



[2024] JMSC Civ. 67

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV03419

IN THE MATTER of all that parcel of land part of Nutshell in the parish of Saint Catherine Registered at Volume 1266 Folio 386 of the Registered Book of Titles.

BETWEEN

HERBERT WALFORD

CLAIMANT

AND

PAUL TAYLOR

1ST DEFENDANT

SUZAN TAYLOR

2ND DEFENDANT

IN CHAMBERS

Ms. Suzan Campbell instructed by Harricamp Law appearing for the Claimant

Mr. Clifton D. Campbell instructed by Archer, Cummings and Company appearing for the Defendants

Heard: **March 18th, 2024 and June 7th, 2024**

Civil Procedure & Practice — Contract Law — Breach of Contract — Elements of a Contract — Specific Performance – Proprietary Estoppel – Possessory Title - Unjust Enrichment — Absence of Documentary Evidence — Sale Agreement

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] On the 23rd day of November 2004, the Claimant entered into an agreement with the 1st Defendant to purchase property located at Lot 282 3 East Greater Portmore, in the parish of St. Catherine, registered at Volume 1266 Folio 386 of the Register Book of Titles for the sum of **Thirty-Three Thousand United States Dollars (USD\$33,000.00)**. Several payments were made by the Claimant to the 2nd Defendant pursuant to instructions from the 1st Defendant. In February 2021, the Claimant indicated to the 1st Defendant that he was taking steps to have the property transferred from the 1st Defendant to him and his nephew. After this request was made, there was a breakdown in communication between the Parties and the transfer was not effected. The Claimant was subsequently informed that the property was being transferred to the 2nd Defendant and lodged a caveat to secure his interest in the property.

[2] On the 23rd of July 2021, the Claimant filed a Fixed Date Claim Form initiating proceedings against Paul Taylor and seeking orders against him. On the 1st of February 2022, an Amended Fixed Date Claim Form was filed naming both Paul and Suzan Taylor as Defendants and seeking the following orders:

- *The Claimant is entitled to the legal and equitable interest in All That parcel of land part of Reids Pen now called East Chedwin, Greater Portmore in the parish of Saint Catherine being Lot numbered Two Hundred and Eighty-Two on the plan of part of Reids Pen now called East Chedwin, Greater Portmore registered at Volume 1266 Folio 386*
- *The Claimant is entitled to all the equitable interest and legal interest in property registered at Volume 1266 and Folio 386 of the Register Book of Titles since he has paid the registered proprietor Paul Taylor the sum of **Thirty-Three Thousand United States Dollars (USD\$33,000.00)** for the property either directly or through his wife and agent.*
- *The First Defendant be ordered to transfer all the legal and equitable interest in the property to the Claimant forthwith.*
- *The First Defendant execute all and any relevant documents for transferring of the said property to the Claimant.*

- *The Registrar of the Supreme Court shall be empowered to sign and execute and/or all documents on behalf of the First Defendant should he fail and/or refuse to sign same to effect the purposes set out in paragraph 1 of the above.*
- *Costs to the Claimant*

CLAIMANT'S CASE

[3] In his first affidavit which was filed on the 23rd of July 2021, Mr Walford stated that on the 23rd of November 2004, he entered into the abovementioned agreement. The agreed sale price was to be paid in three (3) instalments over a period of three (3) months. Mr Walford said that the first payment of **Seven Thousand Five Hundred United States Dollars (USD\$7500.00)** was paid on the signing of the sale agreement. A second payment of **Ten Thousand United States Dollars (USD\$10,000.00)** and a third payment of **Fifteen Thousand United States Dollars (USD\$15,000.00)** were agreed on. The sale agreement was produced by him as an exhibit. The parties to the sale, who are related by marriage, all live overseas and there was no attorney hired in Jamaica to handle these proceedings. As such, the usual formalities required for the sale and transfer of a property in Jamaica were not observed.

[4] Mr Walford indicated that at the time of purchase, the 1st Defendant had a mortgage which was registered on the property on the 1st of June 1995. The purchase price was not paid in three (3) instalments as agreed and Mr Walford's evidence shows that payments were made between 2004 and 2014. Following the execution of the sale agreement, Mr Walford allowed his nephew Rupert Wright to occupy the house and he gave evidence that Rupert Wright had been residing there for over ten (10) years prior to the filing of this claim. During this period, on the instructions of the Claimant, Rupert Wright paid the sum of **Two Thousand Dollars (JMD\$2000.00)** monthly as rent which went towards the mortgage held by the 1st Defendant. He was also responsible for the payment of the property taxes. In October 2020, the Claimant was notified that the mortgage had been paid in full.

[5] Up to this point, it appears that relations between the Parties were amicable but things took a negative turn in February of 2021, when Mr Walford decided that he wanted to have the property transferred to himself and his nephew and retained an attorney to do this. Mr Taylor was informed of this development and according to Mr Walford, all communication between them broke down as Mr Taylor stopped taking his calls. Mr Walford then spoke to his niece, the 2nd Defendant and was informed by her that Mr Taylor would be transferring the property to her. Mr Walford then lodged the caveat against the Title and initiated legal proceedings for specific performance. Pursuant to the legal proceedings, Mr Walford obtained a Valuation Report in 2021 which stated the value of the property as **Ten Million Nine Hundred Thousand Dollars (\$10,900,000.00)**.

