[2021] JMSC CIV. 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 2341 OF 2004

BETWEEN	**COURTNEY ROBINSON (Executor of the Estate of Herman L. Denton, deceased)**	**APPLICANT**
AND	**DENNIS WRIGHT**	**1ST RESPONDENT**
AND	**LISA ROSE WRIGHT**	**2ND RESPONDENT**

IN CHAMBERS

Ms. Tamika Smith instructed by Ramsay Smith Attorneys-at-law, and Mr. Stokely Marshall for the Applicant

Mr. Charles Piper Q.C. and Mr. D'Angelo Foster instructed by Charles E. Piper and Associates for the Respondents

November 24 and December 11, 2020, February 26, April 16, and July 16, 2021.

Application to extend time to comply with Order of the Court - Agreement for Sale of Land – Specific Performance – Willing, Ready and Able to Complete - Payment of Interest and/or Rent - Good Title - Wilful Default - Encroachment and Incumbrances – Caveat - Vacant Possession - Costs

ICOLIN REID J. (AG.)

[1] This application finds its genesis in a failure to complete an agreement for sale of certain property. The property consists of a duplex dwelling house located at Lot

74-82 Constant Spring Road, in the parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 910 Folio 8 of the Register Book of Titles. Consequent on the failure to complete the agreement for sale, a claim was filed before this court and certain orders were made by McIntosh J on July 20, 2006. The orders made by McIntosh J were not enforced and so Mr Courtney Robinson (the Applicant) filed a notice of application seeking the following orders:

1. *That the time for the enforcement of the Order on the Notice of Application for Court Order granted on July 20, 2006 be extended;*

2. *That the 1st and 2nd Claimants complete the sale in compliance with said Order;*

3. *That the 1st and 2nd Claimants pay interest for the period of default in completion of the Agreement for Sale dated February 6th, 2002;*

4. *That the 1st and 2nd Claimants pay mesne profit or rent for the period February 2002 to present;*

5. *That the caveat lodged by the Claimants be removed from the Duplicate Certificate of Title registered at Volume 910 Folio 8; or alternatively*

6. *A Declaration that the Claimants have no further interest in the property;*

7. *Costs; and*

8. *Such other Orders or reliefs as this Honourable Court deems fit.*

[2] A determination in this application requires consideration of whether the Applicant was ready, willing and able to transfer good title to Mr. Dennis Wright and Mrs. Lisa Rose Wright (hereinafter called “the Wrights”); whether the Wrights had failed, neglected, or refused to complete the terms of the contract; and whether the Wrights are required to pay interest on the balance purchase price (pursuant to the agreement for sale) and rent. A review of the facts will also aid in my determination and takes place below.

BACKGROUND

[3] Mr. Herman L. Denton entered into an agreement for the sale of the property to Michelle Chen, Thelma Agatha Chen and Errol Aphanso Chen (the Chens) in November 1997. The Chens were placed into possession of a portion of the property. They, however, failed to meet their contractual obligations and as such, Mr. Denton considered their contract to have been terminated.

[4] Mr Denton subsequently entered into a second Agreement for Sale with the Wrights on February 6, 2002. The agreed sale price was $4,500,000.00. A deposit of Six Hundred and Seventy-Five Thousand Dollars ($675,000.00) was paid upon signing of the contract by the purchasers. The balance was to be secured by way of mortgage from a reputable financial institution. The date for completion was on or before the expiration of 90 days after executing the Agreement for Sale and on payment in full of all monies payable by the purchasers.

[5] The relevant portions of the agreement for sale are outlined below:

> *"INCUBRANCES, RESERVATIONS, RESTRICTIONS, RESTRICTIVE COVENANTS AND/OR EASEMENTS (IF ANY)*
>
> *Free from incumbrances other than the restrictive covenants and easements (if any) endorsed on the Certificate of Title and such easements as are obvious and apparent.*
>
> *POSSESSION*
>
> *Vacant on completion*
>
> *…*
>
> *SPECIAL CONDITIONS*
>
> *…*
>
> *2. The property sold will be sold as the same shall stand at the date hereof without reference to extent or condition respectively and the Purchasers are buying the same as is where is and if any error, mis-statement, mis-calculation or omission shall arise the same shall not annul the sale nor*

entitle the Purchasers to be discharged from his purchase nor shall any compensation be payable or allowed in respect thereof.

…

7. It is hereby agreed by the Vendor and the Purchasers that the Purchasers shall pay interest at the rate of sixteen percentum (16%) per annum on all monies payable hereunder which are not paid on the date or dates on which such payments were due and interest shall be computed from such due date(s) to the date(s) of actual payment."

[6] The Wrights were in occupation of one side of the property when the second sale agreement was executed.

[7] The sale was not completed within the 90 days as stipulated by the Agreement for Sale. There were several reasons for the delay. One such reason was that a surveyor's report dated April 4, 2002, revealed a boundary encroachment of 19 feet. To address this issue, the Wrights' attorney wrote to Mr Denton's attorney requesting an undertaking to be given to the Jamaica National Building Society (JNBS) to rectify the encroachment so that they could secure a mortgage from that institution. On July 4, 2002, Mr Denton's attorney-at-law gave his undertaking to the JNBS in the following terms "*We give our undertaking, however, to establish a fence in the designated boundary line and that this rectification will be done before the completion of the sale*".

[8] The Chens, thereafter, lodged a caveat against the property on November 5, 2002, claiming an equitable interest as purchasers and forbidding the transfer of the said property to anyone. They remained in possession of one side of the property and were under an agreement to pay rent in the sum of $20,000.00 per month from October 2002.

[9] JNBS subsequently gave a letter of commitment to the Wrights for $3,500,000.00 and an undertaking to Mr Denton's attorney-at-law on January 14, 2003. This undertaking resulted in the purchasers having a balance of $476,370.00.

