JUDGMENT

IN THE SUPREME COURT OF JUDICATURE
OF JAMAICA
CLAIM NO. HCV 01719 OF 2008

BETWEEN	**SHARON BENNETT**	**1st CLAIMANT**
AND	**CHARLENE THOMAS**	**2ND CLAIMANT**
AND	**VIVIAN DONALDSON**	**1ST DEFENDANT**
AND	**VIVIAN DONALDSON**	**2ND DEFENDANT**

(Representative of the Estate of Ena Donaldson,)
Now deceased

Ms. Danielle Archer, Ms. Shanna Stephens and Mrs. Ingrid Clarke-Bennett for the Claimant instructed by Pollard Lee Clarke and Associates.
Mr. Gavin Goffe instructed by Mrs. Elise Wright-Goffe and Co. for the Defendants.

IN OPEN COURT

Heard: **10TH and 11TH January 2011, and 29th September 2011(in Chambers), 18TH November 2011, 8th December 2011 and 15th March 2012.**

AGREEMENT FOR SALE OF LAND-PURCHASER ENTERING INTO POSSESSION FOR A PERIOD OF TIME-WHETHER LIABLE FOR INTEREST ON UNPAID BALANCE OF PURCHASE PRICE OR MESNE PROFITS-CONSEQUENCES OF VENDORS REMAINING IN POSSESSION THEREAFTER-SPECIFIC PERFORMANCE-WHETHER VENDORS GUILTY OF WILFUL DEFAULT.
WHERE VENDOR IN POSSESSION IN DEFAULT, BUT NOT WILFUL, ENTITLEMENT TO RENTS AND PROFITS, AND NOT INTEREST-

PURCHASER ENTITLED TO REMEDY OF SPECIFIC PERFORMANCE-DEDUCTION OF COSTS FROM BALANCE PURCHASE PRICE AND INTEREST

PROCEDURE-WHETHER LATE FILING OF WITNESS STATEMENT SHOULD STAND-WHETHER PARTY'S WITNESS STATEMENT SHOULD BE ADMITTED AS HEARSAY EVIDENCE

Mangatal J (Delivered by Sykes J) :

[1] This claim involves an Agreement for Sale dated March 9, 2007, entered into between the Claimants as Purchasers, and the Defendants as Vendors. The 1st Defendant and his wife Ena Donaldson, now deceased, agreed to sell and the Claimants agreed to buy a parcel of land part of Congreve Park Pen, called Braeton New Town in the Parish of Saint Catherine. The lot is numbered 491 on the plan of part of Trenham Park and is the land comprised in the Certificate of Title registered at Volume 1129 Folio 533 of the Register Book of Titles "the property". The purchase price was Two Million Six Hundred Thousand Dollars ($2,600,000.00).

[2] Express terms of the Agreement for Sale required that the purchase price would be payable in three portions, i.e. Two hundred and Sixty Thousand Dollars ($260,000.00) a further payment of One Hundred and Thirty Thousand Dollars ($130,000.00), all payable to the Defendants' Attorneys-at-law E. Wright Goffe and Company, and the balance of Two Million Two Hundred and Ten Thousand Dollars ($2,210,000.00), payable on completion of the Contract.

The background to the proceedings

[3] As required by the Agreement, the Claimants paid the required deposits, amounting to a total of $390,000.00 and applied for a mortgage loan for the balance of the purchase price ($2,210,000.00) from the National Housing Trust "the NHT". Completion was set to take place within 120 days of signing and the time was stated to be of the essence of the Agreement in respect of all payments due from the Claimants. Possession was required to be vacant on completion. It was stated in Clause 8 of the Agreement that "**TIME SHALL BE OF THE**

ESSENCE of the contract as it relates to payment of the Purchase Price or any instalment thereof or other sums payable by the Purchaser hereunder and on the failure of the Purchaser on the due date to pay any sum payable hereunder interest shall accrue on the unpaid balance of Purchase Money at the rate of **15% per annum** from the due date of payment until payment is received. ….."

[4] By letter dated 5th June 2007, the Defendants' attorneys-at-law, at the request of the NHT, extended the Agreement for a period of 30 days to 31st August 2007. By letter dated 19th June 2007, the NHT issued a letter of undertaking to the Defendants' Attorneys-at-Law in the sum of $2,294,985.00 being the mortgage amount, plus $84,985.00, towards the Claimants' half costs of the transaction. This letter of undertaking was sent to the Defendants' Attorneys-at-law, in exchange for documents to secure completion, i.e. the Duplicate Certificate of Title, a registrable Instrument of Transfer (along with the registration fee), Discharge of Mortgage and Withdrawal of Caveat (if any), the original transfer tax certificate and an up to date certificate of payment of taxes. An executed transfer was duly delivered by the Claimants to the Defendants' attorneys-at-law on 30 August 2007. This would have completed all that was required of the Claimants under the Agreement.

[5] However, according to the Defendants' case, in or about the third week of May 2007, the Claimants moved onto and took possession of the property. The Claimants say that they were put in possession orally by Mr. Robert Gordon, the servant and/or agent of the Defendants, to secure the property. They further say that while they had not been living on the property, they had engaged in doing necessary repairs as the premises were uninhabitable. The Defendants, on the other hand, insist in their Statements of Case, that the Claimants entered the premises without their permission, authority or consent and that the Claimants illegally connected electricity and water supply and began to carry out construction work.

[6] By letter dated 5 June 2007, the Defendants' attorneys-at-law wrote to the Claimants' then attorney-at-law, claiming that the Claimants had taken possession without permission, and demanding rent or interest on the unpaid

balance of the purchase money payable under the Agreement. I note that in the Ancillary Particulars of Claim, paragraph 3, filed on behalf of the Defendants, it is pleaded that that the Claimants took possession of the property without permission , “sometime during October 2007”.

[7] The Claimants’ case is that as time passed they were then waiting on the Defendants to complete the Agreement. The Defendants, on the other hand, maintained that they would not be going any further with the Agreement until the matter of interest or rent was settled. The Defendants on 7 February 2008 served a notice on the Claimants making time of the essence of the Agreement and demanding completion within 14 days. By a subsequent letter dated 28 February 2008, the Claimants not having completed in accordance with the notice, the Defendants’ attorneys-at-law wrote to the Claimants’ attorneys-at-law cancelling the contract. In cancelling, the Defendants maintained “that at all material times they were ready, willing and able to complete the said contract”. They claim that they would have completed the Agreement if the Claimants had remedied the breach of the Agreement for Sale represented by the taking of possession without permission and without settling on compensation.

