IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV03201

BETWEEN	**MAVIS SPENCER**	**CLAIMANT**
AND	**DENNIS HANSLE**	**1ST DEFENDANT**
AND	**PETAL HANSLE**	**2ND DEFENDANT**

IN CHAMBERS

Ms. R. Freemantle instructed by Scott, Bhoorasingh and Bonnick for the Claimant

Ms. G. Mullings instructed by Naylor and Mullings for the Defendants.

Oral Contract for Sale of land – Section 4 of the Statute of Frauds – Deposit made to Vendor – Receipt issued for deposit – Whether receipt sufficient act of part performance – Whether consideration has wholly failed – Promissory Estoppel – Forfeiture of Deposit – Innocent /Negligent/Fraudulent misrepresentation – Caveat against Dealings – Evidence – How to deal with issue of credibility.

Heard: December 17, 2018

MORRISON J.

[1] That the delivery of this judgment did not mature before now is, of course, regretted. Timeliness was not idle. The least said requires no amendment. The Claimant, certainly up to the filing of this claim, was a Registered Nurse who lived

in Scarborough, Ontario, Canada. The First and Second Defendants are husband and wife and the joint names of the subject property. The First Defendant is a builder while the Second Defendant is a Realtor.

Background

[2] The root of the matter alleges the Claimant is that the failure of the oral agreement to be consummated by the parties is to be borne by the Defendants who, she opines, may have been prompted by 'Sellers Remorse'. Whatever may have been that motive, she advances, its pretext is simply a stratagem to extract from her unlawful expenses in relation to the deposit which she paid over to the First Claimant.

[3] On the other hand, the Defendants assert that the promises or expectations of the oral contract being fulfilled was excited by the Claimant's knowing deceit and/or her innocent and/or negligent and/or fraudulent or misrepresentations.

[4] Sometime in March 2011 it was agreed between the First and Second Defendants that they would sell their residential dwelling to the Claimant at the latter's urging.

[5] There was a process of bargaining by the parties as to the denominations of the species to be paid, the deposit and other contractual terms. The process stalemated after the Claimant paid a deposit on account. There are significant departures of fact between either camp's accounts.

[6] It therefore falls to me to determine those relevant facts on which the outcome of this matter rests. Significantly, both sides blame each other as to the reason for the Agreement for Sale not being signed. It is also the case that the Claimant caused a caveat to be lodged against the property in question. This was done on

The Pleadings

[7] The Fixed Date Claim Form and Particulars of Claim was filed on June 7, 2013. Defence and Counterclaim was filed on October 4, 2012 and thereafter a Defence to the counterclaim was filed on January 31, 2013. Pleadings were finally closed with the filing of an Amended Defence and Amended Counterclaim followed by a Defence to the Further Amended Defence and Counterclaim.

[8] From the Particulars of Claim the Claimant alleges that it was a term of the oral contract that the purchase price would be $27,000,000.00 denominated in Jamaican dollars; that the First and Second Defendant would engage their Attorney-at-law to prepare the agreement for sale; that an initial deposit of Forty Eight Thousand Seven Hundred and Fifty Canadian dollars (CD$48,750.00) equivalent to Four Million Jamaican Dollars ($4,000,000.00) was made payable to the First and Second Defendant; that since the payment of the deposit the Defendants have failed and/or refused to produce the Agreement for Sale for it to be executed by the Claimant and/or to refund the monies paid; that, the Claimant also claims interest on the outstanding amount at a commercial rate to the date of judgment or earlier payment.

[9] As to the Defendants traverse of October 16, 2015 I reproduce it in full so as to accentuate the facts in issue. Here, I shall also produce, in full, the Counterclaim/Set Off of the Defendants. This will be followed by the Defence to the Defence and Counterclaim filed on November 25, 2015.

[10] The Further Amended Defence and Counterclaim was filed on 16th October 2015. It reads:-

a) "That in early 2011 the Defendants were contracted by the Claimant who expressed an interest in purchasing their property at 3 Trenton Close, May Pen, P.O. in the parish of Clarendon.

b) That in the parties' initial negotiation the Defendants agreed to a price which was significantly lower than the market value of the property as was acknowledged by

the Claimant. The assessed market value of the premises at the time was $32,500,000.00.

