[2023] JMCC COMM. 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. 2017CD00304

BETWEEN	**GREGORY DUNCAN**	**1ST CLAIMANT**
AND	**GLOBAL DESIGNS AND BUILDERS LIMITED**	**2ND CLAIMANT**
AND	**DION STAPLE**	**1ST DEFENDANT**
AND	**MARRIO BLAKE**	**2ND DEFENDANT**
AND	**DGS CHARTERED ACCOUNTANTS & BUSINESS ADVISORS LIMITED**	**3RD DEFENDANT**
AND	**PROACTIVE LIFESTYLE LIMITED**	**4TH DEFENDANT**

IN OPEN COURT

Mr. Orville C. Morgan instructed by Orville C. Morgan & Co. for the 1st and 2nd Claimants

Mr. Dwayne O. Trowers for the 1st, 3rd and 4th Defendants

HEARD: 17th, 19th January, 3rd February, 6th March and 14th April 2023

CONTRACT FOR SALE OF LAND -BREACH OF CONTRACT – WHETHER THERE ARE SUFFICIENT ACTS OF PART PERFORMANCE BY PARTY – EQUITABLE REMEDY OF SPECIFIC PERFORMANCE

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The 1st Claimant Gregory Duncan is a real estate developer and the sole shareholder and director of the 2nd Claimant Global Designs and Builders Limited. The 1st and 2nd Defendants Dion Staple and Marrio Blake were chartered accountants, loan facilitators, auditors and expert business advisors and they operated through the 3rd Defendant DGS Chartered Accountants and Business Advisors Limited. The 4th Defendant is a company owned and operated by the 1st Defendant. On May 19, 2017, the Claimants initiated a claim against the Defendants claiming the following orders:

> *(i) a Transfer of clean Title and all legal and equitable interest in the Manor Park property;*
>
> *(ii) payment and discharge of Mortgage number 1788424 registered at Volume 1432 Folio 79;*
>
> *(iii) recovery of title registered at Volume 1432 Folio 79 (iv) specific performance; and (v) damages.*

[2] The 2nd Defendant did not respond to the Claim and he is now deceased. The 1st, 3rd and 4th Defendants filed their Defence and counterclaimed against the Claimants for breach of contract arising from the Claimants' failure to effect payment of sums advanced to Mr. Duncan in his personal capacity during the period February 2010 to 2017 as loans.

THE CLAIMANTS' CASE

[3] On the 6th January, 2010, the Claimants entered into an Agreement (hereafter "the first agreement") with the 3rd Defendant to act as loan facilitators for the Jamaica Mortgage Bank Loan. In 2011, the Claimants further engaged the Defendants to facilitate the financing and purchase of land located at Manor Park registered at Volume 1405 Folio 464 of the Register Book of Titles (hereafter called "Manor Park property").

Manor Park Property

[4] It was agreed that the Manor Park property would be purchased in the names of the 1st and 2nd Defendants to enable them to secure mortgage financing towards the

purchase price. It was also agreed that construction of a six (6) unit development on the property after its acquisition would cost an estimated Fifty Million Dollars ($50,000,000) and the 1st, 2nd and 3rd Defendants would be responsible for finding financing for the development phase of the project.

[5] It was understood and agreed between the parties that the Defendants were being placed as registered proprietors on the title as mere trustees for the Claimants solely to secure a mortgage and the Claimants would develop the property while making payments to the Defendants to cover the purchase price, mortgage and interest and be responsible for any development financing.

[6] The 1st, 2nd and 3rd Defendants purchased the Manor Park property in May 2012 with a Mortgage in the sum of Ten Million Dollars ($10,000,000) from the National Commercial Bank Jamaica Limited however, the Defendants informed the Claimants that the purchase price was Twenty Million Dollars ($20,000,000). The mortgage was to be repaid by the Defendants in the amount of Three Hundred and Fifty Thousand Dollars ($350,000.00) monthly.

[7] On September 9, 2012, the parties executed another agreement (hereafter "the second agreement") to facilitate the transfer of ownership of the Manor Park project to the Claimants for a purchase price of Fifty Million Dollars ($50,000,000). Up to the signing of the second Agreement, the Claimants had already repaid Five Million Five Hundred Thousand Dollars ($5,500,000) to the Defendants in partial settlement of their obligation and by April 2013, the payments made to the Defendants totalled Twenty-Five Million, Thirty-Two Thousand, Eight Hundred and Nine Dollars ($25,032,809.00) towards the Manor Park deal.