[6] In his second affidavit, which was filed on February 1st, 2022, Mr Walford provided details on the manner in which the payments were made. He exhibited four (4) 'receipts', which he stated he had been able to locate. The 'receipts' were copies of the cheques which were paid to the account of Suzan Taylor as instructed by the 1st Defendant, Paul Taylor. The cheques produced showed the following payments to the account of the 2nd Defendant:

- On the 10th of January 2004 – **USD\$3000.00**
- On the 11th of April 2014 - **USD\$10,000.00**
- On the 18th of August 2004 - **USD\$5000.00**
- On the 16th of June 2006 - **USD\$2000.00**

[7] The agreement for sale was signed by Mr Walford on November 23rd, 2004 and by Mr Paul Taylor on October 1, 2004. It was witnessed by a Notary Public for the State of New York in the United States of America on the 23rd of November 2004. The agreement identifies the property to be sold and states the purchase price which was alluded to above. The terms governing payment stipulates that the buyer shall pay an earnest deposit of **Seven Thousand Five Hundred United States Dollars (USD\$7500.00)** upon signing of this contract. The total amount is to be financed by the buyer. The contract was contingent upon the payment of the

earnest money at signing or within five (5) days of the signing by both parties to the contract. A provision making time of the essence was also included. In terms of the expiration of this offer, this was stated as November 1st, 2004 at midnight, unless accepted by signing and returning to the offering party.

- [8] In his viva voce account, Mr Walford stated that he is an Accountant and a Pastor. In cross-examination, he indicated that in 2004, he had been an Accountant for over sixty (60) years. He agreed that as an Accountant, evidence of payment in proof of a transaction was required and that the best evidence would be a receipt. Mr Walford conceded that the 'receipts' he exhibited are cheques which only account for payments in the sum of **Twenty Thousand United States Dollars (USD\$20,000.00)**. It was suggested to him that the reason why he only had receipts for **Twenty Thousand United States Dollars (USD\$20,000.00)** is because that was all that was paid and this was strongly rejected by him. He insisted that these were all that he could provide as the bank had failed to give him a print-out of the cheques issued. Mr Walford acknowledged that there were no receipts exhibited but maintained that all payments had been made to the 2nd Defendant pursuant to the 1st Defendant's instructions. He disagreed with the suggestion that he had no reason to sue Mrs Taylor and insisted that she had received the money on behalf of her husband and as husband and wife, they were both liable to him for same. Mr Walford accepted that if full payment was not made, he would not be entitled to have the property transferred.

DEFENCE CASE

- [9] The first witness for the defence was Mr Paul Taylor who informed the Court that he is a Civil Engineer and a Driver. He gave his address as New York, United States. Mr Taylor confirmed that there had been an agreement for sale of the disputed property. He denied however, that an initial payment of **Seven Thousand Five Hundred United States Dollars (USD\$7500.00)** had been made by Mr Walford at the time of signing. His actual words were 'the sum was not paid to me'.

He denied that the sale price had been paid in full and asserted that only **Twenty Thousand United States Dollars (USD\$20,000.00)** had been received.

- [10] Mr Taylor denied that Rupert Wright had been living at the property from 2004. He asserted that it was in 2005 that he was informed that someone was living at the house. His wife contacted Mr Walford, who informed them that it was his nephew and that he had arranged for the nephew to pay the mortgage as rental for the property. The nephew was also responsible for its upkeep. Mr Taylor denied any knowledge of Mr Walford's efforts to have the property transferred to him and his nephew. He stated that he had informed Mr Walford that he was going to transfer to the property to his wife and Mr Walford agreed with this position. Mr Taylor asserted that Mr Walford is not entitled to specific performance as a balance of **Thirteen Thousand United States Dollars (USD\$13,000.00)** was still outstanding on the sale agreement.
- [11] Mr Taylor was questioned about the period during which the agreement was made, he initially stated that this occurred in November 2004. When asked to be more specific, he resiled from the month and indicated that it was sometime in 2004. He was questioned whether the agreement had been submitted to any government agency in Jamaica and he indicated it had not been. When asked whether stamp duty had been paid on the transaction, he informed the Court that this would have been left to his wife to do. When questioned further on the point, he acknowledged that he was not aware of any of the formalities in Jamaica being complied with. He was adamant that this would not be required as this was a US transaction.
- [12] He was asked if it was his position that no payment had been made at the time of the signing of the agreement, and he stated that he would have to refer that question to his wife. When asked to clarify this response, he stated that no payment was made on that date. He was asked to indicate if it was his evidence that the first payment on the sale had not been received until 2006. He was quite brusque in his response and insisted that he did not remember. He maintained however

that the sum of **Thirteen Thousand United States Dollars (USD\$13,000.00)** was still outstanding.

[13] Mr Taylor conceded that in the years between 2004 and the filing of this suit, he never demanded these outstanding sums. He acknowledged that there had been a mortgage on the property at the time of the sale but insisted that he could not remember if it had been in arrears. He was asked to clarify when he became aware that someone was living in the house and he stated maybe three (3) or four (4) years after the transaction had been signed in 2004. This response was then changed to 2006 or somewhere around then. He was asked about the sum of **Two Thousand Dollars (JMD\$2000.00)** which was paid as monthly rent by Mr Wright for over fifteen (15) years and he denied that he had ever rented any property. In response to the question whether the mortgage has been paid by the Claimant since the agreement for sale, Mr Taylor denied having any knowledge of this but conceded that the mortgage had been paid. He initially stated that the payments had been made by him but later indicated that no payments were made by him after the sale agreement had been executed.

[14] It was suggested to Mr Taylor that the agreement had not been subject to any formalities because it had been between friends or relatives, and he agreed. He also agreed that he only mentioned receiving **Twenty Thousand United States Dollars (USD\$20,000.00)** because that was all that was reflected on the cheques presented by the Claimant. He strongly denied that the only reason he made no demand for this 'outstanding sum' was because the money had already been paid in full. Mr Taylor was questioned about his plan to transfer the property to his wife and he denied that he had ever intended to do so. He was asked if he had ever taken any steps to remove Rupert Wright from the property and he said that he had not. It was suggested to Mr Taylor that Mr Walford had paid the entire **Thirty-Three Thousand United States Dollars (USD\$33,000.00)** and he disagreed. It was also suggested that Mr Walford had cleared the mortgage. Mr Taylor insisted that he could not recall if Mr Walford had done so but the mortgage had been paid in full. He subsequently conceded that Mr Walford had agreed to pay the mortgage.