c) That a total of $328,750.00 Canadian Dollars was agreed by the parties as the purchase price for the property. The entire purchase price was to be paid in Canadian Dollars. This amount was at that time equivalent to about $27,000,000.00 Jamaican Dollars, the exchange rate has in fact changed since that time. The Claimant also agreed to absorb certain expenses associated with the transaction such as legal fees, stamp duties, registration fee, etc. The Claimant paid the sum of $48,750.00 Canadian Dollars on account of the purchase price which amounts to about $4,000,000.00 Jamaican Dollars at that time. Annexed and marked “is a copy of the email confirmation from the Claimant regarding the payment made. The said money was paid as a down payment in order to secure the property.

d) A receipt was issued to the Claimant by the Defendant personally. The Defendant avers that the said receipt is evidence of the fact that the contract price was intended to be in $328,750.00 Canadian dollars.

e) That the parties agreed that the balance due on account of the purchase of the said premises would be paid by September 2011 when the transfer documents for the premises and other documents would be prepared and registered.

f) That in the interim i.e. before the intended time for completion the Claimant requested that the Defendants do a considerable amount of improvement work on the premises for her own purposes.

g) The claimant who came to the premises with her husband and brother visited the premises and knew at all material times that a portion of the funds paid by her had been used to make the premises more luxurious according to her demands.

h) That neither the Defendants nor their attorney, Georgette Stewart-Harrisingh, heard anything from the Claimant regarding the balance due for many months despite the Claimant’s promise to pay the balance by the said date.

i) Eventually the Claimant began to proffer excuses regarding her ability to access the funds necessary to complete the transaction. In this period the Jamaican Dollar depreciated against the Canadian Dollar.

j) That based on the Claimant's negligent misstatement/misrepresentation to purchase the property, the Defendants relied on same to their detriment, turning down other prospective buyers and carrying out improvements in conjunction with the claimant's wishes.

k) In the said period March 2011 to September 2011 the Defendants turned down three other prospective purchasers for the said premises and advised these persons that the premises was already sold. The Defendants treated the terms set out in the receipt issued as binding obligations on their part to transfer the property on payment of the balance stated thereon by the Claimant. The Defendants expected that the Claimant would honour her obligations.

l) The Claimant eventually retained legal counsel in October 2011.

m) That on October 20, 2011 proposing a new purchase price of $23,000.000.00 not $27,000,000.00 as alleged by the Claimant. This offer was rejected as an alternate sale price.

n) That after sometime it became apparent and obvious that the Claimant was unable to complete the original agreement and various letters came from her attorneys, Scott-Boorasingh & Bonnick proposing alternate prices. These letters were presented and exchanged entirely without prejudice. No alternate price was agreed.

o) That the Defendants aver that the allegation that the price of the property was $27,000,000.00 Jamaican is incorrect. The agreement as at March 2011 was for the purchase price to be paid in Canadian Dollars in the sum of $328,750.00 Canadian.

p) That in reliance on the Claimant promises the Defendants did further work on the premises

amounting to over $1,000,000.00 to improve same in accordance with the requirements of the Claimant.

q) That the Claimant put the Defendants to inconvenience and expense as a result of her inexcusable and unexplained delays in paying the Canadian Dollar price agreed.

r) That the Defendants suffered loss and damages as a result of the Claimants decision to go back on its promise to purchase. That during the period of January to December 2011 had the subject property been sold and those funds deposited to their Investments Account at Jamaica Money Market Brokers as they had intended the Defendants would have earned an interest of to 5.25% per annum of $27,000,000.00 they had intended the Defendants would have earned an interest of 5.25% per annum or $27,000.000.00 per annum x 5.25 x 5 years = $7,087,500.00. *(Emphasis the Defendant's).*

s) The Claimants Attorney at Law has also indicated to the Defendant's Attorney that a caveat had been placed on the subject property thereby encumbering the property for approximately 5 years which does not allow the property to be sold, pledged or mortgaged. *(Emphasis the Defendant's).*

t) The actions of the Claimant has put the Defendants at a financial disadvantage as they have neither the full purchase price of the subject property nor are they able to sell the property to another buyer." *(Emphasis the Defendant's).*

For completion I set out below the (counter claim) and its accompanying Set Off in full:-

"Counterclaim/Set off of the Defendants

a. *That the claimant by virtue of the doctrine of the Promissory Estoppel, be ordered by this court to perform its obligation of completing the purchase of property located at Lot 3 Trenton close, May Pen in the parish of Clarendon and if the Claimant cannot*

specifically perform the agreement the Defendant seeks a declaration from this honourable court that the deposit of $48,750.00 Canadian Dollar paid by the Claimant be forfeited.