[8] However it also appears that the Defendants’ Certificate of Title to the property had been lost sometime in 2007. The Defendants aver that instructions had had to be given by them to the Registrar of Titles to prepare and issue a new title directly in the names of the Claimants. The new title was not issued until 14 April 2008 and the Claimants claim that that is an indication that the Defendants were not in a position to complete the agreement during the period specified in the notice to complete issued on behalf of the Defendants.

THE CLAIMS

[9] The Claimants seek specific performance of the Agreement for Sale, damages for breach of contract, and interest. The Claimants indicate that they are ready, willing and able to complete, as financing still stands available upon the Defendants duly performing their end of the bargain. The Defendants on the other hand, claim to have cancelled the Agreement on the basis of the Claimants’

breach of contract. In an Ancillary Claim, they counterclaim damages for breach of contract and trespass.

THE EVIDENCE-

Claimants' Case

[10] The 1st Claimant Sharon Bennett gave evidence. It was her evidence in examination-in-chief that Mr. Robert Gordon was the person who had initially shown her the premises and that she was in constant contact with him throughout the transaction. She states that she received a phone call from Mr. Gordon in or about June 2007, indicating that he had heard that she had evicted the tenants who resided at the property and had taken possession of the property. Mrs. Bennett states that she told him that she did not know what he was talking about and indicated that this was not true. She also states that in October 2007, she informed Mr. Gordon that the matter was taking too long. She reminded him that the place was in a state of disrepair and that she was eager to start work on the property. Mrs. Bennett states that Mr. Gordon, in his capacity of servant and/or agent of the Defendants then gave his express permission for the Claimants to enter the premises and commence necessary construction and general repairs in advance of the completion of the sale. On the faith of those representations, she gave her mason/contractor permission to carry out repairs. As regards the Defendants' allegation of her having taken possession, she states that this was erroneous because she has never resided, slept or occupied the premises during the period alleged by the Defendants, or at all, save for instructing her mason/contractor and electrician to enter the premises to effect repairs. She maintains that possession at all material times remained with the Defendants. In cross-examination, Mrs. Bennett stated that although she knew that the Agreement stated the completion date as the 31st August 2007, she only returned the Transfer in late August even though it was received in June. This was because her daughter, the Second Claimant, Charlene Thomas "Ms. Thomas" had to sign. Ms. Thomas was residing in the United States and had to get the document notarized and to obtain the county clerk's certificate regarding the notary public's commission, as required by law. Mrs. Bennett states that this took some time. In response to Mr. Goffe, Attorney-at-Law for the Defendants' question whether, if she had received a copy of the letter dated June 5, 2007

sent by Mrs. Wright-Goffe to her then Attorney-at-Law Mr. Adamaraja, she would have responded differently, Mrs. Bennett concedes that she most likely would not have entered the premises in October 2007.

[11] Mrs. Bennett also agreed that she recalled her Attorneys indicating that she had taken possession informally. She denied that she connected utilities. She indicated that when she went to the property water was running, and that whilst workmen would need electricity for testing, she rewired but did not connect anything. When asked by Mr. Goffe to whose account the electricity was billed, her reply was, to ask the electrician. Mrs. Bennett claims that the first time she learnt that there was an issue about her having taken possession informally, was in December while workmen were there. She therefore took up and removed cement, pipes and everything that had been brought there. She indicated that she never expected to pay any interest on the balance purchase price because she believed that the agent Mr. Gordon having given permission for the Claimants to go in to the premises, there was agreement.

[12] Mrs. Bennett's son, and brother of Ms. Thomas, Mr. Basil Williams also gave evidence. Mr. Goffe successfully applied for paragraphs 8-11 of Mr. Williams' Witness Statement to be struck out as consisting of impermissible hearsay statements.

[13] Mr. Williams indicated that he is a student at the Norman Manley Law School and is employed to the law firm Pollard Lee-Clarke and Associates on a part-time basis. He indicated that he accompanied his mother when she first went to view the premises. When they toured the property with Mr. Gordon, Mr. Williams recalls that there was electricity at the time because there was a light bulb in the living room area which was on, and a lady was cooking in the kitchen area. He supports his mother's evidence that they did not enter and take possession of the premises during the June period, as alleged by the Defendants at some stage.

14] In cross-examination, Mr. Williams stated that when he and his mother first visited the premises, it did have running water in the pipes. He indicated that throughout the life of the contract Mr. Gordon was very involved.

[15] The last witness called for the Claimants was Mr. Trevor Solomon. Mr. Goffe applied for certain parts of Mr. Solomon's witness statement to be struck out. Paragraphs 5,8, and 9 were struck out in their entirety while paragraphs 4 and 7 were modified as set out on pages 64-65 of the Bundle headed "Judges' Supplemental Trial Bundle".

[16] Mr. Solomon indicated in his examination-in-chief that he is a self-employed electrician and in or about late October to November 2007, he was contacted by a mason known to him as Max. Max took him to the property, which Mr. Solomon inspected and he gave Mrs. Bennett an estimate of the cost of rewiring the premises. At the premises, he saw missing window panes, a severely damaged front door, and a large pool of water on the floor of the living room. He gave the Claimants a list of items that would be needed and he also made some of the purchases himself in his name on December 15 2007.

[17] In cross-examination, Mr. Solomon indicated that at the time when he first went to the property, which was sometime between mid-October and November, debris was already cleared out and was piled in front of the gate. He got authorization from Mrs. Bennett to do the work some time between November and December 2007 and he finished the work on December 15 2007. After he finished his work Max was to come and finish the masonry work. Mr. Solomon said that he finished his electrical work. It then remained for Mrs. Bennett to give money to the Inspector in order to get a Certificate to take to the Jamaica Public Service and get a contract for the supply of electricity.

Defendants' Case

[18] At the close of the Claimants' case, Mr. Goffe made an application for court orders, as follows:

1. The Witness Statement of Fitzroy Mann filed on January 7, 2011, be allowed to stand.
2. In the alternative, the Witness Statement of Ena Donaldson be allowed to stand pursuant to Rule 29.8(2) of the Civil Procedure Rules 2002 "the CPR".

[19] The stated grounds upon which the orders were sought were as follows:

(i) Mrs. Ena Donaldson is severely ill and unable to attend the trial.

(ii) On the original trial date, the court excused Mrs. Donaldson, as well as the 2nd Claimant, from attending the trial.

(iii) Mr. Fitzroy Mann has first-hand evidence of factual matters in dispute.

(iv) There is no prejudice to the Claimants who have had the opportunity to see the evidence, which is virtually the same as the evidence that Mrs. Donaldson intended to give and they will have the opportunity to exclude any hearsay evidence as well as to cross-examine the witness.