- [15] In response to questions by the court, Mr Taylor stated that Mr Campbell had prepared the sale agreement, this appeared to be a reference to his attorney. He also indicated that he had read the document before signing. His attorney intervened and asked for Mr Taylor to clarify his first response. The question was posed once more and Mr Taylor was asked if he understood the question, he responded that he had not and stated that the sale agreement had in fact been prepared by Mr Walford. He was asked to examine the document specifically the clause which outlined the governing law. He informed the Court that the agreement would have been governed by the law of Jamaica based on the location of the property. He was asked about the sale contingency clause and acknowledged that it required that the earnest payment of **Seven Thousand Five Hundred United States Dollars (USD\$7,500.00)** be made within five (5) days of the agreement. He maintained however that he does not remember when the first payment was made.
- [16] The final witness called in this matter was Mrs Suzan Taylor, the 2nd Defendant. Mrs Taylor acknowledged her connection to both the 1st Defendant and Claimant. She gave evidence that she had been informed by her husband that the sum of **Seven Thousand Five Hundred United States Dollars (USD\$7,500.00)** was not paid on signing and has never been paid. She accepted however that the sum of **Twenty Thousand United States Dollars (USD\$20,000.00)** had been transferred to her by the Claimant. Mrs Taylor insisted that she was never aware that Rupert Wright had been put in possession of the property and was told about this by someone else. She made contact with her uncle who informed her that his nephew was residing there and making monthly payments of **Two Thousand Dollars (\$2000.00)** as rent, which went towards the mortgage on the property. In her statement, Mrs Taylor indicated that her uncle was aware that her husband was going to transfer the property to her and expressed no disagreement.
- [17] In cross examination, Mrs Taylor maintained that she was not aware of Mr Wright's presence at the property until 2005 and 2006. She agreed that no demand had ever been made by her husband for the sum which was alleged to be outstanding.

In the course of her response, the Court observed that she appeared to be speaking to someone off camera who was heard saying the word, 'no'. Mrs Taylor was asked for the whereabouts of her husband and stated that he was upstairs. The witness insisted that she was alone in the room. When instructed to span the room with the camera on her device, she held the camera to the roof. She was instructed to lower it and at that point indicated that her autistic son had accidentally entered the room and had been the person who had spoken to her. She was reminded by the Court that she was not to be communication with anyone else while giving her evidence and the cross-examination continued.

- [18] Mrs Taylor agreed that she was aware that Rupert Wright was at the property and that **Two Thousand Dollars (JMD\$2000.00)** was to be paid monthly by him. She was also aware that he was to take care of the property. She was asked if her husband had paid any mortgage since the agreement was made and she said he had not. She conceded that no payment had been made by her either. Mrs Taylor acknowledged that the mortgage on the property had been cleared but could not recall if the mortgage had been in arrears at the time of the agreement.
- [19] She was questioned whether her husband had intended to transfer the property to her despite the payments by the Claimant and stated that it was actually her idea to effect the transfer. She stated further that she made this decision following a discussion with the Claimant at her home three (3) years ago.
- [20] In re-examination by Mr Campbell, Mrs Taylor was asked about the meeting that she purportedly had with Mr Walford. She outlined that during this meeting, Mr Walford complained to her that his nephew was trying to take the house out of his hands. She suggested to him that the only way to avoid that happening was for her to do a transfer of the property to herself. She also insisted that no demands had been made of the Claimant for the outstanding funds as he is family.
- [21] In response to questions from the Court, she indicated that only her husband's name was on the title. She was asked if Mr Taylor had been present for the

discussion with Mr Walford and she said he was not but she told him after of her proposal. She indicated that initially she had not been aware of the sale agreement but became aware at the time the documents were prepared and signed. She subsequently became a part of the payment system. She was asked what she meant by 'initiating the process', and she explained that she started the process to transfer the property to herself and advised Mr. Walford on the phone about it but the process was not completed.

[22] Permission was granted to Ms Campbell to conduct further cross-examination on these issues. Mrs Taylor indicated that the process was not complete because Mr Walford sued. Mrs Taylor agreed that her affidavit did not contain any reference to the meeting and discussions had with her uncle. She also agreed that this was the first time that the Court was hearing this information. It was suggested to her that the meeting never happened. Mrs Taylor chuckled and responded that the Claimant's Attorney should ask her client what he had to say. When instructed by the Court to respond to the question, she stated that she did not agree with the suggestion.

CLAIMANT'S SUBMISSIONS

[23] In her submissions on the issue, Ms Campbell commenced by identifying facts which she described as not in dispute or agreed between the parties as follows:

- 1) The Claimant and the First Defendant entered into a Sale Agreement on the 4th day of November, 2004.
- 2) The Claimant and the First Defendant live overseas and did not hire a lawyer in Jamaica to conduct the sale.
- 3) The Claimant, Nephew Rupert Wright, paid **Two Thousand Dollars (JMD\$2000.00)** for mortgage.
- 4) Rupert Wright occupied the property.

- 5) The Defendants were knowledgeable that Rupert Wright occupied the subject property.
- 6) The Claimant paid money towards the Sale Agreement.

[24] Counsel then identified the following facts as being in dispute or not agreed between the parties:

- a. The Claimant paid all monies to the First Defendant for the sale of the property.
- b. The Claimant is entitled to the legal and equitable interest in all that parcel of Reids Pen called East Chedwin, Greater Portmore in the parish of St. Catherine being Lot numbered Two Hundred and Eighty-Two on the plan of part Reids Pen now called East Chedwin, Greater Portmore registered at Volume 1266 Folio 386.
- c. **Two Thousand Dollars (JMD\$2000.00)** was paid towards the Mortgage and was not a rental payment.