b. *That in addition and/or in alternative to (a) the Defendants ask that the damages the Defendant suffered as a result of the Claimant's conduct be assessed by this Honourable Court and set off against the deposit paid.*

And the Defendants counterclaim against the Plaintiff:

2. *Damages for breach of contract in lieu of or in addition to Specific Performance of the Agreement together with interest; and/or alternatively damages for deceit and/or innocent/negligent/fraudulent misrepresentation.*

3. *Further or in the alternative, a Declaration that the Agreement has been cancelled and that the Defendants do forfeit the Deposit paid by the Claimant;*

4. *Interests*

5. *Costs*

6. *Further and /or other relief."*

Submissions by the Claimant

[11] It is expedient that I identify the various areas of the law that I have been invited to pronounce upon which the Claimant suggests as being relevant to a determination of the issues as raised:-

a. The law as to Agreement for sale and Specific performance

b. The law as to Failure of Consideration

c. The law as to Promissory Estoppel

d. The law as to Forfeiture

e. The law as to Deceit, and Fraudulent, Innocent and Negligent Misrepresentation

[12] In addition, the Claimant has asked this court to come to certain findings of fact which serves in its purpose to introduce the issue as to the credibility of the parties.

[13] The Claimant's list of authorities include:

i. ***Fauzi Elias v George Sahely & Co (Barbados) Ltd [1983] 1 AC 646***

ii. ***Steadman v Steadman (1976) AC 536***

iii. ***Leonard McLean v Herbert Espeut & Rita Espeut, (1991) 28 JLR 9***

iv. ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC32***

v. ***Manhertz & Manhertz v Island Life Insurance Co. Ltd. SCCA No. 24 of 2006***

vi. ***Workers Trust & Merchant Bank Ltd. v Dojap Investments Ltd. [1983] 2 ALL ER 370***

vii. ***Orville Walker & Anor v George Lawrence & Anor CL 1998/W101, delivered on 3rd November, 2006.***

viii. ***Derry v Peek [1889] UKHL (01 July) 1***

ix. ***Hornal v Neuberger Products Ltd [1956] EWCR CIV JLO***

x. ***Davy v Garrett (1877) 7 Cl. D. 473***

xi. Butterworths Common Law Series: The Law of Contract, 4th Ed. P. 881 – 882 & 909 - 910

The Defendants Submissions

[14] From the written Amended submissions filed the Defendants have urged this court to say that the oral evidence of the Claimant supports their contention that the Claimant contracted to purchase the property and that she did not have the means to do so. In that regard, submit the Defendants, the Claimant therefore negligently stated an intention to buy the subject property from the Defendants. As such, contends the Defendants, they acted upon the Claimant's misstatement and are entitled to compensation.

[15] Further, the Defendants have urged this court to come to a finding of facts adverse to the Claimants, including but not limited to, the fact that, the First Defendant took the deposit from the Claimant, at her request, to hold the property for her. Furthermore, the Defendants submit on the issue of Caveat against Dealings.

[16] The Defendants enlisted the aid of certain authorities in their contention:-

a. Cadler v Crane Christmas
b. Headley Byrne v Heller
c. Amalgamated Metal Trading Ltd. v DTI, The Times, March 21, 1989
d. Central London Property Trust Ltd. v. High Trees House Ltd. (1947)

The Issues

[17] From the pleadings, facts and counterfacts and the legal submissions by the parties, the issues joined can fairly be summarised to be:-

a) Whether the terms of the oral agreement are those contended for the Claimant or those contended for by the Defendants;

b) Whether the oral agreement was breached by the Claimant or by the Defendants;

c) Whether the consideration has wholly failed;

d) Whether the Defendants are entitled to the equitable remedy of specific performance;

e) Whether the Claimant has a right to the return of the deposit with interest thereon, if not,

f) Whether the Defendants are entitled to forfeit the deposit

g) Whether the Defendants are entitled to damages be it deceit or any of the heads of misrepresentation as has been asked for

[18] In considering the issues it is apt that I begin by looking at the provisions of the Statute of Frauds. According to Section 4, 'No action may be brought upon any contract for the sale of land or other disposition of land or any interest in land, unless the agreement upon which such action is brought or some memorandum

or note thereof is in writing and signed by the party to be charged or by some other person thereto by him lawfully authorised." To put it tersely, the law requires that certain kinds of contracts be memorialized in writing, be signed by the party to be charged and that there be sufficient content to evidence the contract. What is required by the law is for there to be a memorandum or note which must contain a description of the property, the purchase price, any other terms agreed to by the parties including the completion date, the payments of the purchase price and the stages of payments of the purchase price. Such a memorandum or note must, according to the Statute, be signed by the party to be charged.