[8] The Claimants had some financial challenges and were unable to meet deadlines for repayment by March, 2013. The Defendants approached the Claimants to repay the remaining liability at which time the Claimants requested that the title be transferred to them before the debt is paid off. In September 2013, the Defendants lodged Caveats

against 3 units in another development called Rose Gardens that were being held by the Defendants as security for the initial costs for acquiring the Manor Park property.

JOHNSON HILL

[9] The 1st Defendant Dion Staple, (hereafter "Mr. Staple") made a deposit of Five Million Nine Hundred Thousand Dollars ($5,900,000) on one of Mr. Duncan's property located at 3 Woodpecker Avenue, Hellshire registered at Volume 1432 Folio 79 of the Register Book of Titles (hereafter "Woodpecker Avenue") however, he later changed his mind and requested a refund. Mr. Duncan did not have the cash to repay Mr. Staple and instead agreed to allow him to use the Woodpecker Avenue property as security to get a loan from the Bank of Nova Scotia Jamaica Limited (hereafter "Scotiabank") for the deposit owed.

[10] Shortly after receiving the loan from Scotiabank, Mr. Staple received the refund of the deposit from the proceeds of sale of Units in Johnson Hill, Hellshire, however, Mr. Staple refused to discharge the mortgage and instead indicated that the refund is being held on account for the Manor Park property.

[11] The Claimants are claiming the transfer of clean titles and all legal and equitable interest in the Manor Park property.

THE DEFENDANTS' CASE

[12] By agreement dated April 21, 2011, the Defendants and Evolve contracted to loan the Claimants the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) to be repaid on or before June 30, 2011. This loan is referred to as the "pre-existing debt". The agreement stipulated that Evolve would procure a mortgage on property registered at Volume 1359 Folio 147 and that the Claimants would pay Two Million Five Hundred Thousand Dollars ($2,500,000) every ninety (90) days if full payment of the loan is not realized by June 30, 2011.

[13] Before the due date for payment of the pre-existing debt, the Claimants requested an additional Two Million Five Hundred Thousand Dollars ($2,500,000) bringing the pre-

existing debt to Ten Million Dollars ($10,000,000). On May 24, 2011, the Defendants entered a second agreement to loan the Claimants an additional sum of Five Million Dollars ($5,000,000) thus bringing the total pre-existing loan to Fifteen Million Dollars ($15,000,000). The Claimants and the Defendants agreed that the pre-existing debt of Fifteen Million Dollars ($15,000,000) would be repaid on or before October 31, 2011. The second agreement stipulated that Evolve would procure a Mortgage on property registered at Volume 1359 Folio 417 and property registered at Volume 1432 Folio 79 of the Register Book of Titles. The Claimants also contracted to pay One Million Dollars ($1,000,000) per month if full payment of the loan is not realized by October 31, 2011.

[14] After receiving the loans, the Claimants paid only the sum of Five Million, Five Hundred Thousand Dollars ($5,500,000) in September, 2011 thus breaching the agreement and as at August 31, 2012, the total amount owed to the Defendants amounted to Nineteen Million, Five Hundred Thousand Dollars ($19,500,000).

[15] On September 9, 2012, a third agreement was entered into where the Defendants agreed to accept the sum of Fifteen Million Dollars ($15,000,000) from the Claimants in full and final settlement of the balance of the pre-existing debt which amounted to Nineteen Million, Five Hundred Thousand Dollars ($19,500,000). The Defendants also agreed to sell the Manor Park project for the sum of Fifty Million Dollars ($50,000,000) to the Claimants bringing the total outstanding debt to Sixty-Five Million Dollars ($65,000,000).

[16] The Claimants agreed to settle the Sixty-Five Million Dollars ($65,000,000) debt over 3 tranches. The first payment of Twenty-Five Million Dollars ($25,000,000) was to be made on or before January 31, 2013, the second payment of Ten Million Dollars ($10,000,000) to be made on or before March 31, 2013 and the final payment of Thirty Million Dollars ($30,000,000) to be made on or before June 30, 2013. The September 9, 2012 agreement also stipulated that where the Claimants renege, the original sum of Nineteen Million, Five Hundred Thousand Dollars ($19,500,000) together with interest at One Million Dollar ($1,000,000) per month would be payable. It was also agreed that the

Defendants would have the option to sell or undertake the project in order to recover any outstanding amounts.