[25] The case of **Equilibrio Solutions Jamaica Ltd v Peter Jervis & Associates Limited** [2021] JMCC COMM 26 was highlighted as having affirmed the principles of contract law where Laing J stated that for there to be a valid contract, there needs to be an intention to create legal relations, an offer and by the acceptance of that offer, an agreement and consideration.

[26] Counsel also referred to the case of **Lijyasu M. Kandekore v Jamaica Civil Aviation Authority** [2020] JMSC Civ. 167 which mentioned the case **RTS Flexible Systems Ltd. v Molkerei Alois Muller GmbH & co. KG UK (Productions)** 2010 3 ALL ER 1 where Lord Clark stated that:

"Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon

all the terms which they regarded or the law requires as essential for the formation of legally bundling relations"

- [27] The case of **Steadman v Steadman** [1974] UKHL 0619-2 was also commended to the Court wherein the Court enunciated the principle that if one party to an agreement stands by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn round and assert that the agreement is unenforceable.
- [28] Counsel also highlighted the case of **Mavis Spencer v Dennis Hansle & Petal Hansle** [2018] JMSC Civ.159 which discussed **Fauzi Elias v George Sahely & Co. (Barbados) Limited** [1983] (AC) in which 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.
- [29] In delivering his decision, Morrison J commented that equity will intervene in these situations 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 the circumstances where the other party has performed acts pursuant to the contract.
- [30] Counsel also relied on the doctrine of Proprietary/ Promissory Estoppel and cited the authority of **Annie Lopez v Dawkins Brown and Glen Brown** [2015] JMCA Civ. 6. At paragraph 66 of the decision, the case **Crabb v Arun District Council** [1976] 1 Ch 179 was highlighted in which Lord Denning MR stated

In the species of estoppel called proprietary estoppel, it does give rise to a cause of action... What then are the dealings which will preclude [a landowner] from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—even though that promise may be unenforceable in point of law for want of consideration or want of writing—and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise... Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied"

[31] Ms Campbell asked the Court to consider the doctrine of Res Ipsa Loquitur and the decision of **Alverine Witter v Gore Development Limited & National Water Commission** [2020] JMSC Civ. 221 and asserted the following;

- The Defendants failed to act as a reasonable man and slept on their rights to claim by not interfering or showing interest in the property for more than 16 years.
- In February 2021, the Claimant contacted the 1st Defendant and advised him of his intention to retain counsel to complete the Sale Agreement by transferring the property to him. The 1st Defendant ceased contact with the Claimant following this indication. The Defendant did not intend to complete the sale but only sought to profit from and take advantage of the Claimant.
- The decision of **Horace Brown v Shirley Brown & Christopher Brown & Ellen Ann Mellish** 2022] JMSC CIV. 162 is relevant as it provides that "

...If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

- In the case at bar, the Claimant placed his nephew Rupert Wright in the property for several years, during that time he paid off the mortgage, paid property taxes and maintained the property on the understanding that the Claimant is the legal and beneficial owner of the property. The 1st and the 2nd Defendants, knew that the Claimant's nephew resided in the property from 2005 and allowed him full control and possession as he carried out acts of ownership of the disputed property by improvement and construction of the property and as such allowed the Claimant to believe or expect to have rights or interest in the property.
- The Claimant relies on the principle of equitable estoppel as explained in Snell's Equity, 29th Edition, page 569 at paragraph 2 as the relevant factors were present, firstly the act of acquiescence, "if a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards interfere and take the profit." Secondly, encouragement which occurs where a party under an expectation created or encouraged by a landowner that he will have an interest in it, goes into possession and lays out money upon the land. Equity may compel the owner to give effect to the expectation. And thirdly, promises or representations as to future conduct which may occur where a party is led to suppose that the other will not insist on his legal rights either at all or for the time being.
- In the case at bar, the Defendants accepted all payments for the property by the Claimant. The Claimant by his acts and through his nephew acted to his detriment by expending a significant amount of money maintaining the property throughout the years and neither of the Defendants have put up any resistance nor stated in their Affidavit of any attempt to recover the property throughout the years.

- [32] Counsel agreed that the primary issue to be determined by the Court is the amount of money that was actually paid to the 1st Defendant in furtherance of this agreement. She submitted that with the absence of documentary evidence, the Court is compelled to examine the credibility of the parties.
- [33] In reviewing the case of the Defendants, Ms Campbell submitted that this revolved around the non-payment of a balance of **Thirteen Thousand United States Dollars (US\$13,000.00)** which is still outstanding. Counsel argued that despite this assertion, the Defendants did not make any demands of the Claimant to pay the outstanding sum. They have not filed any claim to recover same neither have they sought occupational rent for the fourteen (14) years that the Claimant had placed his nephew in possession. Counsel contends that the only reason the Defendants did not demand payment was simply because no monies were owed by the Claimant.
- [34] Ms Campbell submitted further that by his own admission the 1st Defendant was aware that there was a mortgage on the property at the time of the transaction but he could not recall if the mortgage was in arrears. He stated that he was not aware that the Claimant was paying the mortgage but has not shown any documentary proof that he was paying the mortgage. He denied knowing whether or not the mortgage was paid on the property. He also denied renting the property to anyone but acknowledged that he had become aware that the Claimant's nephew was residing at the house. He did nothing however to remove him.
- [35] Counsel submitted that the Defendants are neither credible nor witnesses of truth and the 1st Defendants had intended to transfer the property to another person who was not party to the contract despite admitting that more than half of the agreed sum for the property had been received.
- [36] Counsel relied on the case of **Douglas AB Thompson v Nigel Morgan** [2021] JMCA Civ. 10. This was an appeal against the decision of Wint-Blair J (Ag) (as she then was) in which she gave judgment for Mr Nigel Morgan, the respondent, who

