. Rhoden would have written the letter and made the request if they had not requested an extension, he said he had no reason to believe so.

[60] I would not imagine that the attorney-at-law for the Defendants in the sale who would be an officer of this court would make such a request without being instructed to do so, or refuse to demur if the Defendants did not have an obligation to pay the stamp duty in the proportion which Mr. Thompson stated was due by them. In the absence of protest by Ms. Rhoden and the presence of a request to extend the time within which to pay the sum, I find it to be more probable than not that it was the agreement of the parties that the Defendants would pay one half of the stamp duty assessed on the agreement for sale. I also find that the Defendants were aware of their obligation to pay one half of the stamp duty assessed on the agreement for sale, which was executed on 14th March 2012. There is no evidence of the sums having been paid by the Defendants to date.

[61] In all these premises, I find that any obligation which the Claimant would have had to register the transfer of the Property, consequent on the execution of the agreement for sale and to register the Mortgage for which the Defendants are the mortgagors, has not

crystalized to give rise to a breach by the Claimant in failing to register the instruments which are required to complete the transaction.

iii.

Is there an enforceable agreement between the Claimant and the Defendants for the sale of the Property?

[62] It is settled law that an agreement for the sale of land must be done in writing, it is equally well established that equity regards as done what should have been done. Consequently, absent compliance with the requirement for writing, where there are sufficient acts of part performance, the law will regard a contract for sale of land as enforceable. As observed by the learned authors of **Elements of Land Law**¹

The doctrine of part performance rendered a contract enforceable, even in the absence of a written memorandum, where the claimant had done acts which, on a balance of probability, were referable to and explicable only in terms of the existence of a contract in relation to land. Although these acts did not need to be such as would demonstrate the precise terms of the contract, part performance was premised on the current existence of an actual contract. Acts of reliance were irrelevant if performed on the footing of mere negotiations which might or might not ripen later into contract.

[63] As earlier stated, the parties' written agreement was not received in evidence on account that the requirement for stamping under the **SDA** was not met.

¹ K. Gray and S.F. Gray, 5th Edn., Oxford, 2009, para. 8.1.40

[64] It is nevertheless established on the evidence that negotiations for the sale of the Property commenced sometime in 2010 and that a purchase price of One Hundred and Fifteen Million Dollars (\$115,000,000.00) was agreed by the parties. That purchase price was payable by way of deposit by the Defendants of Thirteen Million Dollars (\$13,000,000.00), with the balance of One Hundred and Two Million Dollars (\$102,000,000.00) being discharged by way of a vendor's mortgage. Consequent on that agreement the Defendants were put in possession of the Property in December 2010. The deposit was paid by the 1st Defendant in instalments over a period of fourteen (14) months beginning in December 2010 and culminating on 14th March 2012; and the stamped Mortgage pursuant to which the terms of the vendor's mortgage were agreed, was executed on 5th December 2011.

[65] In my view, the foregoing evidence is demonstrative of sufficient acts of part performance which point to the existence of an enforceable agreement for the sale of Property between the parties, and I so find.

iv.

Is the unregistered Mortgage enforceable?

[66] The Mortgage executed by the parties was stamped and accordingly admitted in evidence.

[67] It is expressly stated as being made under the **Registration of Titles Act** (hereinafter called the "**ROTA**"), section 103 of which provides that the proprietor of land which is under the operation of the Act may sign a mortgage in respect of the said land, in the form of the Eighth Schedule. When registered, such a mortgage has the effect as a security but does not operate as a transfer of the land mortgaged, as provided by section 105 of the Act. The Mortgage has not been registered.

[68] That notwithstanding, as observed by Simmons JA with whom Brooks P and Dunbar-Green JA (then acting) agreed in **China Sinopharm International Corporation v Rivi Gardner & Associates** [2023] JMCA Civ 12 at para. 34, "*[a] mortgage is a security given to secure the repayment of a loan. It is contractual in nature and where it is*

unregistered, an equitable mortgage is created...” Support for this position was found in the dictum of Brooks JA (as he then was) in **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes, deceased) v Cowell Anthony Forbes and Miller’s Liquor Store (Dist) Limited** [2016] JMCA Civ 1, on which the Claimant relies. Also cited with approval, at para. 35 of the judgment of Simmons JA is the following statement of the learned authors of **Fisher & Lightwood’s Law of Mortgage**, “[a]n equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court”.