[10] On May 5, 2003, Mr Denton's attorney-at-law acknowledged the payment of $150,000.00 and requested the balance of $325,000 and rent of $220,000.00

before they would send the mortgage documents to JNBS. On August 20, 2003, the Wrights presented an undertaking from the National Commercial Bank (NCB) for the outstanding $325,000.00. This undertaking was to expire on November 7, 2003.

[11] For three years it seemed that there was no activity between the parties. On May 10, 2006, the Wrights obtained another undertaking from the NCB for the sum of $325,000.00. On May 29, 2006, the Wrights made an Application for Court Orders. This application was heard by McIntosh J who on July 20, 2006, ordered specific performance of the second agreement for sale.

[12] Mr Denton died on December 23, 2006. The Wrights again applied to the court for certain orders which resulted in the Applicant being appointed as the personal representative of the estate of Mr Denton (his father) on April 25, 2008.

[13] As Executor of Mr. Denton's estate, the Applicant brought an action against the Chens in a claim form filed on February 18, 2011. This was to enable him to comply with the Order for Specific Performance and allow for the delivery of vacant possession of the property to the Wrights.

[14] Mr. Robinson sought orders to include-

> *"a. A Declaration that the Agreement for Sale between the Chens and his father, Herman L. Denton, the deceased was cancelled.*
>
> *b. An order that the Chens were owing rental totalling $3,180,000.00 from October 2002 to January 2011 and continuing until the final determination of the matter.*
>
> *c. An order that the Chens quit and deliver up possession of the property forthwith.*
>
> *d. Damages for Breach of Contract."*

[15] The Chens counterclaimed and submitted that the orders sought should be denied and they in turn asked the court for orders to include that they have a beneficial interest in the property consequent on contracts executed by the parties.

[16] On the claim, the Court found that -

> *"a. the Agreement for Sale between the Chens and Herman L. Denton (deceased) was frustrated by the order of Specific Performance granted to Dennis Wright and Lisa Rose Wright in Claim No. 2004HCV02341 on July 20, 2006.*
>
> *b. The Claimant was not entitled to forfeit the deposit paid by the Chens.*
>
> *c. The Chens owed rental from November 1997 at the rate of $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000.00 paid to Herman L. Denton.*
>
> *d. The Chens shall quit and deliver up possession of the said property to the Claimant within 14 days of the payment of the sum due and owing to them, in the event that a sum is owed by the estate of Herman L. Denton to the Chens after the sum owed for rental is set off against the damages due to the Chens from the estate of Herman Denton.*
>
> *e. The Chens shall withdraw the caveat lodged against the property within 7 days of delivering possession to the Claimant."*

[17] On the counterclaim, the learned judge made a significant award to the Chens.

[18] The Applicant appealed both judgments. The Court of Appeal, in September 2020, dismissed the appeal on liability and affirmed the decision of D. Fraser J (as he then was). The appeal on damages was allowed in part, with the Court setting aside the award of $6,242,000.00, substituting the sum of $5,180,000.00 and affirmed all other aspects of the judgment on damages.

[19] To date, the Applicant has not satisfied the judgment in respect of the Chens and as such, the Chens remain in possession of a part of the property and the Wrights are in possession of the other part. Both the Wrights and the Chens are obligated to pay rent to the estate of Mr. Denton but at the date of the Application, neither party had paid any rent.

[20] The Applicant, through his attorneys-at-law, commenced communication with the Wrights' attorney-at-law in September 2008 requesting the closing costs, interest and rent. The Applicant also contended that it has now been 14 years since the Wrights have obtained the order for Specific Performance, and yet, they have done

nothing to complete the sale. The Wrights resisted the request for the 16% interest. Between April 2009 and October 2017 there seemed to have been a lull in the communication between the parties. On November 10, 2017, the Applicant repeated his request for these payments to be made.

[21] On June 27, 2018, the Wrights forwarded a copy of the surveyor's report dated April 4, 2002, to the attorney-at-law for the Applicant. Mr Denton's attorney-at-law, had by letter dated July 4, 2002, given an undertaking to remedy the encroachment. To date this has not been rectified. The Wrights refused to pay interest on the basis that the Applicant could not complete according to the terms of the contract and as such, they were only willing to pay rent and closing costs.

[22] Arising out of this stalemate, the Applicant filed the Notice of Application for Court Orders which was mentioned in paragraph 1 above.

[23] At the hearing of the application, the parties agreed to the following:

1. It is the Applicant's duty, being the Executor of Mr. Denton's estate, to have the encroachment removed.

2. The Wrights would pay to have the encroachment removed and the costs of such work will be deducted from the balance purchase price.

3. The Wrights would seek to obtain a letter of undertaking from a reputable mortgage financing company to address the balance purchase price.

4. Time for the enforcement of the Order made by McIntosh J on July 20, 2006, ought to be extended.

5. The Wrights should pay the outstanding rent.

6. The Applicant having received the rental from the Claimants will have discussions with the Chens. The Applicant will determine the sum owing to the Chens pursuant to the Court of Appeal decision and

thereafter have discussion with them to ascertain how soon they will be able to vacate the premises so that the Applicant will be able to have a timeline within which the sale can be completed.

[24] Both sides made detailed submissions and relied on several authorities. They agreed on several points but there were two issues that, although there was agreement between the parties, I thought it important to highlight the arguments because of their importance in determining the case at bar.

Extension of Time

[25] Ms Tamika Smith, counsel for the Applicant, contended that it has been 14 years since the Wrights have obtained the order for Specific Performance, and they have done nothing to complete the sale. The Applicant therefore sought an order pursuant to Rule 46.2(1) of the Civil Procedure Rules (CPR) which requires the permission of the court for a writ of execution to be enforced once six years has elapsed since the judgment was entered.