[17] As a result of the Claimants failure to repay the outstanding debts, caveats were lodged on three properties located at Rose Gardens, Red Hills, St. Andrew where Mr. Duncan had delivered three Agreements for Sale to the Defendants as security for the loans. The Claimants failed to make the first payment of Twenty-Five Million Dollars ($25,000,000) on or before January 31, 2013 and instead made only one payment of Two Million Dollars ($2,000,000) on February 15, 2013 as a result of which the pre-existing debt of Nineteen Million, Five Hundred Thousand Dollars ($19,500,000) plus One Million Dollars ($1,000,000) per month became due and payable. The parties negotiated a settlement of the outstanding debt and the Claimants agreed to transfer one (1) incomplete Apartment valued at Fifteen Million, Five Hundred Thousand Dollars ($15,500,000) to the Defendants and paid the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) towards the pre-existing debt. As at September, 2013 a balance of Six Million, Five Hundred and Five Thousand Three Hundred Dollars ($6,505,300.00) was due and payable by the Claimants.

[18] The Defendants aver that the Claimants are not entitled to the Manor Park property as the property was purchased by the Defendants by virtue of Agreement for Sale dated October 27, 2011 from the Vendors Marlene Patricia Bell, Martin J. Lewis and Lisa G. Jenoure. The Defendants are claiming a Counterclaim for breach of contract and to recover the sum of Eight Million, Seven Hundred and Thirty-Two Thousand, Five Hundred and Seventy-Eight Dollars and Fifty-Three cents ($8,732,578.53) representing payments due and outstanding from the Claimants in reference to the pre-existing debt.

THE CLAIMANTS' EVIDENCE

[19] The evidence of Mr. Duncan at trial is that the Manor Park property registered at Volume 1405 Folio 464 was purchased by the 1st and 2nd Defendants and that it was agreed that the purpose of the September 9, 2012 agreement was to facilitate the purchase of the Manor Park property. He refuted the contention that the terms of

agreement included the repayment of the pre-existing debt of Nineteen Million, Five Hundred Thousand Dollars ($19,500,000).

[20] According to Mr. Duncan the owners of the Manor Park property offered to sell him the property for the sale price of Twenty-Five Million Dollars ($25,000,000). He further indicated that pursuant to the September 9, 2012 agreement, the 1st and 2nd Defendants agreed to sell a 6-unit residential developed property for Fifty Million Dollars ($50,000,000) in total if there was a project, however as there was no project there was no need to pay the full amount of Fifty Million Dollars ($50,000,000).

[21] He averred that as the property was not developed into the 6-unit residential apartments, he instead purchased the undeveloped property for Twenty Million Five Hundred Thousand Dollars ($25,000,000) and that he paid for the undeveloped property by making payment of Seven Million Five Hundred Thousand Dollars ($7,500,000), Two Million Dollars ($2,000,000) by cheque and a transfer of an incomplete apartment valued at Fifteen Million, Five Hundred Thousand Dollars ($15,500,000).

[22] According to Mr. Duncan, Mr. Staple and Mr. Blake should have transferred the title for the Manor Park property after receipt of the payment of Seven Million Five Hundred Thousand Dollars ($7,500,000) however they refused to do the transfer even after receiving full payment for the property.

[23] Mr. Duncan also admitted that he received a loan from Evolve in 2011 however that loan was repaid and according to his knowledge, Mr. Blake who is now deceased was the sole Director of that Company.

THE DEFENDANTS' EVIDENCE

[24] Mr Staple's version of the evidence contradicts that of Mr. Duncan's. Mr. Staple averred that the September 9, 2012 agreement took into contemplation the pre-existing debt that was owed by Mr. Duncan as well as the purchase of the Manor Park property. He admitted that the sum of Twenty-Five Million Dollars ($25,000,000) was paid over to

him by Mr. Duncan however that payment was made towards the pre-existing debt owed by Mr. Duncan from 2011.