was the defendant in a claim brought by Mr Douglas Thompson, the appellant. Mr Thompson had sued Mr Morgan to recover **Twenty Thousand United States Dollars (US\$28,000.00)** and **Two Million Dollars (JMD\$2,000,000.00)** which he asserted he had loaned Mr Morgan in December 2007. The Appellant was able to produce documentary evidence which proved that the monies given to the Respondent was a loan. The Appellant received a receipt which stated that the money given was for a loan. He also admitted to signing one page of a five to six-page document described as the Club Membership Agreement. The evidence of the Respondent and his witnesses were that the money was for an investment. The Court accepted the evidence of the Respondent and his witnesses. The Court of Appeal affirmed the decision of the trial judge on the basis that the trial judge made its decision after assessing the credibility of the witnesses.

[37] Ms Campbell submitted that a similar approach should be adopted by this Court and the evidence of the Claimant be examined and accepted as credible, given that he was not shaken during cross-examination. Counsel argued that in contrast to this the Defendants' evidence was vague and wholly unreliable.

[38] Ms Campbell also relied on the authority of **Demetri Jobson and Gilbert max Jobson v The Administrator General for Jamaica (Administrator of the Estate of Gilbert Baron Jobson) and New Falmouth Resorts Limited** [2020] JMCA App 34. In that matter, both Demetri Jobson and Gilbert Max Jobson (the applicants) are sons of Gilbert Baron Jobson, the deceased. The respondents are The Administrator General for Jamaica (the Administrator General) and New Falmouth Resorts Limited (the company). The Administrator General is the administrator of the estate of Gilbert Baron Johnson. The Appellants sought to set aside an order which granted possessory title to the property to New Falmouth Limited. This appeal was on the basis that there was no documentary evidence that the balance on the purchase price had been paid. The purchase price was **Twenty Six Thousand Pounds Sterling (£26,900)**.

[39] At paragraph 60 of the stated judgment, Brooks JA stated:

“In any event, the company had been, by the time of the Administrator’s General application, in continuous possession of the property for in excess of 12 years. The applicants suggest that Mr. Chisholm’s evidence to that effect is a bare assertion but it is supported by the copy of the Valuation Roll which shows that the company was regarded as the person in possession of the property from at least 1974. On that evidence, the company would have already acquired a possessory title in the property. Rattray J’s order merely allowed for the formalisation of the title.”

- [40] Ms Campbell submitted that applying the reasoning of the Court to this matter, it is undisputed that Herbert Walford has been in undisturbed possession through his nephew since 2005. Although the defendants were aware of this fact, they did not try to dispossess him and they did not demand that the outstanding sum be paid. The Claimant therefore acquired a possessory title and it would only be for the Court to grant formalization of the title.
- [41] Counsel further submitted that although the Claimant did not plead possessory title the authority of **Carmen Williams v Muriel Johnson (By her son and next friend Kevin Johnson)** [2022] JMSC Civ. 96 illustrates that the Claimant can obtain a remedy in equity if it was not specifically pleaded.
- [42] Ms Campbell argued that it would be unjust enrichment for the Defendant and prejudicial to the Claimant to allow them to avoid the contract and transfer the property from the 1st Defendant to the 2nd Defendant.

DEFENDANTS’ SUBMISSIONS

- [43] Mr Campbell asserted that no cause of action has been outlined against the 2nd Defendant and in relation to the 1st Defendant, the Claimant has not fulfilled his obligation to pay the full purchase price as per the sales agreement.
- [44] In challenging the claim against the 2nd Defendant, Mr Campbell argued that it is trite law that a person who is not a party to a contract cannot receive any rights, sue or be sued under the contract. He relied on the enunciation of this principle by McDonald-Bishop JA in **Clayton Morgan & Company v The Estate of Sandra Graham-Bright and Others** [2020] JMCA Civ. 50 in which reference was made

to the extract from Halsbury's Law of England, Volume 22 (2012), paragraph 327 which states:

"The doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement. "

[45] Mr Campbell submitted that according to **Phipps on Evidence**, 15th Edition by M. N. Howard and Others, the general principle of the burden of proof in Civil matters at common law states that "*he who asserts, must prove*". This principle is substantiated in a myriad of cases, emphasizing the importance of same and its practical application in adducing evidence before the Court. This aspect of the law was emphasised by Nembhard J in **Anthony Tharpe v Alexis Robinson and Others** [2022] JMSC Civ. 66 at paragraphs 35 and 36 where she posited that:

[35] The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential. The standard of proof in civil cases is satisfied on a balance of probabilities.

[36] In Miller v Minister of Pensions, Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: - "That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not. '

[46] Mr Campbell argued that applying these principles of law to the facts, the following are evident:

- The cause of action in this suit is breach of contract. The 2nd Defendant was never a party to the contract. Nowhere in the pleadings, does the Claimant make out any cause of action against the 2nd Defendant. She was not one of the persons who reached the agreement. As such, the claim against her should be dismissed with costs.