[26] Counsel for the Wrights, Mr. Charles Piper Q.C, conceded that an extension of time was required for the enforcement of the Court Order granted on July 20, 2006. He also agreed that directions from the Court were needed to facilitate enforcement of the judgment. Queen's Counsel pointed out that orders 3, 5 and 6 sought by the Applicant (stated at para 22 herein) are baseless as it is the Applicant who has remained in breach of the Agreement for Sale and has failed to put himself in a position to complete the sale. Further, counsel argued that an order in terms of item 6 would amount to this court setting aside the Order of McIntosh J, some 14 years after it was delivered. He added too that there has not been an appeal of the learned Judge's decision.

Rent

[27] Miss Smith submitted that despite the Applicant's best efforts, the Wrights have failed, neglected and/or refused to complete the sale. They occupy the premises

rent free since 2003. The Applicant is unable to properly administer the estate because of the inactivity of the Wrights in completing the sale. She also argued that in those circumstances it would be just to have the Wrights pay rent or mesne profit for the duration of the period they have been in occupation. She relied on **Jamaica Edible Oils and Fats Company Limited v M.S.A. Tire (Jamaica) Limited and another** [2018] JMCA App 8 and **Michael Emmanuel John v Fredrica Eunice Crooks** [2017] JMSC Civ 100.

[28] Mr Piper conceded that the Wrights owed rent and so they made a payment of $3,200,000.00 to the Applicant to satisfy the outstanding balance as at December 2020. This payment was made in January 2021.

[29] There was no consensus between the parties on the following issues:

(a) Interest Payment

(b) Encroachment (as a barrier to completion by the Applicant)

(c) Vacant possession

(d) Wilful default

(e) Ready, willing, able to complete the sale

(f) Costs

[30] What follows below are submissions relating to these issues.

Interest Payment

[31] Ms Smith insisted that the Wrights ought to pay 16% interest as stipulated by Special Condition 7 of the Agreement for Sale (stated at para 5 herein) in addition to the rent owing. She relied on **Sale v Allen** (1987) 36 WIR 294 and **Sharon Bennett and Charlene Thomas v Vivian Donaldson and another** [2012] JMSC Civ 30 for support of the position that the Wrights ought to pay both rent and

interest. Additionally, the Applicant sought to rely on authorities to include **Halsbury Laws of England** Volume 42 paragraph 194 which states that "*as soon as the vendor ceases to be entitled to receive the rents and profits for his own benefit, he becomes entitled to interest on the unpaid purchase money until actual payment*".

[32] Ms. Smith submitted that the case at bar is substantially different from both **Sale v Allen** and **Sharon Bennett** on the issue of fault. She pointed out that although the Applicant and the Wrights contributed to the delay, it was the Wrights who were primarily to be blamed, as it was their inaction that had caused the delay in completing the Agreement for Sale. Counsel argued that it was the withholding of the rent for over 16 years that contributed to the estate of Mr Denton being unable to be in a position to complete the sale by depriving the estate of funds so that it could not satisfy the judgment sum to be paid to the Chens. She further argued that the absence of the letter of commitment and the letter of undertaking from the Wrights' attorney-at-law, within the specified 90 days, was solely their fault.

[33] Counsel argued that the Applicant should not be blamed for the delay as he was only appointed personal representative of his father's estate two years after the order for specific performance was made. Ms. Smith insisted that it was the Wrights who had been tardy in completing the sale as against her client, the Applicant. She found support for that argument by highlighting the fact that it was the Applicant who filed this application in an attempt to bring finality to all the proceedings.

[34] She further submitted that the Wrights still have not been able to provide a valid letter of commitment nor undertaking up to the date when the application was heard in November 2020. She further submitted that all these issues combined should persuade the Court that her client should not only be paid the outstanding rent but also the interest as provided by the agreement during the period when the Wrights were in default.

[35] Counsel pointed out that the court should consider awarding 16% interest from the date of completion to the present; or in the alternative the formula used by the Court in **Sale v Allen** and applied in **Sharon Bennett** by Mangatal J. In **Sharon Bennett**, the court concluded that the applicable general rule was "where the interest would exceed the rents and the profits, the vendor, instead of getting the interest, must be satisfied with the interim rent and profits".

[36] Ms. Smith argued that the Wrights should pay interest for the period in which they were in default. This was calculated to be from the date the letter of commitment was due (March 20, 2002) to the date where the letter of undertaking covering the balance of the purchase price was provided (May 10, 2006) and then again from the date when the Wrights obtained the Order for Specific Performance (July 20, 2006 to the date of the hearing (November 24, 2020).

[37] Mr Piper contended that the Wrights were not liable to pay interest on the balance of the purchase price as per Special Condition 7 because the vendor had never been ready, willing and able to complete. He argued that the vendor was always in default.

[38] Mr Piper also asserted that the Wrights had never been purchasers in possession. He argued that they were at all times and continue to be tenants of a portion of the premises. He therefore emphasized that it would be unjust to ask them to pay 16% interest for the entire property when the Chens were occupiers of a section of the property and the Applicant was entitled to collect rent from both the Chens and the Wrights. He sought to distinguish the case at bar from the decision in **Sale v Allen** by arguing that the Wrights were not purchasers in possession but tenants.

[39] Queen's Counsel further argued that the Wrights were never in receipt of rent from the Chens. The Wrights were in fact liable to pay rent to the Applicant. As a result, they should not be liable to pay interest on the balance purchase price until the Applicant was able to overcome the hindrances to completion.

[40] Mr. Piper relied on **In re Woods and Lewis' Contract** [1898] 2 Ch 211 to support his contention that the vendor cannot take advantage of his own wrong and force the purchaser to pay interest by relying on the strict wording of the contract when the vendor himself is at fault. Learned Queen's Counsel also argued that it was not true to say that the vendor has lost the ability to utilise the rents of the premises because the Court had decided that the Chens should pay rent for the period of occupation.