[25] According to Mr. Staple, Mr. Duncan was a very good friend of his and he offered to assist Mr. Duncan who had issues obtaining financing from Scotiabank because of his bad credit history. They both agreed that the loan would be taken out in the name of Proactive Lifestyle (one of Mr. Staple's company) and Mr. Duncan would put up his property as security and also service the loan however, he failed to do so.

[26] He gave Mr. Duncan personal loans the first being in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) in April 2011. Mr. Duncan approached him for another Two Million Five Hundred Thousand Dollars ($2,500,000) which was also granted and in May 2011 a further Five Million Dollars ($5,000,000) was requested by Mr. Duncan. The total sum of Fifteen Million Dollars ($15,000,000) should have been repaid by October 31, 2011 however, Mr. Duncan defaulted in the loan agreements which caused Mr. Staple severe financial challenges.

[27] According to Mr. Staple, the sum of Fifty Million Dollars ($50,000,000) was the purchase price for the land and the related drawing approval. He averred that the September 9, 2012 agreement contemplated the project and the building approval and not a completed development. He refuted the contention that the sum of Fifty Million Dollars ($50,000,000) was payable if the 6-unit residential apartment were completed and instead reiterated that that was the full cost of the land plus the related drawings only.

[28] According to Mr. Staple not all his dealings with Mr. Duncan were written because he enjoyed a friendly agreement as he saw him as his best friend. He averred that Mr. Duncan now owes him in excess of Eight Million Dollars ($8,000,000).

SUBMISSIONS ON BEHALF OF THE CLAIMANTS

[29] Written Submissions on behalf of the Claimants were made largely by the 1st Claimant in person however, Mr. Orville Morgan appeared for the Claimants at the trial stage of the proceedings. Mr. Morgan submitted that the September 9, 2012 agreement

was entered into to facilitate the purchase of a development on the Manor Park property. He further submitted that the agreement was two-fold, the land referred to as one part and the development referred to as the other part. He submitted that the total costs for the land and project is Sixty-Five Million Dollars ($65,000,000) and the Defendants agreed to accept Fifteen Million Dollars ($15,000,000) for the land and Fifty Million Dollars ($50,000,000) for the project.

[30] Counsel submitted that the Claimants paid the first installment of Twenty-Five Million Dollars ($25,000,000) for the undeveloped land as stated by the September 9, 2012 agreement and that the 1st, 3rd and 4th Defendants breached the terms of the agreement and failed to (i) use the proceeds from the first installment to settle the NCB liability and (ii) to provide a completed 6-apartment development to the Claimants in accordance with the terms of the agreement.

[31] According to Mr. Morgan, having paid the first installment, the Purchasers have a beneficial ownership of the land and the Vendors have a right to the money and have the right to place a charge or lien on the land for security. Counsel relied on the authority of ***Lysaght v Edwards*** (1876) 2 Ch D 999 CA to support his submissions for an order for specific performance. Counsel further submitted that the Claimants have an equitable interest in the Manor Park property and relied on the authority of ***Marjorie Knight v Lancelot Hume*** [2017] JMSC Civ 51 which stated at para 48 as follows:

> *"The takes me to the question of damages in lieu of specific performance. The Defendant's refusal to complete would have to treated as a failure to complete. The normal measure of damages where the defendant fails to complete is the market value of the property at the contractual time for completing less the contract price….in the circumstances, it appears that a decree of specific performance is what meets the justice of the case."*

[32] Mr. Duncan in his written submissions stated that the September 9, 2012 agreement did not take into contemplation the pre-existing debt of Nineteen Million Five Hundred Thousand Dollars ($19,500,000) as that debt was entered into between the Claimants and a Company referred to as Evolve Jamaica Limited which is not a party to this claim and that the so called pre-existing debt was settled with Mr. Mario Blake, the