[20] Ms. Archer, on behalf of the Claimants, vigorously opposed the application. As this application was the main thrust of the Defendants' Attorneys-at-Law when it came time for the Defence case to be presented, I dealt with these issues in detail, and substantially incorporate my then ruling during the course of the trial refusing the application, in this Judgment.

[21] The Court's main concern is to deal with matters fairly and justly and in so doing, the Court must see that the trial proceeds in a just manner, whilst ensuring that the real issues in dispute between the parties are dealt with. One of the main thrusts of the CPR, is to prevent trial by ambush. This means that as far as possible the Court must ensure that each party knows what case the other side intends to present and which has to be met.

[22] Whilst it was being said that Mrs. Ena Donaldson was severely ill and unable to attend, no medical evidence was put before me to this effect. The supporting Affidavit of Mr. Mann did speak to Mrs. Donaldson's illness, but there was no evidence that Mr. Mann is a medical practitioner. Mrs. Donaldson's Witness Statement was the only witness statement filed in accordance with the Case Management Conference "CMC" orders, notwithstanding that the CMC order on June 10 2009 allowed for the filing of 5 Witness Statements by each

party. The time for filing Witness Statements had also previously been extended to February 4 2010.

[23] Further, unfortunately, although I was being told that on a previous trial date in April 2010, the Court excused Mrs. Donaldson from attending on this trial date in January 2011, the Minute of the Court's order did not reflect that. The Defendants' Attorneys-at-Law ought, if such an order was made and they intended to rely upon it, to have ensured that a formal order reflecting this state of affairs was filed and perfected. None was. However that order in isolation would not have been sufficient. One would have expected that an order extending the time for filing of witness statements, so as to accommodate the filing of a witness statement by someone else would have been sought. Indeed, if the intention was for Mr. Vivian Donaldson, (who is himself a Defendant named in the case), to give evidence in his wife's stead, that is precisely what ought to have been done. It would not have been sufficient for Mr. Donaldson to simply turn up in court and give evidence without some prior approval of that course by the Court, and it goes without saying, with notice to the Claimants.

[24] In addition, I found that it was not sufficient to say that Mr. Mann's Statement was virtually the same as that of Mrs. Donaldson. If he was intended to be a relevant witness for the Defendants, (indeed the order provided for 5), his witness statement should have been filed long ago. Or at any rate, as in the case of Mr. Donaldson, an order should have been sought after the adjourned trial date in April 2010. It is not completely accurate for the Defendants to say that the Claimants will suffer no prejudice because they have had the opportunity to see virtually the same potential evidence, since that is not the only purpose that providing the Witness Statement beforehand serves. For example, a party upon whom a witness statement is served, may want to perform background checks as to the veracity of what the particular witness is going to say, a party could wish to check whether this witness /new person was even in the island or present when the transaction allegedly took place. These are but examples of the type of matters that the opposing party is entitled to do well in advance of a trial date.

[25] Further, the Defendants put forward as the reason for this late filing of Mr. Mann's Statement, that they had hoped to call Mr. Donaldson in place of Mrs.

Donaldson and only recently learnt that Mr. Donaldson would be unable to attend due to injury. That is not a valid excuse, and in any event, the medical report attached to Mr. Mann's Affidavit indicates that Mr. Donaldson had surgery from as far back as December 22nd 2010, so this application ought to have been made earlier, certainly not on the date of trial.

[26] I was not therefore minded to accede to the first application. As regards the second, Rule 29.8(1)(b) of the CPR indicates that the general rule is that a party who wishes to rely upon the evidence of a witness who has made a witness statement must call that party to give evidence. There must be exceptional circumstances that would allow the statement to be put in as hearsay evidence. This is because the opposing party has the right to test the evidence by cross-examination and would be at a disadvantage, as indeed, would be the Court, in assessing the veracity and credibility of the witness who does not attend.

[27] A good and sufficient reason both under Rule 29.8 of the CPR and of the Evidence Act would have been that Mrs. Donaldson is severely ill and unable to attend Court for trial. However, this reason must be proved to the Court's satisfaction and this application was objected to by the Claimants in its entirety. There has as I have already said in relation to the first application, been no medical Certificate put before the Court in relation to Mrs. Donaldson, and thus, whilst it is unfortunate, there really has been no proper basis put forward for the granting of the second alternative limb of the application. The fact that a person may be elderly does not translate to evidence of illness, much less illness of such a degree that would prevent attendance at trial. The Defendants' application filed January 11 2011 was therefore refused in its entirety.

Developments since trial and before judgment-dealt with in Chambers

[28] A few months after the completion of the trial, Mr. Goffe advised that Mrs. Ena Donaldson had since passed away. On the 29th of September 2011, I arranged to meet with the parties' Attorneys-at-Law in chambers, with a view to discussing the way forward in terms of the parties named in the law suit, having regard to the reported death of Mrs. Donaldson. I made the following orders:

1. On Counsel for the Defendants' advice to the Court, and undertaking to file and serve an Affidavit in proof of the death of Ena Donaldson by the 14th of October 2011, Vivian Donaldson is hereby substituted as the representative of the estate of Ena Donaldson.
2. The late filing of the Modified Witness Statements by the Claimants is allowed to stand.

Mr. Goffe in his closing submissions had submitted that, as the Claimants had not complied with the time ordered by the Court for the filing and serving of the Modified Witness Statements, they ought to apply for relief from sanctions. In my view, there were not yet any sanctions in existence. However, I decided that it would be appropriate and more proportionate to apply a sanction at the stage of judgment.

ISSUES-FACTUAL-

Whether possession taken of property by Claimants, and if so, whether they did so unilaterally or with the permission of the Defendants

[29] Although Mrs. Bennett appears to have formed the view that, in order to take possession, one would have to reside, sleep or inhabit the premises, it is clear that for the purposes of the law, taking possession does not necessarily involve any of those actions. Simply exercising rights such as entering the premises, or authorizing workmen to enter the premises and effect repairs, is enough to constitute possession.

[30] The court will also have to resolve the issue of whether the Claimants took possession of the property with the permission of the Defendants, or whether they did so unilaterally and without their permission. The Claimants rely upon the fact that Mr. Gordon, in his capacity as the servant and/or agent of the Defendants allegedly gave his express permission for them to enter the premises.