[69] **Halsbury’s Law of England** (Volume 77 (2021)), para. 104 puts it this way.

An equitable mortgage is a specifically enforceable contract to create a legal mortgage. It creates a charge on the property but does not convey any legal estate or interest to the creditor; such a charge amounts to an equitable interest. Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the court’s equitable jurisdiction...

[70] On the basis of the foregoing, I find that the Mortgage, though unregistered is a contract between the parties which is enforceable as an equitable mortgage.

v.

Is the Claimant entitled to the substantive relief sought on the claim?

[71] The Claimant claims several substantive reliefs, which I will address below.

Arrears of mortgage up to June 2020

[72] Among other remedies, clause 1 (i) of the Mortgage - which will be reproduced later in the judgment - provides that monies which are secured by it, which have become due and payable, and which remain unpaid in full, are recoverable by suit.

[73] While there was some dispute on the pleadings as to the amount of the Defendants’ indebtedness under the mortgage as at June 2020, it was agreed by the

parties at trial that the mortgage arrears up to that period totaled Fifty-Two Million Six Hundred and Eighty-Eight Thousand Eight Hundred and Twenty-Eight Dollars and Ninety-One Cents (\$52,688,828.91). This followed the admission of the accounting evidence supplied by the accounting expert instructed in the claim. This figure was calculated based on the agreed monthly mortgage payments of principal and interest in the amount of Eight Hundred and Fifty-Three Thousand One Hundred and Sixty-Eight Dollars and Eighty-Seven Cents (\$853,168.87).

[74] In the premises, I find that the Claimant is entitled to the sum of Fifty-Two Million Six Hundred and Eighty-Eight Thousand Eight Hundred and Twenty-Eight Dollars and Ninety-One Cents (\$52,688,828.91) being arrears of mortgage due from the Defendants up to June 2020.

Recovery of possession of the Property from the Defendants and Release from the Mortgage

[75] The Claimant specifically asks for “[r]ecovery of possession of the [Property] from the Defendants” and for “[a]n order that [he] be released from the mortgage.” Both reliefs may be conveniently dealt with together.

[76] The Defendants in their Amended Defence and Counterclaim say that in claiming arrears on the mortgage and possession of the Property, the Claimant is seeking “*judicial extinction of the equity of redemption so that he will be wrongfully entitled to retain the fee simple interest in the property.*” The Claimant denies that this is his objective in his Reply to Amended Defence and Counterclaim and says that “*he is seeking to recover the property from the Defendants in order to exercise the power of sale which he has under the Instrument of Mortgage, and to sell the property and satisfy the mortgage loan in full and pay over to the Defendants whatever is left after the mortgage is fully satisfied.*”

[77] To that end, the Claimant submits as follows in written submissions.

29. Paragraph (1) (i) of the Instrument of Mortgage provides “that the power of sale and of distress and of appointing a receiver and all ancillary powers conferred upon and exercisable by the Mortgagee by the

Registration of Titles Act shall be conferred upon and be exercisable by the Mortgagee under this instrument...”

30. Paragraph 1 (m) of the Instrument of Mortgage also provides that, “it shall be lawful for the Mortgagee to sue for and recover from the Mortgagors any principal, interest, late charge, fine or other monies which may remain due and owing to the Mortgagee before or after any sale by the Mortgager of the mortgaged premises under the powers of sale created herein.”

31. The fact that the Defendants are in arrears of the mortgage payment for so many months entitles the Claimant to sell the property and settle the outstanding mortgage due under the Instrument of Mortgage.

[78] Neither counsel cited authorities on the reliefs which are available to an equitable mortgage, and I have found none which suggest that an equitable mortgagee is entitled to a “release” from the mortgage where the equitable mortgagor is in default of mortgage payments. During oral arguments, Counsel Mr. Thompson was specifically asked to address the court on the two reliefs under discussion and it was indicated that the reliefs were addressed by paragraphs 29-31 of the Claimant’s written submissions, which I have earlier. It therefore appears to me and was in fact confirmed in oral submissions that what the Claimant seeks is possession of the Property for the purpose of selling the same in exercise of the power of sale under the Mortgage. The request for “*release from the mortgage*” is therefore approached in that context.