- The Claimant seeks a declaration that the 1st Defendant has entered into a legally enforceable contract and has failed to fulfil his contractual obligations. As a result, an order for specific performance compelling the 1st Defendant to transfer his name to the Registered Title as owner in fee simple as per the sales agreement has been sought. The Claimant however, has failed to recognize that as per the sales agreement, transfer of title will only be effected upon the full payment of the purchase price from the buyer to the seller as provided for in the agreement under the title "Delivery of Deed".
- The Claimant bears the burden of proof in respect of his allegations of having paid the first instalment of **Seven Thousand Five Hundred United States Dollars (USD\$7,500.00)**, and the additional **Twenty-Four Thousand United States Dollars (USD\$24,000.00)**. To date, he has failed to do so. In his affidavit filed on the 1st of February 2022, the Claimant details and exhibits receipt copies of payments being made, claiming that they amount to **Twenty-Four Thousand United States Dollars (USD\$24,000.00)**. Upon calculation of said receipts, which corroborates the affidavits of the Defendants herein, the Claimant only paid **Twenty Thousand United States Dollars (USD\$20,000.00)**, leaving a balance of **Thirteen Thousand United States Dollars (USD\$13,000.00)** to be paid.
- In accordance with the above stated law, the Claimant has failed to discharge his legal and evidential burden to prove that he has fulfilled his contractual obligations, earning him the right to obtain specific performance against the Defendants.
- The Claimant was contractually bound to pay the full purchase price of the property before any transfer instrument is effected in his name as per the sales agreement. The Claimant has failed to prove that he has fulfilled his contractual obligation, entitling him to become holder of the fee simple.

- To seek an equitable remedy such as specific performance, the maxims of equity must be adhered to. Namely "*he who seeks equity must do equity*" and "*he who seeks equity must come with clean hands*" are instructive. The Claimant has lied to the Court regarding his payments to the Defendants herein and is not deserving of the orders sought.

[47] Mr Campbell argued that the Claimant has failed to discharge his burden and is not entitled to judgement against the Defendants for an order of specific performance. He also asked that costs be awarded to the 1st Defendant against the Claimant to be agreed or taxed.

[48] Mr Campbell asked the Court to take note of the evidence elicited during cross-examination of the Claimant where the following statements were said:

- He was an Accountant for 60 years and has an appreciation for retention/preservation of evidence of payments in a transaction.
- The best form of evidence for a transaction is a receipt.
- He only provided documentary evidence of payment of **Twenty Thousand United States Dollars (USD\$20,000.00)**.
- Full payment of the contractual amount was required.
- He paid **Thirty-three Thousand United States Dollars (USD\$33,000.00)** but the Bank failed to give him a print-out.
- He was never given any receipt but used his cancelled cheques as a form of receipt.
- Mrs. Taylor was not a party to the contract/agreement. She received the money on behalf of the 1st Defendant, her husband.
- Mrs. Taylor was not the owner of the property.
- He is only entitled to have the property transferred to him, if he has paid all of the monies.

[49] The evidence of the Defendants during cross-examination was also highlighted specifically the following statements:

- The agreement was signed in November 2004; it was not taken to a government agency for stamp duty. Mr Taylor was unsure of the payment of stamp duty and the formalities required for compliance in real estate matters in Jamaica.
- No payment was made at the time of the signing of the agreement. He only received **Twenty Thousand United States Dollars (USD\$20,000.00)** as shown by the presentation of cheques.
- Mr Taylor did not make any claim for the payment of the outstanding sum of **Thirteen Thousand United States Dollars (USD\$13,000.00)** in the fourteen (14) years since the last payment.
- Mr Taylor acknowledged the existence of a mortgage on the property but was unaware of the status at the time of the transaction.
- He was aware that Rupert Wright was occupying the property in 2006 but denied renting the property and was uncertain as to payment of the mortgage since the transaction.
- Mrs. Taylor is the niece of Mr Herbert Walford and stated that only **Twenty Thousand United States Dollars (USD\$20,000.00)** was received from her uncle.
- Mrs Taylor acknowledged that Rupert Wright was in possession of the property from 2005 or 2006 and he paid **Two Thousand Dollars (JMD\$2,000.00)** for property upkeep based on Mr Walford's instructions.
- Mrs Taylor statement for the first time that she had a meeting with Mr. Walford about the transferral of the property to her.

[50] Mr Campbell argued that on assessment of the evidence it is clear that the Claimant omitted the nature of the initial payment of **Seven Thousand Five Hundred United States Dollars (USD\$7,500.00)** as well as the balance of **Five**

Thousand Five Hundred United States Dollars (USD\$5,500.00). He provided no documentary proof of his efforts to obtain the missing payments from the bank which was mentioned for the first time during cross-examination. Counsel contends that this self-serving evidence from the Claimant should be rejected as he has the burden of proving that full payments were made.

[51] In respect of the Defendants, Mr Campbell asserted that they did not make any demands or claims for the balance of the money owed because the Claimant is a relative. Counsel contended that the evidence for the Claimant is not at such a standard that the Court can say that it thinks that his allegations are more probable than not. The end result of this would mean that the Claimant has failed to discharge his burden.

DISCUSSION AND ANALYSIS

Was there a valid contract between the Parties which should be enforced by an order for Specific Performance?

[52] For a contract to exist, there must be an offer, acceptance of that offer, consideration and an intention to create legal relations. The basic test for determining whether there is an agreement, is to ask whether there was an offer by one party which was accepted by the other. In the instant case, the Defendant made an offer which was accepted by the Claimant. This information is gleaned from the Sale agreement entitled, **Residential Real Estate Sale Contract**.

[53] The creation of a contract with its essential terms was addressed in **Keith Garvey v Ricardo Richards** [2011] JMCA Civ. 16, where Harris JA stated at paragraphs 10 -12 as follows:

It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a

contractual obligation, born out of an oral or written agreement, is in existence.

*Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship. In **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK (Production)** 2010 3 All ER 1 Lord Clarke, at paragraph 45, describes the applicable test to be as follows:*

'Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.'

- [54] The essential terms of an agreement must at all times be present and must be clear and unequivocal. The Court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.
- [55] There is no dispute that the parties executed the contract. In doing so, they agreed to the written terms and payments were made and received pursuant to same. It is also not in dispute that the Agreement provided for the payment of the purchase price of **Thirty-three Thousand United States Dollars (USD\$33,000.00)** in three (3) instalments.
- [56] It is Mr. Walford's position that he paid the full contractual amount. The Defendants, on the other hand, maintain that the Claimant did not pay the agreed sum. They allege that there was no payment of the first instalment of **Seven Thousand United States Dollars (US\$7,500.00)**. They further allege that the Claimant only paid **Twenty Thousand United States Dollars (US\$20,000.00)** in total.