2nd named Defendant who is now deceased. He further stated that the Defendants are in breach of the terms of the agreement by failing to transfer the title to the Manor Park property to the Claimants as agreed between the parties. He invited the Court to rely on the authority *of* ***Lysaght v Edwards*** (1876) 2 Ch D 499 to allow the Claimants to settle the mortgage at NCB to enable its discharge and to alleviate the liability burden that will be placed on the 2nd Defendant's surviving daughter. He also seeks an order that the Registrar of Titles be instructed to register the names of the Claimants on the title for the Manor Park property within thirty (30) days if the Defendants fail to do so.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[33] Counsel for the Defendants, Mr. Dwayne Trowers submitted that the September 9, 2012 agreement supersedes the previous agreements entered into between Mr. Duncan and the 1st and 2nd Defendants' former company Evolve and that Mr. Duncan failed to satisfy those debts. Mr. Trowers further submitted that the September 9, 2012 agreement took into contemplation the pre-existing debt which was reduced to Fifteen Million Dollars ($15,000,000) that emanated from a loan agreement dated May 24, 2011 as well as the sale price for the Manor Park property in the sum of Fifty Million Dollars ($50,000,000).

[34] Mr. Trowers submitted that the issues before the Court are:

> *(i) whether a breach of the September 9, 2012 agreement reverted the negotiated reduced sum of Fifteen Million Dollars ($15,000,000) to Nineteen Million Five Hundred Thousand Dollars ($19,500,000) pursuant to the May 24, 2011 agreement,*
>
> *(ii) whether the negotiated settlement with the Claimants to transfer one incomplete apartment valued at Fifteen Million Five Hundred Thousand Dollars ($15,500,000) plus payment of Seven Million Five Hundred Thousand Dollars ($7,500,000) was payment for the pre-existing debt only,*
>
> *(iii) whether the Defendants' attorneys-at-law accepted an undertaking from the Claimants' attorneys-at-law to accept the transfer of one incomplete apartment valued at Fifteen Million Five Hundred Thousand Dollars ($15,500,000) and a payment of Seven Million Five Hundred Thousand Dollars ($7,500,000) as*

payment for the pre-existing debt owed to the Claimants as well as payment for the Manor Park project.

[35] Counsel submitted that paragraph 16 of the September 9, 2012 agreement articulated that should the Defendants default the loan and such default is not remedied within fourteen (14) days, the Claimants should pay the original sum of Nineteen Million Five Hundred Thousand Dollars ($19,500,000) together with interest at the rate of One Million Dollars ($1,000,000) per month. The 1st Claimant failed to make the first instalment of Twenty-Five Million Dollars ($25,000,000) on or before January 31, 2012 as stipulated by the agreement and as such he is in breach of the agreement.

[36] Counsel relied on the case of ***Kandekore, Lijuasu M. v Jamaica Civil Aviation Authority*** [2020] JMSC Civ 167 which further cites Lord Clark at paragraph 45 of ***RTS Flexible Systems Ltd. v Molkerei Alois Muller GmbH & Co.*** KG UK (Productions) 2010 3 All ER 1 which states 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 what was communicated between them by words or by conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law required as essential for the formation of legally binding relations."*

[37] Counsel submitted that the principle that the Court should extract is that in order to satisfy an intention to create legally binding contractual relationship there should be an agreement on all essential terms. He further submitted that the terms of contract were clear and a breach invoked paragraph 16 of the September 9, 2012 agreement.

[38] According to Mr. Trowers, the Claimants' reliance on the Letter of Undertaking dated September 17, 2013 from Hollis and Company Attorneys-at-law to ground their submission that the Defendants accepted the Undertaking as full and final settlement of all sums is ludicrous. Counsel relied on the authority of ***Aedan Earle v National Water Commission*** [2014] JMSC Civ 69 where Sykes J (as he then was) explored the approach to be adopted by the Court in interpreting a contact. Sykes J. adopted the approach set

out in Lord Hoffman in ***Investor Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 All ER 98 who stated that the interpretation of a contract is the process of ascertaining what the document would mean to a reasonable person, having all the background information, 'which would reasonably have been available to the parties in the situation in which they were at the time of contract. "Background' in this context means anything which would have affected the way in which the language of the document would have been understood be a reasonable man.

[39] Counsel also referenced Nembhard J in the case of ***McDonald, Ricardo v Island Networks Limited*** [2019] JMSC Civ 125 who enunciated the fact that it is now equally pellucid that, the fact that a document is on the face of it, clear, does not preclude the Court from examining the surrounding circumstances, to see whether the prima facie meaning remains intact, or, is affected by the matrix of fact. Nembhard J further cites ***Static Control Components (Europe) v Egan*** [2004] 2 Lloyd's Report 429 at chapter [17] stating that the Law has now advanced to the point where the background information includes the Law and proven common assumptions, even if those assumptions were incorrect per the case of ***BCCI v Ali*** [2002] 1 AC 251.