[19] Of serious consequence is the stricture of the said Section 4: "if the conditions are not completed with, all that this means is that the contract is unenforceable. However, it is not void. As such, equity will intervene to enforce an oral contract for the sale of land where it can be shown that there were acts of part performance.

Findings of Facts

[18] I hold myself obliged to say that I do not find favour with the First Defendant's evidence. It is not to be supposed that I impute or seek the cast imputation on the character of the First Defendant. Rather, I desire to say that, his evidence, and the delivery of it, did not nudge me over the threshold of believability. There was a want of documentary support for his assertions. To illustrate, the First Defendant gave evidence that he undertook repairs to the house at a cost of JA$1,000,000.00 and that he spent a further sum of JA $3,000,000.00 to do other works on the building yet his unsparing industry and attention to the details of his improvements to the building and property was tinselled over with a terse embellishment of words without documentary support. In fact, from Mrs. Stewart-Harrisingh's letter (Exhibit 12) it emerges that what was spent was JA$1,000,000.00 and not JA$4,000,000.00. To pass from that, I notice that the entire deposit without a scintilla of remainder was spent in achieving that end. I hope I will not be convicted of naiveté when I say that the entire episode was too pat without it being particularised through documentary proof or support.

[19] Accordingly, I am to say that, generally, wherever there are conflicts on the evidence between the Claimant's evidence and that of the First Defendant I inclined to accept the Claimant's over that of the First Defendant's. I am distinctly maintaining that the Claimant gave her evidence with unequalled simplicity and directness of veracity. On the other hand, the First Defendant, unless I greatly mistake the temper of his delivery, appeared to have fallen under the sway of astute equivocations or subtle indirections.

[20] At this juncture, I hold it to be expedient that I address the various concerns regarding the terms of the Agreement for Sale, The Deposit, The balance on the purchase price, Who breached the Agreement, Whether the Defendants are entitled to an order for specific performance or Whether the Defendants are entitled to an award of damages as claimed by them and, finally, Whether the Claimant is entitled to a return of her deposit. Taking each concern in order as as outlined I accept that the initial negotiations were between the Claimant and the First Defendant. The initial purchase price as agreed between them was JA $26,000,000.00. However, the Claimant caused a valuation and a surveyor's report to be done and which report showed a market value of JA $32,000,000.00. After the Claimant gave a copy of the report to the First Defendant, the latter conferred with the Second Defendant and the parties agreed to a purchase price of JA $27,000,000.00 or the equivalent in Can$328,750.00.

[21] The Defendants' claim that the contract price was to be in Canadian Dollars is not accepted as this was not put to the Claimant in cross-examination to elicit a response from her. I do not find that the agreed purchase price was to be Can$328,750.00 not of all expenses and costs as alleged by the Defendants. What strikes the mind rather forcefully is that Exhibit 5 (receipt for the deposit) does not bear out the contention of the Defendants that the purchase price was to be in Canadian Dollars. Further, from Exhibit 6 (email sent by the Claimant to the First Defendant) it is cogent evidence that the deposit was in JA$4,000,000.00 and not in Canadian dollars.

[22] As to the Deposit it is to be particularly noted that the First Defendant prevailed upon the Claimant to have it paid to him directly and not to the lawyer proposed by the Claimant which lawyer she intended to handle the deposit and to prepare the Agreement for Sale on her behalf.

[23] As to the 'Additional Work' sub-head I accept the Claimant as being a reliable witness when she says that it was her understanding that the property in question would be sold to her in its unimproved state and that she did not ask the Defendants to do any work on the property. According to the Claimant, "I did not even have the Sales agreement or anything. It is still their house so why would I ask for this?"

[24] Two facts stand in the way of the First Defendant's contention that the Claimant had asked him to make the improvements to the property. For one, this is uncorroborated and is unsupported by the Second Defendant. Second, on the First Defendant's own misgivings about the Claimant being able to complete the contract, the question is, why would he have decided to take a chance in putting in facilities in the house in the light of those misgivings? His contention that he had told the Claimant that he had taken the deposit to hold the property for her fails to resonate especially in view of his assertion that the deposit was made in the absence of a contract "simply because there were persons who had evinced an intention to come from England with deposits and that Spencer had given him the funds to stop him from entertaining anyone else in respect of the property." It seems to me that the First Defendant's failure to reduce into writing the terms of the agreement of the sale was all the more imperative in light of his doubts concerning the Claimant's ability to bring closure to the transaction and in view of the fact that there were others prospective buyers. Accordingly, I declined to accept his evidence in this regard.