[31] In **Doe d Mann v. Walters** [1824-1834] All E.R. 428, it was held that an agent who has authority to collect the rents of a landlord and manages the landlord's affairs during his absence abroad, does not, in the absence of any

evidence in that behalf, have authority to give a notice to quit. Further, that where an agent has given a notice to quit without authority, ratification of his authority must, in order to validate the notice, be given before the moment at which the notice becomes operative. Littledale J. discussed the matter in this way:

> *Mr. Mann, when he left this country, may have made Grylis manager of his affairs and receiver of his rents without intending to authorise him to determine tenancies. Suppose Mann had lent money upon mortgage, would it follow that, as manager of his affairs, Grylis would have had authority to determine the loan. Clearly not. Nor does it follow from his being Manager of Mann's affairs that he had the authority to determine the estate of the tenants…*

[32] It is true that, as Mr. Goffe intimated, Mr. Gordon was not called by the Claimants to support their claim that Mr. Gordon had given them permission. On the other hand, the Defendants also gave no evidence in that regard, or at all. Since Mr. Gordon did not come to give firsthand evidence of what he did and did not say, I cannot say that I am satisfied on a balance of probabilities that Mr. Gordon did give the Claimants permission to enter the premises for the purpose of effecting necessary repairs and for securing the premises. I am satisfied though, based upon the evidence of the witnesses called on behalf of the Claimants, that the premises were in a state of disrepair. However, in any event, the Claimants entered into the contract with the Defendants and in the Agreement it was stated that E. Wright Goffe & Company were to have carriage of sale and that possession was to be vacant on completion. In her evidence in cross-examination, Mrs. Bennett admitted that E. Wright Goffe and Company had not given her permission to enter the premises or to go ahead and effect repairs. Mr. Gordon was not a party to the Agreement, although his name is mentioned in it in the context that a commission was to be payable to him. In all the circumstances, I find that although Mr. Gordon was the Defendants' agent for the purpose of showing the property to the Claimants, and even interacted with the Claimants frequently, including bringing the first draft of the Agreement and bringing the instrument of transfer to the Claimants, he was not, in the absence

of evidence to that effect, authorised to let the Claimants into possession or to give the Claimants permission to enter the premises. It seems patently clear, in the absence of any evidence to the contrary, that it was Elise Wright–Goffe and Company who were authorized to give possession as they had the conduct and management of the sale on behalf of the Defendants. Even if I was satisfied that permission was given by Mr. Gordon to the Claimants to enter the premises, which as I have already said, I am not, to be valid, the Defendants would have had to ratify Mr. Gordon's actions and authority. There is no evidence to support any such ratification.

[33] In my judgment, the Claimants took possession of the premises without the permission of the Defendants and I find that they did so for the period between October and December 2007 (three months).

LEGAL ISSUES-

(A)-What are the obligations of purchasers of land who go into possession before completion-are they liable to compensate the vendors for their occupation of the property, either by way of payment of interest on the unpaid balance purchase price or mesne profits?

[34] In **Sale v. Allen** (1987) 36 W.I.R. 294,(see the Headnote) a decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of Jamaica, the appellant entered into an agreement to sell property to the respondent in April 1976. Although the agreement specified the date of completion (31 May 1976) and made time of the essence, in fact the appellant was not at the date of the agreement able to transfer title to the property. At the date of the agreement the appellant was the surviving executor of the will of a testator who had died in 1962. However, although the appellant's co-executor had died in 1975, his death had not at the date of the agreement been recorded in the register. It was not in fact recorded until July 1976, which was after the completion date prescribed by the agreement. The stipulation in the agreement as to time being of the essence had been waived by common consent and no alternative completion date was formally fixed. Completion was delayed and the respondent was allowed to enter into possession. The evidence established that the respondent had been in possession of the property as purchaser under the

sale agreement since July 1976. In March 1979 she agreed to pay a nominal rent of $10 per month. The evidence seemed to suggest that this was because of an apprehension on the part of the appellant that she might otherwise be able to establish a possessory title. The delay in completion was entirely the fault of the appellant. In May 1981, the appellant served notice on the respondent purporting to rescind the sale agreement. The appellant also sought, amongst other relief, a declaration that the agreement had been rescinded and an order for possession. The trial judge dismissed the appellant's claim, but on the respondent's counterclaim, made an order for specific performance of the agreement. The Court of Appeal upheld the order for specific performance, but refused the appellant's claim for interest on the balance of the purchase money. The appellant appealed to the Judicial Committee. It was held, allowing the appeal so far as it related to the claim for interest, that the agreement by the respondent to pay nominal rent did not displace the ordinary rule that, even where delay was the fault of the vendor, a purchaser in possession and in receipt of the rents and profits of the property sold was liable to pay interest on the balance of the purchase money calculated from the date of entry into possession.

[35] The Claimants' Attorneys-at-Law also referred to **Gibson's Conveyancing** 20th Edition, where at pages 137, 138, 140-142, and 156, it is stated:

> (Page 137)
>
> ***As to completion of the purchase.*** *This condition fixes a date and place for payment of the remainder of the purchase-money, and completion of the purchase. It provides also for the apportionment of outgoings, and for payment of interest on the remainder of the purchase-money if, from any cause other than the wilful default of the vendor, the purchase is not completed on the day fixed, and also for the purchaser being entitled to possession from the date fixed for completion.*
>
> (Page 138)
>
> ***Payment of balance of purchase-money and interest.*** *When time is of the essence of the contract. The time fixed for completion is not, as a rule, of the essence of the contract, so that neither party*

may treat failure by the other party to complete on the day fixed as a ground for rescinding the contract. And this will still be so even if the contract provides that if the purchaser fails to complete his purchase according to the conditions in the contract his deposit shall be forfeited and the vendor may resell, for, since the date specified in the contract is not an essential part of the contract, there has been no such breach as to make the provision operative. To this general rule there are two exceptions, the first being where the contract expressly provides that time shall be of the essence, and the second where the nature of the subject-matter of the contract makes it so, eg. On a sale of a licensed premises, or a house required for immediate occupation…..

(Page 140-142).