[40] It was submitted that the Letter of Undertaking to accept the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) as full and final settlement of all sums due and owing was interpreted and predicated on the pre-existing sums that were due and owing per the breach of the Agreement dated September 9, 2012. Counsel contended that if the Court examines the surrounding circumstances to see whether the prima facie meaning remains intact or is affected by the matrix of fact the Court can assess that the pre-existing debt and the money paid is much lower than the money owed. He further submits that the sums paid is just a small fraction of the assessed value of the Manor Park project, therefore it would be ludicrous for the Defendants to accept such an inconsequential sum for both the pre-existing debt as well as the Manor Park project.

[41] Counsel submitted that the Attorney-at-law who had conduct of the matter vehemently denied accepting an undertaking for the payment of the Manor Park project however admitted to accepting an Undertaking to settle the pre-existing debt for the

further payment of Seven Million Five Hundred Thousand Dollars ($7,500,000). He submits that the Claimants claim must fail as the evidence proffered does not suggest that the Defendants accepted an Undertaking for the Manor Park project and as such they are not entitled to the property.

DISCUSSION

The Manor Park Property

[42] The main issue to be determined is whether the Claimants are entitled to a transfer of clean title and all the legal and equitable interest in the Manor Park property and to Specific Performance. The Claimants are seeking to have the title to the Manor Park property transferred to them on the basis that they paid Twenty-Five Million Dollars on account of the Manor Park property ($25,000,000) to the Defendants and so are entitled to clean transfer of the Certificate of Title relating thereto.

[43] The Defendants have disputed this account and although they agree that the sum of Twenty-Five Million Dollars ($25,000,000) was paid they assert that it was paid to discharge the pre-existing debt and not on account of the Manor Park property.

[44] It is clear that the 1st Claimant and the 1st Defendant at some point enjoyed a friendly relationship. It is also clear that significant sums of money passed between the two of them unaccounted for. The way in which they conducted their affairs is atypical of how business men engaged in this kind of business usually conduct affairs. They were in the habit of writing off millions of dollars, lending millions of dollars, at times without any written documents. However, in the course of their dealings the parties did take the time to execute a document referred to as “Agreement” which is the subject of Exhibit one and this I believe ought to be my starting point.

[45] This Agreement was executed in the presence of an Attorney-at-law and it is the only document signed by both parties that refers to this Manor Park property however it also related to the pre-existing debt owed by the Claimants to the Defendants. Counsel representing the Claimants in his submissions reminded the Court of the well-established

legal principle regarding sale of land which is found in **sections 2** and **4** of the **Statute of Frauds**, **1677** which provides *inter alia* that all contracts for the sale of land must be in writing or must be evidenced by sufficient evidence in the form of a memorandum or note.

[46] He relied also on the judgment of Evan Brown J as he then was on ***Marjorie Knight v Lancelot Hume*** [2017] JMSC Civ 51. At paragraphs 16 to 18 of the judgment the Court reiterated the principle in these terms:

> *"[16]. All contracts for the sale or transfer, or other disposition of an interest in land must be either in writing or evidenced in writing: sections 2 and 4 of the Statute of Frauds 1677. This writing or memorandum, must identify the parties by names or description and the capacity in which they contract. The memorandum must also speak to the material terms of the contract and signed by the party to be charged. (See Treitel The Law of Contract 12th ed. Para 5-015 to 5-019) The material terms of the contract include a description of the property to be purchased, the agreed price, the date for completion (if it was fixed), the stages of payment of the purchase price and payment of the deposit: Commonwealth Caribbean Property Law 2nd ed pp. 272-273.*
>
> *[17] The contract to convey the legal estate in the land is called an estate contract: Commonwealth Caribbean Land Law p. 158. Upon conclusion of the contract, the purchaser acquires the equitable interest in the land, the legal estate remaining with the vendor until the conveyance has been executed. Further, until completion the vendor holds the legal estate on trust for the purchaser: Riverton City Ltd v Haddad (1986) 40 WIR 236, 258-264. The vendor has a right to retain possession of the estate until the purchase money is paid, unless there is an expressed stipulation concerning the time for delivering possession.*
>
> *[18] Where the contract is breached by the vendor, the purchaser has rights both at common law and in equity. The purchaser may sue for damages. Damages, however, may not be an adequate remedy. In that event, the purchaser may seek a decree of specific performance, compelling the vendor to convey the legal estate to him; that is, to convey the land to him: Commonwealth Caribbean Land Law p.158."*