[25] As for the Agreement for Sale I accepted the Claimant's contention and rejected that of the First Defendant. I accepted the Claimant's contention that both herself and the First Defendant would instruct Mrs. Stewart-Harrisingh to prepare the

Sales Agreement for on-sending to the Claimant in Canada and for the latter to sign and return it to Mrs. Stewart-Harrisingh. However, it is particularly clear that the First Defendant was not minded or keen to insert Mrs. Stewart-Harrisingh into the transaction in order to save or diminish the expense-associated legal services that she would entail as a lawyer. The First Defendant, it suffices to remind, according to the evidence of Mrs. Stewart-Harrisingh, approached her in late 2010. He asked her for an estimate which is a breakdown of the costs involved in selling the property as the purchase price given to her by him. She obliged by giving him the estimate. The First Defendant then asked her to represent the parties to the transaction. She declined. However, she did not hear about the matter again until the Claimant came to her office. She gave to the Claimant, at the time of the latter's visit, a copy of the estimate. According to Mrs. Stewart-Harrisingh, the First Defendant did not tell her that he had received a deposit from the Claimant. Sometime later, she says she received communication from Mrs. Donna Scott-Mottley of Scott, Bhoorasingh attorneys –at-law who was who was acting on behalf of the Claimant: See Exhibit 10 dated 7th November 2011 (7/11/2011).

[26] According to Mrs. Stewart Harrisingh, she had not been retained prior to that point by the First Defendant. It was after her receipt of a letter sent to her by Mrs. Donna Scott Mottley that she was retained by the First Defendant: See Exhibit 9 dated 20th November, 2011. It is quite apposite to note that Mrs. Stewart-Harrisingh testified that the First Defendant told her that he would revert to her once he had finalised the terms of the agreement. On that piece of evidence, I could not bring myself to accept that the failure to prepare the Agreement for Sale as alleged by the First Defendant was due to the fault of Claimant. That this could not be so in palpably clear: Mrs. Stewart Harrisingh was not brought into the transaction until October 2011. This rather upends the First Defendant's contention that he was contacting Mrs. Stewart-Harrisingh "daily on the phone" to check if the Claimant had given her the information to prepare the Agreement for Sale. To the contrary, it was the Claimant who was making the efforts to contact Mrs. Stewart-Harrisingh and to that end sought without success to obtain her phone number from the First Defendant.

[27] It is my view that the balance of the purchase price was to be financed by way of the Claimant securing a mortgage. The evidence of the First Defendant is "She said she was going to apply to Jamaica National Building Society and I should keep track of her mortgage application; to check with Paul Lettman to keep track of her application. She gave me his contact information."

[28] By the First Defendant's own admission, he being familiar with the mortgage application process, he knew that an applicant for a mortgage cannot obtain it unless a written agreement for sale is provided to the mortgage company. It is astounding then, in the light of that admission, where he maintains that he was following up with Paul Lettman of Jamaica National Building Society on the progress of the mortgage application when he knew that the Agreement for Sale had not even been drafted. That the First Defendant knew that the Claimant intended to secure a mortgage is further supported by Exhibit 9 is, incontestable.

Failure of Consideration

[29] The principle which governs the above is to be found in the seminal authority of ***Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd [1943] Ac 32.*** The facts there can be summarized thus. The Plaintiff, ***Fibrosa,*** agreed to purchase machinery from the Defendant ***Fairbairn,*** an English company. The machinery was to be manufactured in England and sent to Poland. To that end, the Plaintiff made a payment of £1,000.00 on account. However, international hostilities broke out resulting in Germany invading Poland with Britain declaring war on Germany. The Plaintiff tried to recover the sum of £1,000.00 from the Defendant who refused asserting that the invasion had frustrated the contract. In the ensuing legal determination the House of Lords held that the Plaintiff was entitled to recover the sum of £1,000.00 from the Defendant who refused asserting that the invasion had frustrated the contract. In the ensuing legal determination the House of Lords held that the Plaintiff was entitled to recover the £1,000.00 as payment as the failure by the Plaintiff entity to complete the payment to the Defendant amounted to a failure of consideration. In the result, the Plaintiff was

declared entitled to recover its £1,000.00 down payment. Lord Chancellor, among eminent others, distilled the principle to be applied to such a scenario: "The claim of a party who has paid money under a contract to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based upon any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiffs use." Farther along in his judgment Lord Chancellor added that, "when one is considering the law of failure of consideration and of quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails, the inducement which brought about the payment is not fulfilled." With this distillation of the principle as highlighted his brethren agreed. Applied to the instant case I can find no basis in fact or in law to say that there was no failure of consideration

Promissory Estoppel

[30] Broadly speaking, where one party to a contract grants to the other party a concession that he will not enforce his rights or a particular right in a particular way and such a concession is not supported by consideration then the equitable principle of promissory estoppels arises.