…

Interest . *Even if the contract does not provide for payment of interest, the purchaser is bound by law to pay interest on the purchase-money if the sale is not completed when it ought to have been, but he can relieve himself from the necessity of doing so by providing himself with the money and giving the vendor notice that it is lying idle-that is, of course, if the delay is not his fault. When, however, the contract provides for payment of interest, and does not give the purchaser the right to deposit the money…., he cannot avoid the liability by giving notice to the vendor that he is ready to complete, or by lodging the balance of the purchase-money in court under an order of the court, even though the delay is caused by the state of the title. But no interest is payable if the delay is due to the wilful default of the vendor, even though the contract makes no exception in that case. ….*

…

Meaning of "wilful default". *As to the meaning of "wilful default", Bowen L.J .said in Re Young and Harston's Contract , that "default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances-not doing something which you ought to do, having*

regard to the relations which you occupy towards the other persons interested in the transaction. The other word… 'wilful' implies nothing blameable, but merely that the other person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." This explanation has often since been cited with approval. It is wilful default for the vendor to go abroad for a holiday and thus delay completion, or not to be in a position to vest the legal estate in the purchaser except through a power of attorney which he knows or ought to know is insufficient for the purpose, or to neglect to put himself in a position to complete until after the time fixed for completion; or to refuse to deliver an abstract of title although owing to a misinterpretation of the conditions of sale he may think the purchaser is not entitled to one and possibly it is wilful default for the vendor to insist on a form of conveyance to which he is not entitled. But it is not wilful default for him to make an honest (though careless) misstatement of the title in the conditions of sale ; nor to omit to discover and remove a defect in title which could only be detected by extreme vigilance.

*****...**

(Page 156)

(ii) ***Specific Performance.*** *Besides his remedy in damages the injured party has the alternative remedy of specific performance. Specific performance of a contract to sell land will be enforced at the suit of the purchaser almost as a matter of course, for, in the case of such a contract, damages are generally insufficient to compensate the disappointed party; and as the court acts on the principle that the remedy should be mutual, it will specifically enforce the contract at the instance of the vendor, though his claim is only to obtain payment of the purchase-money. There are, however, many grounds on which cause may be shown why a*

> *decree should not be granted, and as the remedy of specific performance is discretionary, the court is not bound to grant it…..*

[36] The Claimants were in possession of the property without the Defendants' permission for a period of three months. Had the Defendants not adopted the approach of seeking interest or rent in respect of that possession, the status of the Claimants might well have been that of trespassers. They were not contractually entitled to possession unless or until completion occurred. However, in the circumstances, in my view the Claimants for that period of three months are to be treated as licensees. In that regard, and based upon the evidence adduced, I find that interest on the balance purchase price is a fair measure of the value of this unauthorised possession. [37] In my judgment, on the authority of **Sale v. Allen**, the Claimants are liable to pay interest on the balance purchase price for the period October 2007 to December 2007, whilst they went into possession. However, the Defendants were not entitled to insist upon some understanding or agreement being arrived at in terms of compensation as a precondition to the completion of the sale. This issue does not go to the root of the contract between the parties and ought not to have presented an obstacle to performance by the Defendants. At the time when this occurred, it is true that the Claimants had already been somewhat tardy in getting the executed Transfer back to the Defendants in that they delivered it only a day before the extended date for completion. However, it was not unreasonable that some time would have to be taken for execution of the document abroad by Ms. Thomas. Further, neither at the time of the return of the Transfer or otherwise, is there evidence that the Defendants relied upon this as a basis for cancelling the Agreement. On the contrary, the only basis relied upon subsequently by the Defendants was that the Claimants failed to agree a form of compensation for taking possession. Hence the pleading at paragraph 15 of the Defence that "the Defendants would have completed the said contract if the Claimants had remedied their breach of the Agreement for Sale". Thus, at the time of the Claimants' taking of possession and entry of the property, they had performed their obligations under the contract. This includes the NHT undertaking.

[37] The matter of compensation was a matter upon which the Defendants could have lawfully required the Claimants to account along with other payments due under the transaction, and to have brought into the balance in completing the sale transaction. Alternatively, but perhaps less attractive, would have been an option of dealing with the Claimants unauthorised possession as an independent and separate cause of action, whether during or after the sale was completed. It did not, in my judgment, provide the Defendants with good grounds for cancellation or rescission of the Agreement. This is particularly so as the Defendants did not continue in possession beyond December 2007. Indeed, they were not in possession at the date when the Defendants served the notice making time of the essence, and therefore seeking completion of the Agreement. Continued disagreement could have been resolved by obtaining appropriate declarations, directions or orders from the Court pursuant to the **Vendors and Purchasers Act,** and carrying out balance adjustments and holding of funds in escrow pending resolution.

[38] It is also clear that, at the date when the Defendants' Attorneys gave the Notice of February 7, 2008, making time of the essence and demanding completion within fourteen days, the Defendants were not themselves in a position of readiness to complete. The new title was not issued until the 14th of April 2008. In Mrs. Wright-Goffe's letter dated February 20 2008 in response to Pollard Lee Clarke and Associates, it was stated that until the question of payment of interest was settled, the Defendants' Attorneys would not be forwarding the documents to the National Housing Trust. Messrs. Pollard Lee-Clarke had requested that the documents be sent in order to allow completion to take place. It is this misapprehension as to the relative weight of the Claimants "wrong" in entering into possession without the Defendants' permission and without agreeing compensation that unjustifiably caused the transaction to be derailed.

[39]. I find that the letter from Wright-Goffe and Company to Pollard Lee-Clarke and Associates dated 7th April 2008 in which the Defendants' Attorneys indicated that the sale was now terminated is not a valid and effective termination of the contract. As the subject matter of the Agreement was land, which land and

property the Claimants purchased with a view to occupying, damages would not be an adequate remedy for them. Further, I am satisfied that the Claimants stand ready and willing to complete the purchase. It is equitable that the Defendants be compelled to carry out that which they had contracted to do.

[40] Completion was originally scheduled for the end of August 2007. However, this time was extended, and although the Defendants purported to make time of the essence in February 2008, they were not themselves at that time in a position to complete. The Agreement for Sale provides for interest to be paid by the purchaser on the unpaid balance of the purchase money on the purchaser's default. I accept the statement made in **Gibson's Conveyancing** that "no interest is payable if the delay is due to the wilful default of the vendor, even though the contract makes no exception in that case", as being the law in Jamaica. However, in my judgment, although the Defendants were not in a position to give Title at the date of completion, or indeed at the time of giving Notice making time of the essence, they were not guilty of wilful default. In **Sale v. Allen,** the delay in completing the transaction was the fault of the vendor. The death of the appellant's co-executor had not been recorded, and needed to be recorded. However, the purchaser was still held to be obliged to pay interest upon the balance purchase price. I do not think that the default in the present case, which really is that the Defendants were not able to make good title because the title had been lost, amounts to wilful default. It does not seem to me to be any more wilful, or of a higher order than the default of the vendor in **Sale v. Allen.** In my judgment, interest should be paid by the Claimants on the unpaid balance for October – December 2007.