[47] This Court must therefore apply the seminal principle that contracts for land ought to be in writing and pay regard to the Agreement. It was agreed that at the time of this

Agreement on September 9, 2012 the Claimant was indebted to the Defendants in the sum of Sixty-Five Million Dollars ($65,000,000), Fifteen Million ($15,000,000) was to settle an existing debt which was reduced from Nineteen Million Five Hundred Thousand Dollars ($19,500,000) and Fifty Million Dollars ($50,000,000) was the cost of the Manor Park project. This debt was to be settled in total by June 2013, by the Claimant making payment in three instalments, with the first one being in the sum of Twenty-Five Million Dollars ($25,000,000) to be paid on before January 31, 2013, the second one in the sum of Ten Million Dollars ($10,000,000) to be paid on or before March 31, 2013 and the third in the sum of Thirty Million Dollars ($30,000,000) to be paid on or before June 30, 2013. The proceeds of the first instalment was to be used to settle the mortgage with the National Commercial Bank.

[48] The developers deposited with the owners three Agreements for Sale in respect of three apartments in Rose Gardens a development being undertaken by the developers and assigned the net proceeds of sale to the owners. Upon receipt of the first instalment all obligations relating to the three apartments were to be cancelled. This Agreement also provided for the transfer of ownership of the Manor Park property upon full payment of the total debt by the Claimant/Developers.

[49] In seeking to resolve this main issue as to whether the property should be transferred to the Claimant, several other issues arise for my determination. They are as follows:

1. Who breached the Agreement and what was the consequence of the breach?
2. Whether the sums paid by the Claimants were to settle the pre-existing debt or were paid on account of the Manor Park property?
3. Whether the Defendants accepted an Undertaking from the Claimants' Attorney-at-law to pay the sum of Seven Million Five Hundred Thousand ($7,500,000) in full settlement of all sums owed?
4. Whether payments made by the Claimants represent an act of part performance so as to entitle the Claimants to specific performance.

Who breached the Agreement and what was the consequence of the breach?

[50] There is no issue that this Agreement was breached however, the 1st Claimant has asserted that it was the Defendants who breached the Agreement in not paying over the sums to the National Commercial Bank to clear the mortgage. The 1st Defendant's response is that the 1st Claimant is in breach as he did not pay the agreed sum on the agreed date.

[51] The terms of the Agreement were clear and in the normal course of things ought to be given effect unless there is something else to the contrary. The Claimants were required to make the first payment on January 31, 2013. I have accepted that instead of paying the sum of Twenty-Five Million Dollars ($25,000,000) on January 31, 2013, the 1st Claimant instead paid Two Million Dollars ($2,000,000) on February 15, 2013. It is clear to me that in these circumstances it was the Claimants who breached this Agreement.

[52] The penalty for default as set out in Clause 16 of the Agreement was that should the developers default on the terms of the Agreement and do not remedy such default within fourteen (14) days after written notice has been given, then the developer shall be required to pay to the owners forthwith the original sum of Nineteen Million Five Hundred Thousand Dollars ($19,500,000) together with all accrued interest at the original rate of One Million Dollars ($1,000,000) per month. In addition, the owners will have the option to sell or undertake the project in order to recover any amount due from the developers.

[53] Mr. Duncan has suggested that having failed to meet the deadlines for the 1st and 2nd instalments under the 2nd Agreement, none of the parties made any attempts at recovery or enforcement under the 2nd Agreement and that the Defendants were suffering from financial difficulties and were willing to negotiate outside of the 2nd Agreement in order to quickly recover principal by foregoing interest payments. There is no indication from either party that any written notice was given pursuant to this provisions and so this is somewhat supportive of the Claimant's position that no attempts were made to enforce this Agreement.