[79] As to the remedies available to an equitable mortgagee, I find assistance in **Halsbury’s Law of England**, para. 248 of which states:

An equitable mortgagee is entitled to possession if there is a special agreement or the court so orders. He may appoint a receiver if empowered to do so expressly or by statute; otherwise an application to the court is necessary. If an express or statutory power exists he may sell the property and may have express powers enabling him to convey the legal estate. He may obtain an order for sale, specific performance, or foreclosure; and he may, instead of proceeding against the security, bring a claim on the personal covenant.

[80] Of the entitlement to possession in particular, the words of Harman J in **Barclays Bank Ltd. v Bird** [1954] Ch. 274, 280 are instructive.

Any... equitable mortgagee is entitled, to come to the court and take out a summons asking for possession. It does not matter from that point of view that the mortgage is equitable. The only limitation on an equitable mortgagee in that respect is that he has no right to possession until the court gives it to him.

[81] The learned editors of **Halsbury's** observe however, that:

584. Possession does not provide the mortgagee with absolute ownership of the security. *The mortgagee does not have an unfettered right to deal with the property as the mortgagee sees fit even though the mortgagee may become responsible for liabilities associated with it... This is to be contrasted with the position under foreclosure.*

...

586. Possession results in the mortgagee becoming liable to comply with the duties imposed on mortgagees in possession by the common law. These duties are owed not only to the mortgagor but also to all other persons who are interested in the equity of redemption... *These duties are potentially quite onerous (especially that of being liable to account strictly) and are capable of significantly hampering the mortgagee's ability to deal with the security. They do not arise if the mortgagee chooses to foreclose or to appoint a receiver who is deemed to be the agent of the mortgagor.*

[Emphasis added]

[82] As to the duties of the mortgagee in possession at common law, they are stated thus by the learned editors at para. 586.2:

A mortgagee in possession is liable to account not only for the income the mortgagee actually receives from the property but also for the income the mortgagee should have received if not for wilful neglect or default. Where the property is let at the date of entry into possession, the mortgagee is liable to account at the rate of the rent reserved as long

as it was capable of being recovered with due diligence. Where the property is unlet at the date of entry into possession, the mortgagee is under a duty to use due diligence to let it at a full rent. In default, the mortgagee is liable to account for the rent that should have been obtained. If the mortgagee enters into actual occupation of the security the mortgagee is liable to account for a fair occupation rent. In the case of a leasehold security, a mortgagee in possession is liable to account on a similar basis in relation to any forfeiture occasioned by the mortgagee's default. Here the amount to be accounted for represents the value lost.

[83] Outside of the above stated duties,

587. Once the mortgagee has entered into possession, they are unable to easily withdraw however onerous the mortgagee finds the position to be. Certainly, in the absence of special circumstances, the court does not assist the mortgagee to do so by ordering the appointment of a receiver. If the mortgagee has an express or statutory power, the mortgagee is able to withdraw from possession by appointing a receiver without recourse to the court. In the absence of a court order or the co-operation of the mortgagor, even a transfer of the security does not absolve the mortgagee from the liability to account etc.

[84] It is also stated at para. 571, that

Although the primary purpose of possession is likely to be to facilitate a sale, the mere fact that the mortgagee has entered into possession does not necessarily place the mortgagee under an obligation to sell. The mortgagee is entitled to enforce the right to possession as long as the mortgagee does so for the protection or enforcement of the security and not from some ulterior or improper motive...

[85] The Defendants have wisely conceded in their written submissions that a mortgagee can take possession as one of his remedies, but that he would have to endure the liabilities of a mortgagee in possession. In the face of this concession, the Defendants' own admission that they have defaulted on their mortgage payments for a

substantial amount up to June 2020 (which default continues as disclosed on the evidence), and their admission of challenges which have prevented and continue to prevent them from honouring their mortgage obligations - I can see no reason to refuse the Claimant's claim for possession of the Property to enable him to sell and realize the security.

vi.

Are the Defendants entitled to the substantive relief sought on their counterclaim?

[86] The Defendants pray for a number of reliefs on their counterclaim, each of which are addressed subsequently.