[41] On the 18th November 2011, I handed the parties a draft judgment. Originally, at that time, I was of the provisional view that the Claimants should also pay interest on the balance purchase price from the 14th April 2008, the date when the new title was issued until a date to be fixed by the court's order. However, because I realized that interest and costs were going to play a major role in this case, and these issues had not been addressed in detail when the closing submissions were made, I asked the parties to let me have further submissions. In particular I requested submissions on these questions, with a

view to finalizing the order. The parties also expressly agreed in a joint letter dated December 6 2011 that I should re-visit the issue of interest payable on the balance purchase price, if any (exclusive of the October-December 2007 period) since there was not yet any order in respect of that period. Mr Goffe helpfully provided me with a copy of the Court of Appeal's judgment in SCCA 2006 Application No 8/2009 **Sans Souci Ltd. v. VRL Services Ltd** , delivered July 2 2009 in relation to the court's powers to vary, alter or re-open its own orders.

[42] I asked the parties to attend court on the 8th of December 2011 at which time written submissions were supplemented by oral. One of the issues that was never addressed initially, was the question of the appropriate interest if the Defendants were found to be at fault, but yet not to be guilty of wilful default. All of the Claimants' pleadings and submissions had been based only on the Defendants being found guilty of wilful default as opposed to simply being at fault. The authorities show that different considerations arise. Also, although many exhibits were handed up in a bundle consisting of 150 pages, the parties at no time prior to the 8th of December 2011 expressly dealt with rents that would be applicable to the property, and what consequences should flow from the fact that the Claimants were no longer in possession after December 2007.

[43] The Claimants also made a claim for damages for trespass, and for rent but I do not find that these claims have been made out.

The Claimants' Submissions on Interest and Costs

[44] As regards the issue of costs, the Claimants point out preliminarily that the Defendants did not comply with the court's order made on September 29 2011, which was that an Affidavit in proof of the death of Ena Donaldson was to be filed by October 14, 2011. Counsel Mr. Goffe also gave his undertaking so to do. They point out that the order for substitution of Vivian Donaldson for Ena Donaldson was contingent on this filing and proof. The Affidavit was not filed until October 28, 2011, 12 days after the deadline. The Claimants submit that for the substitution order to be effective an application for relief from sanction would be necessary and the court's initial order would have to be varied. This will mean, the submission continues, unnecessary use of judicial time and waste of the

court's resources. As the Claimants' costs were reduced to 7/8ths for a similar reason, the Claimants submit that the sanction for the Defendants' non-compliance with the court's order should be full costs of the action to the Claimants.

[45] According to the Claimants' Attorneys-at-Law in their written submissions, "To a Conveyancer, it is trite law that interest is payable by a purchaser on the balance purchase price ONLY where the purchaser is in possession of the relevant property. A vendor's entitlement to interest does not materialize out of thin air but arises from being kept out of possession of the property being conveyed without being in receipt of the balance purchase money."

[46] The Claimants submit that since they were only in possession for the period October –December 2007, this is the only period in respect of which they are liable for interest. They submit that there is clear evidence highlighting the degree of control and possession of the property retained by the Defendants since January 2008.

[47] The Claimants now submit, since I have indicated my finding that the Defendants are not in wilful default, that, even where a vendor is not guilty of wilful default, a purchaser who is not in possession and who is not at fault for the delay in completion, should not be ordered to pay interest. This is because the vendor has had the control and the benefit of the property and is thereby in law "in receipt of the rents and profits" whether or not the vendor actually chose to rent the property.

[48] Reference was made to Halsbury's Laws of England, Volume 44 at 942, which reads:

> ***Interest on purchase money where the vendor is in possession***
>
> *If there is delay in completion which is due to the default of the vendor, and the interest is in excess of the rents, the purchaser is not liable to pay interest during the period of delay, but the vendor retains the rents.*

[49] In the 21st Edition of **Gibson's Conveyancing**, it is stated, at pages 205-206:

> ***Part 6. Apportionment of Rent and Outgoings and Payment of Interest***
>
> *The general rule is that the vendor becomes entitled to interest as soon as he ceases to be entitled to keep the rents and profits for his own benefit, for, as Wilberforce J. , has said, "on general principle it is not right that the purchaser both should have the income of the property from the date of the contract[sic] and in addition should be relieved of paying interest on the purchase-money" (**Re Hewitt's Contract** [1963] 1 W.L.R. 1298, at pp. 1301-1302)….*
>
> ***Rent and interest under open contract**-Under an open contract completion should take place as soon as a good title is shown, and after that time the vendor receives the rents and profits as a trustee and must account for them to the purchaser when completion takes place (**Re Highett and Bird's Contract** [1903] 1 Ch. 287; **Bennett v. Stone** [1903] 1Ch 509).*
>
> *It follows that, under such a contract, if the purchase is not completed at the proper time, that is when a good title has been shown, the purchaser must pay interest, apparently at the rate applicable to all equitable apportionment, namely 4 per cent. per annum, on the balance of the purchase money from that time until completion(see per Leach , V-C, in **Esdaile v. Stephenson** (1882), 1 Sim. & St. 122, at p.123; **Monro v. Taylor**(1852), 21 L.J. Ch. 525; also **Halkett v. Dudley** [1907] 1 Ch. 590, 606). As the purchaser is entitled to rents and profits from this time no hardship is caused by this rule, except that the rate of interest is inadequate at the present time.*
>
> *Correspondingly, a vendor who remains in occupation must make allowance to the purchaser of a fair occupation rent from the date when the purchaser has to pay interest to the date of actual completion…., unless the delay in completion has been the fault of the purchaser and the vendor has been obliged to remain in possession for the protection of the property and not for his own benefit….*
>
> *……*

> ***Delay vendor's fault****- If delay in completion is the fault of the vendor he is not allowed to profit from his own wrong, so that where the interest would exceed the rents and profits the purchaser may insist on the vendor being satisfied with the rents and profits until completion takes place (**Paton v. Rogers** (1822), 6 Madd. 275; **Jones v. Mudd** (1827), 4 Russ. 118). As Wilberforce J. more recently said, "where the sale is delayed by the vendor's default the general rule is that the vendor, instead of getting the interest, must be satisfied with the interim rent and profits; but he does not lose both ways" (in **Re Hewitt's Contract** [1963] 1 W.L.R. 1298, AT P. 1302). See further below as to conditions in the contract relating to the vendor's "wilful default". In any case, if the purchaser is not responsible for the delay the purchaser may place the balance of the purchase-money on deposit and give notice to the vendor of the deposit, and he will then be liable only for such interest as is actually received from the deposit (**Regents Canal Co. v. Ware**(1857) , 23 Beav. 575, 587). See however, the remarks made, post, p.208, as to the fact that interest is not now normally paid in respect of money on deposit withdrawable on demand.*

[50] The Claimants submit that the Defendants being in default, cannot therefore benefit both ways by being allowed to retain control of the property to the exclusion of the purchasers and in addition be compensated by way of interest in respect of the same period.