- [57] The conduct of the parties in this case reveal that the Claimant and the 1st Defendant intended to create legal relations and entered into what was supposed to be a legally binding contract. The question that must be determined at this juncture is whether or not there was a contract which can be enforced by the Court. Although the legal requirements for the stamping of the agreement and payment of relevant fees, which are required under the 'governing law' provision were not complied with, this would not be sufficient to determine that the contract was not a valid one.
- [58] The basis on which the validity of the contract is disputed by the Defendants, specifically the 1st Defendant, is that the purchase price was never paid in full. This assertion, if accepted by the Court, would constitute a breach of Contract and be sufficient grounds to deny the orders sought by the Claimant. The evidence in respect of these payments is hotly disputed by the respective Parties. It was interesting to note however that while Mr Walford insisted that he made all payments, Mr Taylor acknowledged that his assertion that only **Twenty Thousand United States Dollars (USD\$20,000.00)** had been paid was due in part to the fact that this was all that the documentary evidence disclosed.
- [59] In my consideration of the evidence on this point, I reviewed the sale agreement, specifically the provision that an earnest deposit of **Seven Thousand Five Hundred United States Dollars (USD\$7,500.00)** was to be paid within five (5) days of signing the agreement. Although the agreement was executed in November 2004, Mr Taylor said he never received this payment. Neither did he ask for it. On my review of the cancelled cheques, which were accepted by both sides as documentary proof of payment, it was observed that some of the payments pre-dated the executed document as two (2) of the cheques bear dates in January and August 2004 respectively. The drafting and execution of the Agreement appears to have been an effort to formalise what had begun as a casual/informal transaction between the family members.

[60] The remaining payments for which documentary evidence was presented show payments in 2006 and 2014. It is evident from this pattern of payment, which deviated from the agreement, but was accepted by the Defendants, that the Parties did not strictly enforce or abide by the payment schedule which had been included in the agreement. It was also evident that in spite of their assertion that only **Twenty Thousand United States Dollars (USD\$20,000.00)** had been received by them, the Defendants produced no documentary records, such as a receipt or even a print-out from the account to which the payments had been made. While the Court is mindful that the burden of proof is on the Claimant to show that the payments were made, it is clear that the documents provided tell only a part of the story and the Court has to consider the credibility of the Parties in order to determine what payments were actually made.

[61] Although Mr Taylor was quite insistent that he never received the earnest deposit or any other payment made by the Claimant, outside of the **Twenty Thousand United States Dollars (USD\$20,000.00)**, his memory on a number of material particulars raised serious questions as to his credibility as a witness on this point. While the agreement disclosed that he and the Claimant were the sole parties to the sale, it was observed that when Mr Taylor was asked about the stamping of the sale agreement he responded that this was for his wife to do. When confronted as to whether it was his position that no payment was made by the Claimant at the time of the agreement he responded that he would have to refer this question to his wife. When pressed on the point, he stated that no payment was made. This elusive approach to a straight-forward question created doubt in the mind of the Tribunal as to whether Mr Taylor was being truthful on this issue.

[62] The concerns as to his credibility were further compounded by his responses to questions about the mortgage and whether the Claimant's nephew had been residing at the premises. Mr Taylor acknowledged that there had been a mortgage at the property at the time that the agreement was entered into. He struggled to recall however if it had been in arrears. He was asked whether he had continued to make payments after the agreement and initially indicated that he had, his

response was then amended to state that he had not. When questioned whether he agreed that the mortgage had been paid in full he indicated that it was but professed ignorance as to who made the payment. He subsequently conceded that the Claimant had assumed responsibility for same.

[63] Mr Taylor's credibility issues continued, as even though he said in his witness statement that he had informed the Claimant of his intention to transfer the property to his wife, in cross-examination he denied that he had ever intended to do so. This response was in direct contrast to the evidence of his wife who asserted during cross-examination that this had been the plan and it was discussed with Mr Taylor following a conversation which she had with Mr Walford.

[64] Mrs Taylor's account was also replete with discrepancies as even though she insisted that only **Twenty Thousand United States Dollars (USD\$20,000.00)** was paid by her uncle, she admitted that she did not know when the agreement was made and only became a part of the process when her account was used to receive payments.

[65] This begged the question as to what may have transpired prior to her entry into the matter. It is instructive that in her evidence her basis for believing that the earnest deposit was never paid and only **Twenty Thousand United States Dollars (USD\$20,000.00)** was paid is grounded in the fact that her husband told her so. The reliability of her account was further undermined when she volunteered for the first time in cross-examination that the Claimant had asked her to assist him by preventing his nephew from taking control of the house and had agreed with her proposal that the property be transferred to her instead. Not only was this assertion absent from her statement, it was also contrary to the Defendants' position that Mr Walford was not entitled to have the property transferred to him as he still owed **Thirteen Thousand United States Dollars (USD\$13,000.00)** on the balance.

[66] Additional questions as to the reliability of Mrs Taylor's account continued to present themselves during her cross-examination. While she was being questioned

about Mr Wright and the role played by him ,the Court became aware that she was communicating with someone off camera who appeared to be instructing her in respect of her response. Mrs Taylor initially denied that someone else was in the room with her but eventually indicated that her autistic son had entered the room. In assessing the truthfulness of this explanation, the Court found it instructive that when she was asked to turn the camera to show who else was in the room, she turned the device to the ceiling instead and kept it there for a few minutes before adjusting it to show the room. Prior to this incident, Mrs Taylor did not demonstrate an inability to manage the technology and it appeared to be contrived that she would suffer such a challenge at this stage.