Declaration that Claimant is in breach of his contractual obligation to register transfer and mortgage, and damages for breach of contract

[87] It is contended on behalf of the Defendants that the Claimant is in breach of the parties' agreement in failing to register the transfer of the Property to them and to register the vendor's mortgage. This is premised on the argument that initial payments having been made to the Claimant, all that was left to be paid was covered by the mortgage and should have been paid by the Claimant. The Defendants also ask for damages for breach of contract.

[88] It is the Claimant's response that the Defendants have failed to show that he has breached any term of the parties' agreement for the sale of the Property which would cause them to be entitled to damages. There is merit in the submission.

[89] Pursuant to section 88 of the ROTA,

The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto;... Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which

he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall there upon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, of the original lessee, mortgagee or annuitant.

[90] So far as is relevant, sections 103 and 105 of the Act provide as follows for mortgages:

103. The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Eighth Schedule, and may charge the same with the payment of an annuity by signing a charge thereof in the form in the Ninth Schedule.

...

105. A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or charged; ...

[91] Pursuant to section 32(3) of the SDA, “*transfers*”, like agreements for the sale of land and mortgages are chargeable with *ad valorem* duty.

[92] As indicated elsewhere in this judgment, while section 3 of the TTA imposes transfer tax on the transferor, section 18 prescribes that it is the transferee who is responsible for paying the tax charged to the Commissioner.

[93] So far as is relevant to these proceedings, section 33 (1) of the TTA also provides that,

In the case of the transfer of any property, the transferee may –

(a) upon payment of tax in respect thereof, apply to the Commissioner of Inland Revenue for a certificate that all tax charged in that respect has been paid; or

(b) apply to the Commissioner for a certificate that no tax is payable in respect thereof by the transferee pursuant to section 18.

[94] Judicial notice is taken of the fact that where there is a written agreement for sale of land, it is the agreement which is submitted to the Stamp Office for assessment of transfer tax and stamp duty. Both duties are aggregated. Upon payment of the assessed duties, the agreement for sale is stamped with the duties charged. After the stamping of the agreement, the instrument of transfer is executed by the parties and submitted to the Stamp Office for certification and cross-stamping. The payment of the transfer tax and stamp duty is noted on the instrument and signed by the Commissioner. Thereafter the transfer instrument is lodged with the Registrar of Titles for registration. Where the sale is financed by a mortgage, the registrable instruments, that is, the transfer instrument endorsed by the Commissioner, title and the mortgage document is sent to the Titles Office for registration.

[95] There is no evidence of an instrument of transfer being executed by the parties and while the Mortgage has been stamped, it has not been registered.

[96] While I have found that then purchase price for the Property has been paid in full by way of deposit and vendor's mortgage, and that monies have been paid by the Defendants on the mortgage account, no portion of those sums represent an advance to the Claimant to discharge the Defendants' liability for stamp duty or other out of pocket expenses which are necessary to complete the transfer of the Property or the registration of the Mortgage. I have also specifically found that the Defendants had an obligation to pay one half of the duties assessed for the stamping the agreement for sale executed on 14th March 2012, which obligation they have not honoured to date, despite being aware of the same. It is the Defendants in my view who have failed to do what is required to effect registration of a transfer and the Mortgage.

[97] In these premises the entreaty of the Defendants for an order that the Claimant is in breach of his contractual obligation to register the transfer and mortgage; and for an award of damages for breach of contract are refused.

Decree of specific performance commanding Claimant to transfer the Property to the Defendants

[98] Mr. Golding submitted on behalf of the Defendants, that the court should make an order for specific performance which would require the Claimant to transfer the Property to them and register the mortgage to ensure that the parties' respective interests are reflected on the certificate of title for the Property. This is premised on the contention that although the Claimant has the legal interest in the Property by virtue of his continued registration on title as proprietor, the Defendants are entitled to the beneficial interest.

[99] The Claimant accepts that the Defendants are entitled to the beneficial interest in the Property, but Mr. Thompson submitted that the Defendants are not entitled to an order of specific performance as they have failed to perform the essential terms of the parties' agreement and have not demonstrated by their conduct, that they are willing and able to perform their obligations under it. I find the submission to be meritorious.