[51] The Claimants further submit that interest at 15% amounts to $331,500 per annum over a period of at least four years, whilst they claim that the maximum rentable amount for the property is $240,000.00 per annum. Reference was made to a valuation report by Mr. Eric Douglas, dated September 14 2009, which formed part of the agreed bundle of trial exhibits. In that report Mr. Douglas opines that the rental that the subject property could have attracted in 2009 was $20,000.00 per month. The Claimants' Attorneys submit that the interest clearly exceeds the rent. Therefore, as the vendors retained control and possession of the property and thus were "in receipt of the rents and profits", the Claimants ought therefore to be liable to pay interest only during the period whilst they were in possession.

[52] In relation to the issue of costs, the Claimants contend that they succeeded on the issues in this case and that it was the Defendants who forced them to commence proceedings for specific performance since the Defendants refused to complete the contract. They submit that the transaction could have been completed and the question of costs resolved by the Court as a separate issue-reference was made to the **Vendors and Purchasers Act**. At paragraphs 30 and 31 of the Claimants' Further Skeleton Arguments, they allege that the Defendants have on 6 different occasions alleged that the Claimants took possession of the property on at least 5 different dates and that interest would be charged by them from these "varying and constantly evolving dates".

[53] In support of their argument that the Claimants are entitled to their full costs, reference was made to **Seepersad v. Persad** [2004] UKPC 19. In that case it was decided that a party who is successful overall should be allowed his full costs, and the court ought not to reduce the full amount unless an issue upon which the overall successful party was unsuccessful resulted in excessive hearing time, or otherwise has resulted in the incurring of significant expense. An issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an "event".

[54] The Claimants submit that, if the court should consider the possession and payment of interest as separate and distinct events, then these are matters in respect of which fault lies entirely with the Defendants for (paragraph 36 of submissions):

- Positing a multiplicity of dates on which the Claimants took possession and should pay interest(on which they lost);
- Wrongly purporting to terminate the contract when they were not ready, willing or able to complete;
- Wrongly refusing to complete the contract for want of interest/mesne profits for periods during which the Claimants were not in possession;
- Wrongly alleging that the Claimants breached the contract.

[55] The Claimants also point to the fact that in paragraph 44 of the Defendants' submission, under the heading 'Settlement Discussions', it is stated:

> *The Claimants maintained that they were only prepared to pay interest for the 3 month period that they admitted to being in possession.*

It was therefore submitted that it is evident on the Defendants' own admission, that the Claimants were successful and entirely reasonable in all the circumstances and that costs should follow the event.

[56] The Claimants submit that they are entitled to costs for two Counsel and they rely upon the decision of Evans J. sitting in the Commercial Court, of the English Queen's Bench Division, in **Juby v London Fire and Civil Defence Authority** 24th April 1990, unreported. This decision was considered with approval in **Seepersad**. In **Juby** , Evans J. stated that the question that the court should ask itself is not whether the work could have been done by one Counsel, but whether it was reasonable to instruct two Counsel. At paragraph 43, the Claimants' Attorneys submit:

> *43. In the circumstances of this case where a combined 6 set of submissions had to be prepared by the parties (each by Order of the Court), the fact that hundreds of pages of research had to be conducted in an area of Law (Conveyancing/Specific Performance/ Breach of Contract) which is highly specialized and most importantly, the fact that the matter involves a dwelling house being purchased and sold by the parties, make it not only appropriate but it is submitted humbly, also necessary for the Court to order costs for two counsel. Indeed, its 'importance to the lay clients' interests' is quite patently of the highest order.*

FORM OF THE ORDER

[57] In relation to the form of the order, I had referred the parties to the **Atkin's Encyclopaedia of Court Forms in Civil Proceedings**, 2nd Edition, 2005 Reissue, on Specific Performance, Volume 37, Forms 58-64. Specific Performance Orders need to be thought out in detail as far as possible in order to guide and secure performance and completion. The Claimants submit that the

proper order for the court to make is that the Claimants' costs, after agreement or taxation, are to be deducted from the balance due on the purchase price. Reliance is placed upon both the decision of the Privy Council in **Sale v. Allen**, as well as that of Wolfe J , as he then was, in **Sale v. Allen** after the matter was remitted by the Privy Council to the Supreme Court for consequential orders, reported at (1991) 28 J.L.R., 541. Reference was made by the Claimants to **Atkins,** 2nd Edition, Volume 37, Forms 64 and 78.

[58] It has also been submitted that the Claimants' Attorneys should have the carriage of sale. They articulate the following, amongst others, as the reasons why that should be so:

- The Defendants are the unsuccessful parties who wrongly and unreasonably refused to complete the contract despite numerous requests from the Claimants' Attorneys to do so;
- If the costs exceed the balance purchase price, the Defendants' Attorneys could simply state that they are no longer instructed by their clients (as they did after the Claimants commenced the action for specific performance when E.Wright Goffe & Co. said they did not have instructions to accept service);
- The Claimants' Attorneys are prepared to give the appropriate undertaking to remit the balance purchase price less deductions due to be paid by the Defendants when ascertained.

[59] The Claimants' Attorneys also rely upon the unreported decision of Sykes J. in **Abrikian & Russell v. Smith & Wright** delivered June 6, 2005, Claim No. CLA 083 of 1994 and the form of the court's order. In that case Sykes J. ordered that carriage of sale should go to the Purchasers' Attorneys, and also ordered the Defendants to pay for penalties which might result as a consequence of the Defendants' refusal to complete the contract.

Defendants' Submissions in relation to Interest and Costs

[60] Mr. Goffe submits that the appropriate order is interest payable until the date set for completion. The jurisdiction of the Court to order interest on judgment debts is prescribed by the **Law Reform (Miscellaneous Provisions) Act**, in

particular section 3. Mr. Goffe submits that that section limits the Court to ordering interest on judgment debts up until the date of judgment unless interest is payable as of right whether by virtue of any agreement or otherwise. He submitted, in response to a query from the court, that the court in this case is therefore not limited to awarding interest until the date of judgment as (i) the interest being awarded is not in the nature of a 'judgment debt' but rather is interest on the purchase price, and (ii) the interest is payable as of right by virtue of the express and implied terms of the Agreement for Sale.