[31] The above principle is comprised of a number of plinths which must cohere to give it its legitimacy. First, the promise must be clear and unequivocal. Second, it must be inequitable for the promisor to go back on his promise. Third, the promise or concession does not create any new contractual rights rather; it prevents the promisor from enforcing his strict legal rights. Fourth, the promise or concession does not extinguish existing obligations, rather, it suspends them. Fifth, and last,

the promisee must have altered his position in reliance on the promise or concession.

[32] Here in the instant case, plainly the Defendants have not brought themselves within the qualifications of the law as the factual basis for their being able to do so is rejected.

Part Performance

[33] I now turn to the doctrine of part performance. It seems now to be generally maintained as settled law that where a claimant has partly performed an oral contract required by the Statute of Fraud to be evidenced in writing, in the expectation that a defendant would perform the rest of the contract, the court will not allow a defendant to escape from his contract upon the strength of the conferring Statute of Fraud, but will order specific performance of the oral contract. The principle to be gleaned here and which is to be particularly noted is that one party may not set up the statute where the other party has been induced to act to his detriment on the strength of the contract. Consequently, it is only the party who has done the act of part performance who can rely on it as the old case law of ***Caton v Caton (1865-67) L.R, 2 HL127*** illustrates.

[34] It is to be particularly noted that part performance cannot by and of itself determine the material terms of the contract. For the doctrine of part performance to become applicable it must be unequivocally connected with the alleged contract. A sufficient act of part performance has been determined to occur where one party has delivered and the other has taken possession: See ***Brough v Nettleton [1921] 2 Ch 25.*** So too where, to be noted, alterations have been done on the premises by the Claimant and supervised by the defendant purchaser: See ***Broughton v Snook [1930] Ch. 505.*** Significantly, I desire here for it to be stressed that, the effect of a sufficient act of part performance has been determined to occur where one party has delivered and the other has taken possession. See ***Broughton v Nettleton [1921] 2 Ch 25***. So too where, to be noted, alterations

have been done on the premises by the claimant and supervised by the defendant/purchaser.

[35] I desire here to lay emphatic stress that, the effect of a sufficient act of part performance, is to enable evidence to be given of all the terms of the contract and that only of the terms related to the act of part performance: ***Broughton v Nettleton, supra***

[36] It is undoubtedly the case that where the contract does not meet the requirements of Section 4 of the Statute of Frauds, it is unenforceable. However, it not being enforceable does not render it void. In ***Fauzi Elias v George Sahely & Co. (Barbados) Limited [1983] (AC)*** the plaintiff and the defendant made an oral agreement for the sale of premises to the plaintiff. On the same day the plaintiff's attorney wrote to the defendant's attorney confirming the oral agreement and, importantly, setting out the terms. A deposit representing 10% of the agreed price was sent by the defendant's attorney to the plaintiff's attorney which was acknowledged by issuance of a receipt by the plaintiff's attorney to the defendant's attorney with the significant words "as deposit on the property agreed to be sold," on it. The defendant refused to complete the sale and the plaintiff sued for Specific Performance of the contract.

[37] The first instance judgment was determined in favour of the plaintiff. It was, however, overturned on appeal to the Court of Appeal. In consequence, the plaintiff approached the Judicial Committee of the Privy Council who held that the parties had concluded an oral contract, that the acceptance of the deposit by the defendant's attorney did not preclude the latter from being regarded as agent for the defendant; and, in circumstances where the terms of a document signed by a party charged with a contract referred to as an oral agreement for the sale of land, parole evidence was admissible to identify any other document which related to the oral contract and the document so identified could be read together with that signed by the party to be charged and if the two documents together contained all

the terms of a concluded contract, they were sufficient to constitute a memorandum in writing of the oral agreement.