[100] The Claimant cites several authorities in support of his submission, all of which are factual dissimilar to the instant case, rendering any detailed recitation of their facts generally unnecessary. The cases establish some principles of general application however, which are relevant to resolving the issue which now confronts the court.

[101] The first authority cited is the decision of the Privy Council in **Australian Hardwoods Pty Ltd v Commissioner for Railways** [1961] 1 All ER 737, which concerned, among other things, whether specific performance of a term of an agreement to request transfer of an occupation permit and sawmill licence would be granted where the option to which the request related was exercised after breaches of the agreement and notice determining the said agreement. Lord Radcliffe said this at p. 742 of the equitable principles which apply to a claim for specific performance:

... It might be a difficult task to enumerate all the separate aspects in which the claim [for specific performance] is liable to be defeated on grounds of equity. It is sufficient for the decision of this case to identify two of them. A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations... Secondly, where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are in fact part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced.

[102] Chappell and others v The Times Newspapers Ltd and others [1975] 2 All ER 233 was also called in aid. Except that there was debate as to the appropriateness of an order for specific performance for contracts of employment and that the second of Lord Radcliffe's principles in **Australian Hardwoods Pty Ltd** was cited with approval, the case does little to advance the Claimant's submission.

[103] In submitting that the Defendants have failed to perform the essential terms of the parties' agreement and are not entitled to specific performance as a result, the Claimant relies on **Tildesley v Clarkson** (1862) 30 Beav 419 and **Modlen v Snowball** (1861) 4 DE G.F. & J. 143.

[104] In **Tildesley** the plaintiff sought specific performance of an agreement of a draft lease, the terms of which had been approved, for the defendant to take the lease of a house. It was a condition of the lease that the plaintiff should finish the house and give possession to the defendant. The house was finished, and possession was given to the plaintiff who made adornments to portions of it and commenced residence. The defendant having lived at the house for some time complained that the plaintiff had not performed his part of the agreement and refused to execute the lease. He subsequently removed from the house before expiration of the lease term. Between the agreement and removal of the defendant from the premises, approximately six months had passed.

Sir Romilly MR found that the covenants to repair which were to be inserted in the lease would fall heavily on the defendant in the present state of the house and in the circumstances, he could not force the defendant to perform the lease. What the defendant reasonably expected and was entitled to expect when he contracted was not what he found at the house.

[105] Modlen is an appeal from the dismissal with costs of a bill for specific performance of an agreement for sale by which the defendant agreed to take a lease of a public house from the plaintiff, on condition that the plaintiff could obtain a "retail licence". If the plaintiff could not obtain the licence for any reason, the defendant was at liberty to quit the premises at any time. The defendant entered into possession but could not obtain a licence without giving an undertaking to the magistrates that there should not be "drawing over the counter", which was a material prohibition. The court found that the bill for specific performance had been properly dismissed but that it should have been dismissed without costs. "Retail licence" was given its ordinary meaning - a licence to sell in retail without condition. Since the defendant could not obtain the retail licence without the condition imposed by the magistrates, he could not have what was stipulated in the agreement. In consequence, there could be no decree for specific performance.

[106] It is a feature of both **Tildesley** and **Modlen** that the parties against whom the orders for specific performance were sought had not in fact received what they reasonably expected to obtain from their respective agreements. There was effectively a failure of the subject matter of the agreements in both cases. Accordingly, the cases are distinguishable and do not assist the Claimant.

[107] It is indeed the case that the Defendants failed in their obligation to pay their portion of the stamp duty assessed on the agreement for sale, and that the stamping of the agreement was necessary to constitute an agreement for sale in law. While their conduct accounts for the Claimant's failure to stamp the agreement for sale, in equity there is an enforceable agreement between the parties for the sale of the Property based on sufficient acts of part performance. The property which is the subject of the agreement for sale therefore subsists. The Defendants have not demonstrated that it is not that which

they intended to purchase, and the Claimant does not suggest that he intended to sell something else.

[108] The evidence led on behalf of the Defendants is that they were coerced into purchasing the Property by the Claimant who misrepresented to them at the time of purchase that the Property was a profitable going concern. In consequence, they say they have had to expend monies to effect repairs to the Property and that since taking possession, the hotel has consistently operated at a loss. This is one of the reasons given by the Defendants for their financial difficulties in honouring their mortgage obligations.