[61] The Defendants submit that in making an order for specific performance, the court should order that interest be payable until the date of completion at the rate which was agreed in the contract, being 15% per annum. Further, that interest should run uninterrupted, from the date when the Claimants took possession until the date fixed by the court for completion.

[62] On the question of costs, it is the Defendants' submission that costs ought to be awarded in the Defendants' favour for a number of reasons advanced, including that (see paragraph 11 of the written submissions) :

> *…*
>
> *ii. It was the Claimants' breach of contract and refusal to complete that gave rise to the initiation of court proceedings;*
>
> *iii. The Defendants succeeded on more issues than the Claimants;*
>
> *…*
>
> *v. The Defendants were prepared to settle the claim and complete the Agreement for Sale upon terms that are similar to those the Court is seeking to order.*

Mr. Goffe, referred to Rule 64.6(4)(b) of the CPR in relation to success on particular issues and its effect on costs orders.

RESOLUTION OF THE ISSUES OF INTEREST AND COSTS

[63] In my view, as the sale in this case was delayed as a result of the Defendants'/Vendors' default, the general rule applies. I further accept the Claimants submissions and calculations demonstrating that here the interest would exceed the rents and profits attainable. The general rule is that, where the

interest would exceed the rents and the profits, the vendor, instead of getting the interest, must be satisfied with the interim rent and profits. This is so whether or not the Defendants in fact rented the premises during the period that they remained in control of possession. I therefore, upon reflection and consideration of the supplemented submissions, accept the Claimants' Attorneys submissions that the Claimants are only liable to pay interest for the 3 month period when they were wrongfully in possession between October –December 2007.

[64] I also accept, applying the reasoning in **Seepersad v. Persad** , that the Claimants have succeeded overall. There is in fact no distinct or separate issue upon which the Defendants have succeeded which could be used as a justifiable basis for reducing the full amount of costs. The Claimants "breach" by wrongfully entering into possession without the Defendants' consent and before completion, for the period October – December 2007, is not a sufficiently distinct or separate issue so as to constitute "an event". This is particularly so as I have held that it did not go to the root of the contract, and did not provide a proper basis for the Defendants to cancel the Agreement.

[65] As indicated in my draft judgment, I had intended to reduce the Claimants' costs to 7/8ths to take account of the late filing of their modified Witness Statements. Mr. Goffe on behalf of the Defendants had raised most stern objections to this late filing on the part of the Claimants' Attorneys-at-Law. However, here the tables have turned, so to speak, and it is now the Defendants who have been guilty of late filing in relation to the order for substitution. It is against this background of the most contentious manner in which this case has been conducted, that I agree with the Claimants that it would only be just to now restore them to a position of entitlement to full costs as a way of dealing with the Defendants' own non-compliance.

[66] In addition, I accept the Claimants' submissions that this was a matter where it was reasonable for two Counsel to be instructed, for the reasons referred to in paragraph 43 of their written submissions.

[67] Further, in my judgment, the authorities, including the decisions in **Sale v. Allen**, indicate that it is appropriate to order that the costs of these proceedings be deducted from the balance due on the purchase price. I am also in agreement that this is an appropriate case in which to order that the Claimants Attorneys be granted carriage of the Agreement for Sale, as my brother Sykes J. ordered in **Abrikian et al v. Wright** .

[68] In my view, the Claimants are entitled to Judgment on the Claim and on the Ancillary Claim. It is hereby ordered as follows:

(a) The Agreement for Sale dated 9th March 2007 for the sale of land part of Congreve Park Pen, called Braeton New Town in the Parish of Saint Catherine being the lot numbered 491 on the plan of part of Trenham Park and being the land comprised in the Certificate of Title registered at Volume 1129 Folio 533 of the Register Book of Titles, "the property", be specifically performed and completed within 90 days of the date of this Order ;

(b) The Claimants are to pay interest on the balance purchase price of $2,210,000.00 for the three month period October to December 2007 at the rate of 15 % per annum;

(c) Costs are awarded to the Claimants on the Claim and on the Ancillary Claim to be taxed if not agreed. Costs are certified to be fit for the appearance of two Counsel at the trial of the Claim and Ancillary Claim.

(d) The amount due to the Claimants for costs after agreement or taxation, is to be deducted from the balance purchase price and interest, and the residue/balance remaining thereafter, if any, is to be paid to the Defendants' Attorneys-at-Law.

(e) Upon the Claimants paying to the Defendants, the residue/balance due, if any, due after the deduction of Costs as ordered at (d) above, (or providing a satisfactory undertaking for payment from a reputable financial institution), the Defendants do:

(i) Execute a registrable Instrument of Transfer of the property to the Claimants;

(ii) Deliver to the Claimants such Transfer so executed(along with the registration fee), together with the Duplicate Certificate of Title, Discharge of Mortgage, and Withdrawal of Caveat (if any), the original transfer tax certificate and up to date certificate of payment of taxes; and

(iii) Give to the Claimants vacant possession of the property.

(f) The Claimants' Attorneys –at-Law Messrs. Pollard Lee Clarke & Associates are to have carriage of sale upon the Claimants' Attorneys-at-Law irrevocable undertaking to remit the residue/balance referred to in (d) and (e) above, to the Defendants' Attorneys-at-Law, E.R. Wright-Goffe and Company;

(g) Any penalty imposed by the Stamp Commissioner arising out of the stamping of the agreement and the payment of transfer tax out of time are to be borne by the Defendants;

(h) In the event that the original Agreement cannot be found, a copy of the agreement presented to the court as document Number 8 in the Agreed Bundle of Trial Exhibits, shall be accepted by the Stamp Commissioner for all purposes as if it were the original;

(i) In the event that the defendants neglect or refuse to execute the instrument of transfer and/or the application to note the death of Ena Donaldson or fail to execute any document necessary to effect or facilitate the transfer of title as ordered within fourteen(14) days of being requested in writing to do so, the Registrar of the Supreme is empowered to execute the transfer and all such documents necessary to effect or facilitate the transfer of title and/or the application to note the death of Ena Donaldson;

(j) In the event that the Defendants neglect or refuse to remit the Duplicate Certificate of Title to the Claimants' Attorneys-at-Law within fourteen (14) days of being requested in writing to do so, the need for the production of the Duplicate Certificate of Title to either effect the transfer of the property or to note the death of Ena Donaldson shall be dispensed with by the Registrar of Titles pursuant to s.81 of the Registration of Titles Act.

(k) The fees associated with the application to note the death of Ena Donaldson as well as any fees payable to replace the duplicate certificate of title or to dispense with the production of the same (should it be necessary) shall be borne by the Defendants and deducted from the purchase price;

(l) Both parties are granted permission/liberty to apply.