Encroachment (as a barrier to completion by the Applicant)

[41] Ms. Smith emphasized that based on Special Condition 2 (seen at para 5 herein), the Applicant was not obligated to remove the encroachment. Counsel highlighted the fact that the Wrights only raised the issue of the encroachment, seven days before the completion. She argued that the Wrights had no difficulties with the encroachment before the surveyor's report and only took issue with it because of the need for a mortgage from the financial institution.

[42] In response, Mr Piper, Q.C., reminded the Court that the Agreement for Sale provided that the property should be "sold free from incumbrances other than the restrictive covenant and easements (if any) endorsed on the Certificate of Title and such easements as are obvious and apparent". He therefore argued that the Applicant had a duty to remedy the defect, which in this case, was the removal of the encroachment.

[43] Queen's Council cited **Alex's Imports Limited v Keith Tenant** (unreported), Supreme Court, Jamaica, Suit No C.L. 109 of 1999/A109, judgment delivered on May 5, 2006, where a similar clause to that of Special Condition 2 of the Agreement for Sale was relied on by the vendor as being a ground of waiver in circumstances where there was a boundary encroachment. The purchaser had taken possession of the property with the knowledge of the encroachment and had its name placed on the title. Daye J opined:

> *"This condition of the agreement for sale, in my view is intended to cover the physical state of the property which is the building. An encroachment on the boundary of a property by a building does involve a physical incursion on the property. However, it cannot be described as the physical condition of the property or building. In any event I hold that it would be inconsistent interprets (sic) the special condition clauses in a contract so that it defeats a main condition of the Agreement for Sale. One of the main conditions of the Agreement for Sale is that the property should be sold*
>
> > *'Free from incumbrances other that the restrictive covenants and easements (if any) endorsed on the Certificate of Title'*
>
> *A boundary encroachment is an encumbrance not endorsed on the title. It is a defect in title. Special Condition 7 does not derogate from the condition to provide a free title."*

[44] The Wrights, he said, had received a conditional approval for the mortgage and have been awaiting the removal of the 19 feet encroachment.

[45] Learned Queen's Counsel, Mr. Piper admitted that completion should have taken place on May 7, 2002 but indicated that Mr Denton's attorney-at-law were advised by letter dated April 30, 2002 about the encroachment. As indicated, he noted that the Mr Denton's attorney-at-law gave his undertaking to have the encroachment removed in letter dated July 4, 2002. Up to the August 3, 2018, the date of filing of this application, that undertaking had not been fulfilled by Mr Denton's estate or subsequently, the Applicant. Without the fulfilment of the undertaking, his client would not be able to obtain a mortgage. He also reminded the Court that in a letter dated June 27, 2018, the Wrights' Attorney wrote to the Ms. Smith indicating that the Wrights were ready to pay over the balance purchase price as soon as the Applicant was in a position to complete.

Vacant Possession

[46] Ms Smith advanced the argument that the Applicant was unable to give vacant possession because the Wrights have not paid the balance purchase price. She added that if the Applicant had been paid, then he would have been able to pay the judgment sums owed to the Chens and then they would in turn vacate the

premises. Counsel therefore attributed the Applicant's inability to provide vacant possession on the Wrights.

[47] Mr Piper indicated that the Agreement for Sale provided for vacant possession on completion. Similarly, **in Alex's Imports**, the purchaser was put into possession of part of the premises. Other tenants were in occupation of the premises at the time when the purchaser took up occupancy. Daye J. found that the purchaser did not take possession of the property as a purchaser in possession. Mr. Piper also relied on **Universal Leasing and Finance Ltd v Montego Vacations Ltd** [2002] UKPC 2 and **Calvin Green v Wynlee Trading Ltd** [2011] JMCA Civ 40 to emphasize his position that the vendor must give vacant possession to the purchaser upon completion.

Wilful Default

[48] Ms Smith argued that the contract does not provide for 'fault' and therefore the Court should give effect to the letter of the contract and award interest regardless of the reason for non-performance of the contract. She submitted that although there was delay on the part of the Applicant, there was no wilful default. Her client had provided an undertaking to have the encroachment removed from as early as 2002, but the Wrights had failed to complete the sale.

[49] Mr Piper argued that there are several factors which support his view that the Applicant had never been "ready, willing and able" to complete the sale.

1. To date, the Applicant has been unable to deliver a good title to the Wrights.

2. It was the Applicant's responsibility to have the encroachment removed. The Wrights could not obtain a mortgage without the Applicant honouring his undertaking to remove the encroachment.

3. The Applicant failed to give vacant possession to the Wrights. The Chens were in possession of the property as tenants for many years

and based on the decision of the Court of Appeal, they are to deliver up possession within 14 days of receipt of the judgment sum awarded to them.

4. In November 2002, the Chens lodged a caveat against the land, and it was to be withdrawn five days after they have vacated the premises. The Applicant, so far, has not taken any steps to satisfy the judgment awarded to the Chens in order to obtain vacant possession, so that he could fulfil the order for specific performance awarded against the estate of Mr. Denton.

[50] The Applicant had the power to resolve these issues and either refused and/or neglected to act. His deliberate inactivity has prevented the completion of the contract.

Costs

[51] Ms. Smith urged the Court to award costs to the Applicant should he be successful on the application and also in the light of the Wrights' conduct which prevented the completion of the sale. Mr Piper, however, argued that the Wrights should be awarded costs of the application because the default has been that of the Applicant.

ISSUES

[52] The main issues for consideration in this application are:

1) Whether the Applicant was willing, ready and able to transfer good title to the Wrights;

2) Whether the Wrights failed, neglected or refused to complete according to the terms of the contract; and

3) Whether the Wrights should pay both interest on the balance purchase price as per Special Condition 7 and rent.

LAW AND ANALYSIS

Extension of Time

[53] Counsel for both parties agreed that time should be extended pursuant to rule 46.2 of the CPR to allow for compliance with the order for specific performance. However, upon further analysis, I am of the view that Part 46 does not apply. I form this view on the basis that a writ of execution does not assist in the enforcement of an order for specific performance. An order for specific performance does not expire; and once such an order is made, it remains valid unless and until it is set aside.