[67] I did not believe her explanation and I find that in spite of strict instructions from the Court that she was not to be in the same area as Mr Taylor during the course of her evidence, this was not being complied with and the possibility of collusion in their responses could not be overlooked. In further cross-examination following this incident, Mrs Taylor's account began to show signs of diverging from that of her husband as she agreed that Mr Wright had been paying the sum of **Two Thousand Dollars (JMD\$2000.00)** towards the mortgage and that he had been responsible for the upkeep of the property. The state of the evidence for the Defence at the end of Mrs Taylor's testimony can only be described as shambolic as not only did the accounts contradict each other but they also suffered from internal inconsistencies as well.

[68] Despite taking this view of the Defendant's case, the Court is mindful that the burden of proof is still that of the Claimant and it is his account which needs to provide the proof that payment had been made. In contrast to the Defendants, Mr Walford's account was consistent that other payments had been made but he had only found the four (4) cancelled cheques which he had exhibited. He candidly accepted that the best evidence of payment would have been receipts and none had been produced by him. He explained that he had requested copies of all the cheques drafted for this transaction but did not receive them from the bank. In assessing this explanation, I considered Mr Campbell's submission that this

explanation had not been provided in his statement. While it is correct that it was not, I did not find this explanation to be a significant departure from his evidence-in-chief where he stated that these were the cheques that he had located.

[69] From the evidence presented by the Claimant as well as the Defendants, it is clear that the Claimant assumed responsibility for the mortgage as a corollary to the sale agreement. It is not in dispute that the mortgage was paid in full as the Claimant gave evidence that it was cleared in 2020 and the Defendants agree that it was paid. On a careful review of this evidence, I am satisfied that the Claimant honoured this monthly obligation for a period of sixteen (16) years until the mortgage had been cleared. On a balance of probabilities, I find that this lends strong support to his assertion that all payments had likewise been made for the property as well. I believe that this was also the reason why the Defendants did not demand this 'outstanding balance' and not merely because he was family.

[70] In contrast to the Defendants, I found the Claimant to be a consistent and reliable witness whose account as to the events remained unshaken in spite of robust cross-examination. In my assessment of his account. I considered whether it was sufficient to meet the legal requirements to prove the claim against each Defendant. While I was satisfied that this threshold had been met in respect of Mr Taylor, I agree with the submissions of Mr Campbell that in spite of the role played by Mrs Taylor, she was in an entirely different legal position than her husband was. She was not a party to the agreement and only acted as an intermediary in receiving the funds which were paid over. To elevate her to a defendant in the action against whom the orders sought should be granted would be contrary to the doctrine of privity of contract.

[71] In light of the foregoing discussion, I am satisfied on a balance of probabilities that the orders sought should be granted against the 1st Defendant only.

Proprietary Estoppel

[72] In addition to the assertion that the purchase price had been paid in full, the Claimant also sought to rely on the doctrine of proprietary estoppel. The relevant principle in respect of same was enunciated by Lord Denning MR in the case of **Crabb v Arun District Council** *supra*.

[73] This authority is instructive as it highlights that equity will mitigate the rigours of the strict law and an individual who has acted on a promise and/or assurance, can receive redress from the principles of equity. Equity will examine the words or conduct of a party and if, on an assessment of all three (3) elements of the doctrine of proprietary estoppel, it is found that the defendant has acted unconscionably, equity will intervene and prevent him from utilizing the rigours of the law to renege on his promise. The question to be answered is whether in the instant case all the three (3) elements of the doctrine of proprietary estoppel can be established.

[74] It is the submission of Counsel for the Claimant that the Defendants had assured the Claimant of an interest in the property and in reliance on that assurance, he expended his time and resources in making the full payments for the purchase of the house, paid off the mortgage and maintained the property. Ms Campbell contended that the Claimant is now at a disadvantage as the defendants have unconscionably reneged on their promise.

[75] It is an established principle that equity is concerned to prevent unconscionable conduct and this consideration permeates all the elements of the doctrine. The law has made it clear that this is where the actions of the landowner is such that it would be unconscionable for him to assert his proprietary entitlement or decline to transfer title. An equitable estoppel (proprietary estoppel) may arise to prevent him from enforcing or relying on his legal rights, once certain conditions are fulfilled.

[76] It is clear from the evidence that following the agreement for sale, the Claimant took physical possession of the property, placed his nephew in residence and assumed all responsibilities associated with it such as the payment of the

mortgage, property taxes and its general upkeep. The assurance which was given to him by the 1st Defendant created a clear expectation of an interest in the property on which he relied and altered his position by expending his time and resources. Based on these facts, it is evident that the Claimant has suffered a disadvantage. This situation is compounded by the fact that efforts were then made by the 1st Defendant to have the property transferred to the 2nd Defendant in order to defeat the Claimant's interest.

[77] Accordingly, I am satisfied on a balance of probability that the Claimant could also have succeeded in his claim on this limb.

DISPOSITION

[78] Before concluding this matter, it had also been argued that the Claimant would have obtained a possessory title against the 1st Defendant as he had been in possession of the property for over sixteen (16) years at the time of the filing of the claim. While the argument appears to be an attractive one, the payment in 2014 would present a challenge to its success as this would be solid evidence that payments were still being made up to this period. This would have the effect of undermining any assertion of exclusive and undisturbed possession for over twelve (12) years.

[79] In conclusion, my orders are as follows:

- Judgment entered for the Claimant against the 1st Defendant.
- Costs awarded to the Claimant against the 1st Defendant to be taxed if not agreed.
- Judgment entered for the 2nd Defendant.
- The Claimant and 2nd Defendant are to bear their own cost.
- Claimant's Attorney to prepare, file and serve the Judgment herein