[38] By the above judgment it is extra apparent that equity will intervene in such a situation to enforce a contract where there are acts of part performance. It does so on the basis that it would be unjust for a party to be allowed to refuse to honour his obligations under the contract by invoking Section 4 of the Statute of Frauds in circumstances where the other party has performed acts pursuant to the contract. Ultimately, then, the court will make an order for specific performance provided there is, at minimum, a sufficient act of part performance.

What act would be so regarded?

[39] In ***Steadman v Steadman [1976] AC 536*** it was held that the alleged acts of part performance had to be considered in their surrounding circumstances and if they pointed, on a balance of probabilities, to some contract between the parties and either showed the nature of or were consistent with the oral agreement as alleged, then there was sufficient part performance of the agreement.

[40] It should here be noted that the mere payment of money, for example, the deposit, where there is an oral contract for the sale of land, does not necessarily by itself constitute part performance. Something more is required. Such a person has to show that he/she has altered his/her position to the extent where a Caveat cannot undo what has been done. In such a scenario a court has the authority to make an order that the deposit be refunded. In the instant case no acts of part performance on the part of the Claimant or Defendants have been grounded in fact or in law. Accordingly, no reliance can be placed on this doctrine to establish that there was a contract.

Forfeiture of Deposit

[41] The law of the issue as regards forfeiture of deposits is as expressed in ***Workers Trust & Merchant Bank Limited v Dojap Investments Limited, Privy Council appeal No. 41 of 1991.*** There the parties entered into a contract for the sale of

land with a stipulation that the purchaser was to pay a deposit. The purchaser duly paid the deposit which was however forfeited upon his failure to complete in time. The purchaser sought the intervention of the courts. The matter went up to the Privy Council with this reference: "This case raises the question whether a deposit in excess of 10% paid under a contract for the sale of land can be lawfully forfeited by the vendor in the event of a failure by the purchaser to complete on the due date."

[42] Lord Browne-Wilkinson, at page 2 of the judgment reiterated the law on forfeiture. "In general, a contractual provision which require one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such position can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land." Having recognised this exception to the general rule, His Lordship noted that, "This exception is anomalous .... The special treatment derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token or earnest (such as a ring) or earnest money." However, he continues, "the special treatment afforded to deposits is plainly capable of being abused if the parties to a contract, by attaching the label "deposit" to any penalty, could escape the general rule which renders penalties unenforceable." After reviewing a few authorities on the subject matter he concludes that "it is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money." His Lordship ruled that in order to be reasonable a true deposit must be objectively operating as earnest money and not as penalty. In the final analysis, it was held that the, customary deposit in Jamaica was 10% and that a vendor who seeks to obtain a larger amount by way of a forfeiture deposit must show special circumstances to warrant the payment of such a deposit.

[43] From the foregoing and on the facts as found in the instant and on the application of the law, the Claimant is entitled to a return of the deposit in the terms as is prayed for by her.

Innocent/negligent Misrepresentation

[44] The law here is that an untrue statement of fact, made by one party, the representor, to the other, called the representee, in the course of negotiating a contract, that induces the other party to enter into the contract, is a misrepresentation.

[45] An innocent misrepresentation is one in which the representator had reasonable grounds for believing that his false statement was true. The misrepresentation must be material to the transaction and the representee must substantially have relied on it. Further, the lie must also proximately cause the other party to suffer damages. Furthermore, the loss occasioned to the representee must redound to the benefit of the representation.

[46] A negligent misrepresentation is one in which the misrepresentation was made carelessly, by the representator to the representee and which is in breach to take reasonable care that the representation is accurate.

[47] I will here, state that the remedies for misrepresentation are recission and/or damages.

Deceit and Fraudulent Misrepresentation.

[48] As will be borne out by the case law authority of Derry v Peek (1889) 14 AC 337, a tort is committed when someone knowingly, that is to say, without belief in its truth, or recklessly, makes a false statement of fact intending that it should be acted on by someone else and that person does act on the false statement and thereby suffers damage.

[49] In the cited authority the House of Lords held that, in 'order to sustain an action of deceit, there must be proof of fraud; fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false, if fraud be proved, the motive of the person guilty of it is immaterial.

[50] It will suffice here to note that there are consequential ramifications that arise when once deceit incorporating fraud is alleged. First, any allegation of fraud must be distinctly alleged and distinctly proved. Further, it is not allowable to leave fraud to be inferred from the facts: See ***Davy V Garrett (1877) 7 CL D 473.*** Second, though the standard of proof is the civil standard of, 'on a balance of probabilities', a higher degree of probability is required: See ***Horal v Neuberger Products [1956] EWCA Civ J 1120-1.***

[51] Again on the found facts and on the law of am to say that the claims made by the Defendants against the Claimant in this respect, wholly fails.