[54] Rule 46.1 outlines what is meant by a writ of execution as follows

> *"(a) an order for the seizure and sale of goods (form 18);*
>
> *(b) a writ of possession (form 19);*
>
> *(c) an order for the sale of land;*
>
> *(d) a writ of delivery (whether it is-*
>
> *(i) an order for recovery of specified goods in form 20; or*
>
> *(ii) an order for the recovery of goods or their assessed value in form 21); and*
>
> *(e) an order for confiscation of assets."*

[55] Rule 46.2 stipulates that a writ of execution may not be issued without permission where "six years have elapsed since the judgment was entered".

[56] It seemed that both counsel believed that after six years had elapsed since the judgment was entered, rule 46.2 would automatically apply. It may also be that rule 46.1(c) which speaks of 'an order for the sale of land' was equated with the order of McIntosh J, given on July 20, 2006, whereby the learned judge ordered that there be specific performance of the Agreement for Sale of Land.

[57] There are several problems in making such assumptions. A writ of execution has little utility in enforcing an order for specific performance. Orders for specific performance often have their own enforcement mechanism as, in most cases, a court will make orders in addition to specific performance to ensure compliance. At times, parties may need to make applications for further directions (such as the case at bar). Writs of execution, on the other hand, are useful in enforcing monetary judgments. For example, in the case of **Girvan Williams v Omotoso Uswale-Nketia** (unreported), Supreme Court, Jamaica, Suit No. CL 1996/W239, judgment delivered July 25, 2007, an application was made under Part 55 of CPR for sale of land to enforce payment of a judgment debt. Such an application could properly fall within the meaning of Rule 46.1(c), that is, an order for sale of land.

[58] Secondly, a court order such as that for specific performance does not expire (see **Beverley Crammer v Lindford Campbell** [2017] JMSC Civ 212, at para 41). Therefore, there is no need to make an application for writ of execution pursuant to Rule 46.3 nor seek the court's permission pursuant to Rule 46.2. Rather, proceedings for contempt of court may be brought should a party not comply with an order for specific performance (**Isaacs v Robertson** [1985] AC 97).

[59] Finally, an order, once validly made by a court of unlimited jurisdiction, remains in force unless and until set aside (**Isaacs v Robertson**). This is not the case for a writ of execution where the validity is limited to a period of 12 months (Rule 46.9) and must be renewed for a period of no more than six months (Rules 46.10 and 46.11).

[60] Based on the foregoing, the request 'that the time for the enforcement of the Order on the Notice of Application for Court Order granted on July 20, 2006 be extended' will not be granted. Rather, it is my view, that the application filed by the Applicant ought to have been in terms seeking further directions to satisfy the order for specific performance made on July 20, 2006.

[61] The wide powers afforded by Part 26, particularly Rule 26.1(2)(v), authorizes the court to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective". Part 26 is not restricted to the context of a case management conference (**First Financial Caribbean Trust Company Limited v Delroy Howell and others** [2013] JMCC Comm 8). The court, by way of its inherent jurisdiction to control its process and in fulfilling its mandate to manage cases so as to further the overriding objective, would always be entitled to hear such an application.

[62] I have therefore exercised these powers bearing in mind the overriding objective. I sought to give certain directions in seeking to ensure that specific performance of the contract would be realised within a short period of time. As a result, after 14 years, and much discussions during the hearing of the application, the parties were able to settle several issues. However, there still remains the one outstanding and vexed issue of the payment of interest which was tied to whether the Applicant (and prior to his executorship, Herman L. Denton) were ever willing, ready and able to complete the contract.

Issue 1: Whether the Applicant was willing, ready and able to transfer good title to the Wrights

[63] For a vendor to seek to enforce the terms of a contract, he himself must be ready, willing and able to provide a good title (**Jennifer Messado and Lanza Turner Bowen v Keith Recas and Nerisha Nathan** [2015] JMCA App 10). Providing good title includes ensuring that there are no encumbrances other than what was clearly stipulated on the title and no legal interest being claimed by others that would affect the fee simple. One should also note that it was the vendor's duty to give vacant possession unless the contract provides otherwise.

[64] In this case, the date set for completion of the sale was May 7, 2002. That date had passed since neither party was ready, willing and able to complete the sale. Several matters caused this unfortunate state of affairs. Most notable, however,

was that the vendor seemed not to be in a position to complete the contract according to its terms, namely, to give good title and vacant possession. Throughout the life of this contract, there have been issues concerning encroachment of the boundary wall, caveat lodged on the title and third parties being in possession of part of the property.

[65] Whether an encroachment was an incumbrance and therefore prevented the purchaser from obtaining a good title was an issue in **Alex's Imports**. Daye J analysed the provisions of a contract for sale of land and reasoned that an encroachment was an incumbrance under a special condition which provided that "*the property was to be free from incumbrances other than the restrictive covenants and easements endorsed on the certificate of title for the property and the easements were to be obvious and apparent*".

[66] Daye J further opined that such encroachment was not covered by a special condition which related to the purchaser accepting the actual state and condition of the property, as at the date of purchase (see para 5 special condition 7). This meant that a vendor was in breach of the agreement for sale as he did not provide a title free from incumbrances. Daye J held that the encroachment amounted to a defect in title.

[67] The Court of Appeal, however, in hearing the appeal in **Keith Tenant v Alex's Import Goods** [2012] JMCA Civ 15 having examined the title, found that it was clear that several mortgages were endorsed thereon. The Court also considered that the purchaser had obtained a letter of undertaking from his mortgagee despite the encroachment. This was an indication that it was possible to obtain a mortgage with an encroachment on a property but that would be dependent on the mortgage company. It is my view, therefore, that the Court of Appeal in **Keith Tenant** illustrated that those encroachments do not necessarily equate to incumbrances that would prevent a good title from being transferred.