[109] There is no evidence however of the Defendants seeking to rescind the contract for misrepresentation and although they made a claim for damages, it was premised upon the Claimant's alleged breach of contract in failing to register a transfer and the Mortgage. Further, while it is the evidence on both sides that some work has been done to the Property after the Defendants took possession, the Defendants have been and remain in possession of the Property from December 2010 but did not seek to get out of the agreement. In fact, it was some months after they were put in possession that the parties sought to formalise their agreement to which the written agreement for sale and Mortgage went in aid. Further still, by the very remedy sought on the counterclaim, the Defendants have asked the court to enforce the agreement for the sale of the Property. In these circumstances, while the Defendants may believe after many years of reflection that they made a bad bargain, I find it impossible to conclude that their financial difficulties are the result of misrepresentation by the Claimant of the status of the Property sold.

[110] The Defendants also say that the imposition of state measures such as curfews and lockdowns during the Covid-19 pandemic and the onset of a chronic illness of the 1st Defendant - who oversaw the day to day operations of the hotel - in early 2020 have negatively affected the operations of the hotel and contributes to the Defendants' admitted financial difficulties. This evidence was not challenged and is accepted.

[111] In the witness statement of the 1st Defendant dated and filed the 18th and 20th May 2022 which was admitted as his evidence, he indicates his desire to sell the Property and pay to the Claimant the monies owed to him under the mortgage but that he and the 2nd Defendant have been unable to so because the legal interest in the property continues to reside in the Claimant who has withheld his consent for them to sell.

[112] The Claimant in his witness statement dated and filed 18th and 19th May 2022, which was accepted as his evidence in chief stated that “[f]rom sometime in 2012 onwards, I have repeatedly asked the Defendants to give up possession of the property but as they were not serious about their obligations, but they never gave up the property.” Nowhere does he say that he sought possession for the purpose of selling the Property to recover monies owed to him and remit the remainder of the sale price to the Defendants.

[113] When the Claimant was asked in cross examination if the 1st Defendant had ever approached him with the suggestion that they should both find someone to sell the property, he said he had only done so on the last occasion they were in court, although he had suggested to the 1st Defendant for years that they should try to sell the Property. He denied that the 1st Defendant had ever requested the title to the Property to sell the same. That was followed by the exchange below:

Mr. Golding: Even since the matter came to court Mr. Smith approached you and said let you and him get someone to buy the property?

Claimant: No. At one point he told me to give him the title to sell the place.

Mr. Golding: He came to you to borrow the title, sell and do what with the money?

Claimant: I don't know Sir. That's why I said no.

Mr. Golding: You didn't say let my lawyer have conduct of the sale?

Claimant: No. Not in those words. I told him to find the buyer and I will sell the place.

Mr. Golding: In 2020, he came to you, and you told him it's your premises and it's not his decision to sell it?

Claimant: It's my place. He can't sell it.

Mr. Golding: He didn't say he was going to sell it, he said let you and him find someone to buy the place.

Claimant: No Sir.

Mr. Golding: That's exactly what he said.

Claimant: No Sir.

[114] The Claimant does not deny that he was approached in 2020 with a suggestion from the purchasers through the 1st Defendant about selling the Property. He expresses, quite tellingly I believe, that it is his place, and the 1st Defendant cannot sell it.

[115] From the Claimant's evidence in chief that he has repeatedly asked the Defendants to give up possession of the Property because they were not serious about their obligations, but that they have never given up the Property; his claim for an order of possession simpliciter; and the exchange in cross examination which I have reproduced - and there were others which I do not find it necessary to set out - the Claimant does not appear to accept that the Defendants who have discharged the agreed purchase price in full by way of deposit and mortgage financing are entitled to the beneficial interest in the Property, that in providing a vendor's mortgage he stands in the position of a mortgagee (albeit equitable), and that the rights and obligations of the parties are adjusted in consequence.

[116] In all these circumstances I find it to be more probable than not, that the Defendants have approached the Claimant as far back as 2020 with a view to having the Property sold in order that they could discharge their financial obligations to the Claimant and recover what remains, but that the Claimant in the belief - however arrived at - that he is entitled to the entirety of the interest in the Property and therefore possession of it simpliciter, was not amenable to the suggestion.