Caveat against Dealings

What is the law here?

[52] A caveat is shorthand for "Let him beware." It is addressed, pursuant to Registration of Titles Act (RTA), to the Registrar of Titles under Section 139, restraining the registration of any dealings affecting the ownership of land without notifying the Caveator. The section also gives the Caveator the power to withdraw the caveat by completing the relevant prescribed form.

[53] Under Section 140 of the Act the registered proprietor may summon the Caveator to court to show cause why the caveat should not be removed. Where the Caveator fails to show such cause or fails to attend a scheduled hearing after being summoned the court may make an order that the caveat be removed.

[54] It should also be noted that after fourteen day the caveat lapses if the registered proprietor has applied for the registration of a transfer or other dealing with the land, if after the Caveat or having received notice fails to obtain an injunction

preventing the registration of the dealing within the said fourteen days. From the above observations it is manifest that the Defendants are not impotent to take steps to have the caveat dislodged. The legal apparatus to have the caveat removed was not activated in light of the bold assertion by the Defendants that they were forestalled in selling the property to other(s) owing to the lodging of the Caveat by the Claimant. Accordingly, proof by assertion of this is rejected on the basis that it is less likely to be so.

[55] As I understand it, the purpose of a caveat may be to allow time for the parties embroiled in an action, pending or otherwise, to apply to the court to enforce or determine an interest in land. Alternatively, the purpose may be to alert a third party as to the interest claimed. Legally, all this means is that a caveat serves as an admonition, caution or working to the world at large. It is a formal notice or warning given by a party to a judge or other court officer concerning the caveator's behaviour and requesting a suspension of the proceeding until the merits of the notice or warning are determined. At this juncture, it is, I think important that I set out the law.

[56] Section 139 reads

> "Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devaluation in law or otherwise, may lodge a caveat with the Registrar... forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, (such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat."

Section 140 the RTA, it is to be noted deals with the lapsing of the caveat following notice by the caveator.

I agree with the Claimant that the law on the methods of removing a caveat, namely, by warning and lapse, by withdrawal and, by order of the court, is as stated in ***Sunswept Jamaica Co., Ltd. v The Registrar of Titles and Angela Clarke-Morales (2016) JMSC Civ 126, supra.***

In light to the above and the relevant facts I am persuaded that the facts and the law do not assist the Defendants. Inaction on the part of the Defendants cannot be the proof by which they were empowered to act under Section 140 if their complaint is that they were prevented by virtue of the caveat being in place. That argument fails.

[57] The Defendant's argument here is that by lodging a caveat on their title and by simultaneously claiming a return of the deposit without removing it disentitles the Claimant to recover the deposit. So, continues the argument, until and unless the caveat is removed the Claimant is by implication declaring to the world that she has a present and continuing interest in the subject property. Thusly, claim the defendants, the claim for a return of the deposit is tantamount to the claimant saying that she no longer has an interest in the property. In other words, the Claimant ought not to be allowed to approbate and reprobate in violation of the equitable maxim "he who seeks equity must himself do equity."

[58] The Claimant counters the above argument by advancing that the fact of her being a purchaser who has made a deposit and is awaiting the completion of the sale imbues her with an interest in the property and thus she has a right to lodge a caveat. Further, argues the Claimant, she is not commencing legal action for an interest in property even as there is no requirement under the Registration of Titles Act (RTA) to file a claim. Rather, what the Claimant has done is to protect her interest in the property by the lodging of the caveat. The fact of the Claimant

seeking a return of the deposit does not initiate against his interest in the property. The Claimant's in the property does not cease, she argues, until the agreement is brought to an end by the deposit being refunded to her.

[59] It is observable enough, on the state of the law that the Defendant's argument here cannot succeed. Plainly, the Claimant by lodging the caveat is not initiating legal action but is merely serving notice, through the said caveat, to another or others of her interest in the property. Further, even if be granted that a less benign interpretation be given or accepted for the lodging of the caveat, the Defendants were not without their remedy in law to have it removed. They did nothing and to merely advance that they were prevented from selling the property to any other prospective buyer is less than convincing.

[60] On the basis of the facts and the law I fail to see how the Defendants' contention can be maintained. In fine the defences and the counterclaim fail as they do not consort with the facts as found accordingly. Judgment is entered for the Claimant. Costs are to go to the Claimant with such costs to be agreed or taxed.