[68] In the case at Bar, the mortgage company would not contract with the Wrights without the encroachment identified by the surveyor's report being removed. If this were a cash sale, there might not have been any issue with the encroachment because the purchaser could always decide to purchase the land as is. Unfortunately, the Wrights could not obtain the mortgage without an undertaking being provided by Mr. Denton's attorney-at-law, stating that the encroachment would be removed. Mr. Denton was informed and Mr. Leon R. Palmer, his then attorney-at-law gave his undertaking to have the encroachment removed before the completion of the sale. The exact terms of the undertaking were: *"We give our undertaking, however to establish a fence in the designated boundary line and that this rectification will be done before the completion of the sale*".

[69] This undertaking was an indication that Mr. Denton accepted the responsibility of having the encroachment removed. He was expected to do what he had promised to do. As a result, the Applicant was estopped from asserting that the purchasers should take the property with the encroachment. The fact that the wall was still standing up to the hearing date in February 2021, indicated the continuous failure on the part of the estate of Mr. Denton and subsequently, the Applicant, to fulfil this undertaking. Furthermore, the failure of the Applicant and the estate to fulfil the undertaking indicated that they had never placed themselves in the position to complete the sale.

[70] On August 20, 2003, the Wrights provided an undertaking from NCB in the sum of $325,000.00 representing the balance sums owed. With this act, the Wrights had completed their duties under the contract. This meant that Mr Denton and/or the personal representative of his estate, the Applicant, was expected to take action to have the encroachment removed and to thereafter forward the requisite documents to the respective financial institutions. Instead, Mr Denton did nothing up until his death in December 2006. In considering the chain of events so far, it can be said, that Mr Denton was the one who was tardy in acting in a manner which showed that he was ready, willing and able to perform.

[71] Two years after the death of Mr. Denton, the Wrights could do nothing to further the completion of the sale as there was no representative for the estate. Thus, the Wrights could not have been blamed for the non-completion of the sale. There was, however, the binding undertaking given by Mr Denton which has subsisted throughout this period.

[72] As indicated, the Chens lodged a caveat sworn to on November 5, 2002 against the transfer of the property to any other person. The Court of Appeal affirmed the lower court's decision in that matter which stipulated that the Chens shall withdraw the caveat within seven days after delivering up possession of the property.

[73] The Applicant has not paid the Chens the damages and costs awarded in that case and as such, the Chens have the legal right to remain in possession and for the caveat to stand. This has prevented the Applicant from transferring a good title as the caveat cannot be removed without him fulfilling his legal obligations towards the Chens.

[74] This leads to the next vexed issue of vacant possession. The Agreement for Sale expressly provides for vacant possession. The presence on the premises of persons who are lawfully in possession as tenants or licencees, such as the Chens, is a breach of that obligation.

[75] The Court of Appeal in **Leon Courtney Robinson (Executor of the Estate of Herman L. Denton, deceased) v Michele Chen and others** [2020] JMCA Civ 42, at para [16] referred to the affidavit evidence of the Applicant who stated that *"[the Chens'] continued occupation of a portion of the said [property] has prevented me from completing [the sale to the Wrights] as I am not in a position to provide them with vacant possession of all the said property*". The Applicant sought the intervention of the Court in 2011 to enable him to as he puts it to "*carry out the Orders of the Court for Specific Performance … giving [the Wrights] possession of the property".*

[76] Despite the arguments advanced by Ms Smith, I believe that the statements made by the Applicant **in Leon Courtney Robinson (Executor of the Estate of Herman L. Denton) v Michele Chen** provided the clearest indication that he had recognised his failure to fulfil his duties under the Agreement for Sale and therefore was unable to complete it. To date, the Applicant cannot give vacant possession because the Chens are in occupation. Further and, in accordance with the Court of Appeal's decision, the Chens shall relinquish possession of the premises within 14 days after they have been paid outstanding sums owed to them.

[77] I therefore find that, to date, the Applicant is not willing, ready and able to complete.

Issue 2: Whether the Wrights failed, neglected or refused to complete according to the terms of contract?

[78] As aforementioned, both parties contributed to the delay in completion of the contract.

[79] The Wrights did not provide a letter of commitment/undertaking within the period stipulated by the contract. Despite Mr Denton providing an undertaking on July 4, 2002, the Wrights did not obtain a letter of commitment until December 11, 2002.

[80] Additionally, as at January 14, 2003, the Wrights owed a balance of $476,370. This was the shortfall that remained after they had received the commitment letter and undertaking for the mortgage from the JNBS. They made a payment on April 29, 2003 in the sum of $150,000 which left a balance of $325,000. This balance was not accounted for until August 20, 2003 when the Wrights provided a letter of undertaking from NCB. They had obtained a renewed letter of undertaking from NCB on May 10, 2006 for the sum of $325,000.00, as well as a letter from JNBS dated July 5, 2006 confirming its willingness to extend a mortgage of $3,500,000.00.

[81] Presently, the undertaking given by JNBS has long since expired. The Wrights have declared, and I have accepted this as being true, that they are unable to

obtain a further letter of undertaking/commitment without the encroachment being removed. The failure to effect removal of the encroachment cannot be attributed to any failure, neglect or refusal by the Wrights.

[82] Furthermore, it is my view that the non-payment of interest and rent is not a failure by the Wrights to complete according to the terms of the contract. The issue of rent did not arise under the Agreement for Sale. The delay which led to the issues of interest and rent was primarily the fault of Mr Denton. Both he and the Applicant failed to fulfil the undertaking given on July 4, 2002. They could not transfer a good title in the names of the Wrights and were never in a position to provide vacant possession.

[83] This means that although the Wrights were tardy in making payment or providing the requisite undertakings, they had, nonetheless, fulfilled their obligations. I bear in mind that their obligation to pay did not arise until the registrable transfer was available.