[117] I am of the view that the Defendants have a genuine desire to honour their financial obligations to the Claimant but have found themselves unable to pay due to financial hardship. I would not agree with the Claimant's characterisation of their failure to honour these obligations as "wanton disregard" of those responsibilities.

[118] Having found by this litigation, that there is an enforceable agreement for sale which is evidenced by sufficient acts of part performance, that there is an enforceable equitable mortgage, and that the Defendants have paid the agreed purchase price of One Hundred and Fifteen Million Dollars (\$115,000,000.00) for the Property by way of the deposit of Thirteen Million Dollars (\$13,000,000.00), with the balance of One Hundred and Two Million Dollars (\$102,000,000.00) being discharged by way of the vendor's mortgage, an instrument of transfer could in fact be executed and registered to enable the certificate of title to reflect the Defendants' Interest in the Property and registration of the Mortgage. Whether the Defendants should obtain the order for specific performance is another question.

[119] As transferees of the Property and mortgagors under the Mortgage, the Defendants would be required to pay a portion of any stamp duty assessed on a registrable instrument of transfer and to contribute to the cost of registering the Mortgage. The Defendants have neither stated nor demonstrated that they are now willing and able to contribute their portion of the monies - including that which would be owed to the Revenue - which would now be required to effect the registration of a transfer of the Property to them and by extension, the Mortgage. I therefore refuse the order for specific performance.

[120] Before moving to the counterclaim for the preparation and furnishing of a statement of the mortgage account there is one other matter which requires address.

[121] Although not sought on the claim or counterclaim, in light of the observations made of the Claimant as to the parties' respective interests in the Property, and my finding that he is entitled to an order of possession which would enable him to sell the Property, it is my view that certain declarations as to the status of the transactions between the parties

and the positions they hold in respect of the Property should be among the orders made, in exercise of the courts inherent jurisdiction to grant declaratory reliefs.

Order for the Claimant to prepare and furnish the Defendants with a statement of the mortgage account

[122] As earlier indicated, the accounting for mortgage arrears up to June 2020 when the Claimant initiated his claim was supplied and agreed by the Defendants at trial. An order compelling the Claimant to prepare and furnish the latter with a statement of the mortgage account in order to determine the claim and counterclaim is therefore unnecessary. The relief is accordingly refused.

[123] It is in all the foregoing circumstances that I determine the claim and counterclaim for the Claimant and make the orders below.

ORDER

1. There is an enforceable agreement for sale in equity between the Claimant and the Defendants in respect of land part of Seven Corners in the parish of St Elizabeth which is comprised in Certificate of Title registered at Volume 1196 Folio 301 of the Register Book of Titles.
2. The Mortgage Under the Registration of Titles Act which was signed on 5th December 2011 is enforceable as an equitable mortgage.
3. Judgment for the Claimant in the amount of **Fifty-Two Million Six Hundred and Eighty-Eight Thousand Eight Hundred and Twenty-Eight Dollars and Ninety-One Cents (\$52,688,828.91)** being arrears of mortgage due from the Defendants up to June 2020.
4. The Claimant equitable mortgagee is entitled to recover possession from the Defendants, land part of Seven Corners in the parish of St Elizabeth which is

comprised in Certificate of Title registered at Volume 1196 Folio 301 of the Register Book of Titles.

5. The Claimant's claim for an order that he be released from the mortgage is dismissed.
6. The Defendants' counterclaim for a declaration that the Claimant is in breach of his contractual obligation to register a transfer of the Property and the mortgage is dismissed.
7. The Defendants' counterclaim for a decree of specific performance commanding the Claimant to transfer the property registered at Volume 1196 Folio 301 of the Register of Titles to them is dismissed.
8. The Defendants' counterclaim for Damages for breach of contract is dismissed.
9. The Defendants' claim for an order that the Claimant is to prepare and furnish them with a statement of the mortgage account is dismissed.
10. Costs to the Claimant against the Defendants on the claim and counterclaim.
11. The Attorneys-at-Law for the Claimant are to prepare, file and serve this Order.

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Carole Barnaby
Puisne Judge