Issue 3: Whether the Wrights should pay both interest on the balance purchase price, as per Special Condition 7, and rent?

[84] The general rule is that where the terms of a contract are clear, the contract must be followed (**Re Hewitt's Contact** [1963] 3 All ER 419, page 422). A clear example of this can be found in **Esdaile v Stephenson** [1822] 57 ER 49 where a contract for sale of land stipulated that the interest must be paid from the date of completion. Fault was not made a condition precedent for the payment of interest. The court held that interest must be paid from the date of completion as the contract made it an express stipulation applying to every delay however occasioned.

[85] In **Sale v Allen**, a case before Judicial Committee of the Privy Council, the Law Lords explained the position that obtains when a contract was ambiguous or there was no provision for interest:

> *"Their Lordships are unable, however, to find in this arrangement anything which would displace the ordinary rule that, even where delay in completion*

> *is due to the default of the vendor, a purchaser in possession and in receipt of the rents and profits of the property sold is liable, on completion, to pay interest on the unpaid balance of the purchase money from the date when he takes possession."* (See page 299)

[86] **Sharon Bennett** further explored the issue of interest. The purchaser in **Sharon Bennett** had wrongfully taken possession for three months after signing the contract for sale. The vendor cancelled the contract and subsequently demanded interest or rent on the basis that the purchaser was at fault for the non-completion of the contract. Mangatal J. found that the purchasers were at fault for three months and must pay interest for that period. On the other hand, the vendors were at fault for the remaining period as they could not provide good title due to the title being lost. Mangatal J, having found that the vendors were in default, accepted that the general rule applied, that is, where the interest would exceed the rents and the profits, the vendor, instead of getting the interest, must be satisfied with the interim rent and profits (paragraph 63). It was declared that the general rule applied whether or not the Defendants (vendors) in fact rented the premises during the period that they remained in control of possession.

[87] It is clear that the principle in **Sale v Allen** and the general rule stated in **Sharon Bennett** are inconsistent. **Sale v Allen** states that interest is payable regardless of the vendor being in default as long as the purchaser is in possession and obtaining rent**. Sharon Bennett**, on the other hand, makes fault of the vendor a prerequisite in determining whether interest is to be paid. I am mindful that I am bound by the Privy Council. These cases, however, seem to agree that a purchaser cannot be held liable to pay both rent and interest in the same instance.

[88] The position, however, appears to be different in the case of wilful default. **Sale v Allen** speaks to *'anything in this arrangement to displace the ordinary rule'*. I believe wilful default is such an exception. Furthermore, in **Sharon Bennett**, Mangatal J, quoting from Gibson's Conveyancing, 20th Edition, said *"no interest is payable if the delay is due to the wilful default of the vendor, even though the contract makes no exception in that case*". She regarded this position as being the law in Jamaica.

[89] Bowen L.J. in **In Re Young and Harston's Contract** [1885] 31 Ch.D. 168, at page 174, in explaining what is meant by 'wilful default' stated that:

> *"…default is a relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances- not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word … 'wilful'… implies nothing blamable, but merely that that person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."*

[90] There is a distinction to be made between the Wrights in the case at bar and the purchasers in **Sale v Allen** and **Sharon Bennett**. The purchasers in the latter cases were purchasers in possession of the properties. Likewise, in the case of **Alex's Import**, it could be said that the Respondent was a purchaser in possession. I do not find, however, that the Wrights are purchasers in possession of the entire property. I find that they occupy as purchasers but that the Chens are tenants of the Applicant. It would, therefore, be not only unreasonable but also unjust to impose on the Wrights the burden of paying 16% interest for a property that they do not fully occupy.

[91] Counsel for the Applicant relied on **Sale v Allen** and **Sharon Bennett** in support of her submission that a purchaser ought to pay interest once they are in possession even if the vendor is at fault. In both cases, the vendors were found to be at fault but not wilful default. In **Sale v Allen**, as in **Sharon Bennett**, the Court found that the vendors were not able to deliver a good title on the completion date because, on the one hand, the death of the co-executor was not noted on the title at the date of completion; and in the other case, the title was lost. The case at bar, however, has unique features that distinguishes it from these cases.

[92] From the inception of the contract between the Wrights and Mr. Denton, Mr. Denton was never able to give vacant possession. He was in fact bound by a previous contract entered into with the Chens who had partially performed on the said contract. His action can be described as a 'default' as he did not do what he

ought to have done, that is, take steps to provide vacant possession by ending the previous contract before entering into the current contract. His action was also wilful as he was a free agent, knowing what he was doing and intending to do what he did. As mentioned previously, this state of affairs continues to affect his estate to this day.

[93] I do not accept the Applicant's argument that his inability to give vacant possession was due to the non-payment of sums by the Wrights. The vendor (Mr Denton) willingly placed the Chens in possession of the property. On executing the contract with the Wrights, he knew that it was his responsibility to give vacant possession. It was Mr. Denton's duty to ensure that the contract that he had with the Chens was at an end before entering into contract with the Wrights. It was also his responsibility to take the necessary steps to remove the Chens before entering into contract with the Wrights. The evidence does not disclose that this was done. Additionally, the Applicant's present difficulty is due to the orders of the Court of Appeal and his own inability to pay the sums awarded to the Chens. As stated in **Rose v Forsythe** (1988) 25 JLR 437 "[a] *party cannot hide behind its own fault*". He cannot benefit from his own default.

[94] Furthermore, Mr Denton and his estate failed to fulfil their undertaking to remove the encroachment. This, I find, is clearly a default as they had not done what was their duty under the contract. An undertaking, as explained in **Sylvester Morris v General Legal Council ex parte Alpart Credit Union** (unreported), Court of Appeal, Jamaica, Civil Appeal No 30/1982, judgment delivered on October 30, 1984, is crucial in the world of commerce and conveyancing. Whenever an undertaking is given to a financial institution, it must be performed forthwith as the consequences to our honourable profession would be dire if they could no longer rely on an attorney's word. Undertakings are of such importance that they subsist despite the death of a client (**Hellings v Jones** 130 ER 140).

[95] The default was also wilful as based on evidence presented, it seems there was no attempt by the vendor to have the encroachment removed. The Applicant has

continued this posture as he had not removed the encroachment even after he had knowledge of the undertaking. He sought to hide behind Special Condition 2 and wanted the Wrights to remove the encroachment.

[96] I find that Mr Denton and subsequently the Applicant were in wilful default. It was Mr Denton's duty to give vacant possession and to remove the encroachment. I consider those to be matters that he had the power to accomplish by his own free will but he either refused or neglected to do them. This situation continued for many years and as such prevented the matter from advancing. I have noted that the death of Mr. Denton and the ensuing delay in appointing a representative could not be regarded as wilful. Unfortunately, the wilful default preceded the vendor's death and continues to present.

[97] I wish to highlight that if the Applicant was entitled to obtain interest pursuant to the contract, then the Wrights would be entitled to all the rent from the property. As a result, the Applicant would then be obligated to account to the Wrights for the rents to be collected from the Chens. I find that the Applicant's position, in seeking interest under the contract and rent from both the Chens and the Wrights, has no basis in law and is repugnant to equity.

CONCLUSION

[98] In all these circumstances, I believe that the Applicant and the Wrights are to take all the necessary steps to complete the Agreement for Sale so that the Order for Specific Performance can finally be realised. The Court was told that the Wrights have recently obtained relevant documents from the Applicant to present to the NHT with the intention of obtaining a mortgage to enable them to pay the balance purchase price and to complete the contract.

[99] The Wrights have already paid all the outstanding rent up to December 2020. The Applicant's Attorney-at-Law is having discussions with the Chens to determine how much money is to be paid to them pursuant to the Court of Appeal decision and to ascertain when they will be able to vacate the premises and to have the caveat

removed. The answer to these important issues will assist the court in making a determination as to what timelines can be given to the parties to complete the contract and have the Order for specific performance realised.

COSTS

[100] The general rule is that costs should be awarded to the successful party (Rule 64.6(1) of the CPR). In this matter, I find that the Applicant was successful on the issue of the payment of rent. The Wrights did concede on this issue. The Applicant was unsuccessful on the issue of interest. I was, however, mindful of the circumstances of the case and had regard to certain issues outlined in Rule 64.6(4). I have noted that it was the Applicant who brought the current matter and tried to provide vacant possession to the Wrights. On the other hand, it was the vendor, Mr. Denton, and subsequently the Applicant who have been the main cause of the delays in the completion of this matter. It was also unreasonable for the Applicant to have exaggerated his claim by requesting both interest and rent and to have not fulfilled the undertaking. The Wrights were, however, extremely unreasonable to have not paid the nominal rent of $15,000 for over 16 years. As such, in my view, it is prudent to exercise powers under Rule 64.6(2) and award costs of 60% to the Wrights to be agreed or taxed.

[101] On April 16, 2021 I made certain orders and indicated to the parties that they should return to Court at a later date to indicate whether the Wrights had secured the letter of undertaking from the NHT in order that the Court would be furnished with a timeline when the parties would be able to fully comply with the order for Specific Performance.

[102] I made the following orders –

1. The hearing of the application is part-heard to July 16, 2021, at 10:00 am for ½ hour.

2. The Applicant and 1st and 2nd Claimants are to complete the sale in compliance with the Order of Justice McIntosh made on July 20, 2006 for Specific Performance.

3. The 1st and 2nd Claimants are to pay rent for the period February 2002 to present.

4. Costs of 60% to the 1st and 2nd Respondents in the Application to be agreed or taxed.

5. The Applicant's attorney-at-law to prepare file and serve the orders.

[103] On July 16, 2021 at the continuation of the matter, Counsel Mr. Stokely Marshall appeared and indicated to the Court that he was recently retained by the Applicant. Mr. Marshall informed the Court that the Applicant wanted to discontinue the matter. He explained that his client complained that every court date was an additional cost to the estate and so far he had been unable to pay either the Wrights or the Chens the court costs which were awarded against it.

[104] It was pointed out to Mr. Marshall by learned Queen's Counsel and the Court that a decision had already been delivered in the matter and therefore his client could not at this juncture discontinue the matter. Mr. Marshall was further informed that the matter was adjourned merely for the Wrights to indicate whether they had received the letter of undertaking from the NHT so that the Court could have a timeline within which the order for Specific performance would be realised.

[105] The Court also indicated to the parties that there was a written judgment in the matter that would shortly be made available to the parties.

[106] Queen's Counsel Mr. Piper indicated that his clients were in the process of securing all the relevant documents requested by the NHT. These documents included a sealed copy of the Court order for Specific Performance, and the statement of accounts from the Applicant. The NHT was also to conduct a site visit

at the property. It was agreed that the statement of accounts would be prepared and verified by counsel Mr. Marshall and thereafter given to the Wrights.

[107] Counsel Mr. Marshall sought to make an oral application for interest to be paid on the outstanding rents owed by the Wrights. It was pointed out to counsel that such a request had not been advanced in the Notice of Application filed by his client and as such it was now too late after the Court had already ruled on the application, to make any such submission.

[108] The Court felt that the matter had been brought to a state whereby the parties were now able to comply with the order of Mrs. Justice N. McIntosh and so I proceeded to make the final orders.

The Court thus made the following additional orders:

1. The Registrar of the Supreme Court is empowered to sign any and all documents that will facilitate the transfer of the property upon completion in the event any of the parties refuse or is unable to sign.

2. The 1st and 2nd Respondents are to pay rent to the Applicant up to the time that their names are endorsed on the certificate of title.

3. The Respondents' attorneys-at-law are to prepare, file and serve the order.