[54] According to the Claimant, subsequent to that the parties came to some other arrangement or agreement and in support of this contention he directed the Court's attention to emails written by Mr Staple. He referred to emails dated July 25, 2012 and March 13, 2013 as evidence that the Defendant sold him the property for Twenty-Five Million Dollars ($25,000,000). The email dated March 13, 2013 was not tendered in evidence before me. The email dated July 25, 2013 was written by Mr Staple to Mr Marrio Blake. He expressed the following therein:

> *"I believe this is too complicated. My understanding is that Gregory will pay us $45 million (debt plus profit) plus approx. $25 million and cost, plus 1 year of interest charged by NCB) for the Portview project. The deadline to pay the $45m is Dec 31, 2012 and the deadline to pay the $25m is June 30, 2012. This $25m will be used to clear up NCB loan but he can pay prior to March 31, 2012 if he wants the title….*
>
> *Based on the foregoing, we will then give Gregory all documents for the Portview project except the title which will be released upon payment of the $25m above. We will also forgive him of the loan due to us.*

[55] Firstly, this is an email and is not signed by any parties so as to bind them. Secondly, this email was not addressed to Mr. Duncan. Even if the email were to be seen as indicative of Mr. Staple's position, it speaks to Mr Duncan owing over Sixty Million Dollars ($65,000,000) and any forgiving of any loan was conditional on him paying Forty-Five Million Dollars ($45,000,000). This email does not further Mr Duncan's position nor does it support what he is indicating. His position is not supported by any other documents. I have looked at all the emails tendered in evidence and did not detect any certain position or firm agreement arrived at between the parties. In any event, I fail to see how a unilateral letter could take the place of a written document executed by both parties. In order to displace the terms of this written Agreement there would have to be some other clear and unambiguous agreement of the parties. I have seen no other such documents nor any indication of any oral agreement. I am therefore left to revert to the terms of the written Agreement.

[56] Although there is no indication that any party sought to enforce the provisions of the Agreement by giving the requisite Notice, the Court will still have regard to the clauses therein. It had already been agreed at clause 7 of the Agreement that interest accrues at the said sum of One Million Dollars ($1,000,000) per month and throughout the trial there was no issue taken with this provision as being outside of the intention of the parties. In those circumstances Mr. Duncan would at the very least be required to pay the pre-existing loan of Nineteen Million Five Hundred Thousand Dollars ($19,500,000) plus interest of One Million Dollars ($1,000,000) per month.

[57] The genesis of the acquisition of the property had to do with Mr. Duncan's intention to develop the property and the fact that because of his credit history he could not have acquired a mortgage to finance the property so he relied on the Defendants to do so. Having entered into this arrangement with the Defendants, they acquired the property and so they are the registered owners of the property. On the face of it, it was the defendants who paid the full purchase price and took out the mortgage from the National Commercial Bank. The Claimant having breached the Agreement he would no longer have the right to possess the property for the purpose of carrying out construction work and he would no longer be entitled to a transfer of the ownership of the land. All of this was conditional upon him fully paying the total debt which he failed to do. Mr Staple, as the registered owner would therefore have had the right to treat with the property as he wished.

Whether the sums paid by the Claimants were to settle the pre-existing debt or were paid on account of the Manor Park property.

[58] The Claimant has contended that the parties in their further negotiations came to other agreements for the sums paid to be paid on account of the Manor Park property. I have already found that there was no material in the emails that reflected any subsequent agreement arrived at between the parties. However, I also have to consider whether based on all the circumstances the sums paid were meant to settle the pre-existing debt or were paid on account of the Manor Park property. Mr Duncan has alleged that he paid back this existing loan to the deceased Defendant or Evolve, a company owned by the

deceased Mr Blake. However, he has shown no proof of this. I find this difficult to accept as nowhere in his communication prior to this did he state this as a fact. I do not believe that he paid any other sums over and above the sums he spoke of in his witness statements.

[59] This now takes me to the question of the credibility of the parties which is a live issue. Mr Duncan was cross-examined at length. I found him generally evasive in his answers to many questions. When asked about whether he was indebted to the owners in the sum of Nineteen Million, Five Hundred Thousand Dollars ($19,500,000) he denied this although this was expressly stated in the Agreement which was executed by him. He thereafter sought to explain that he had received the loan from an entity referred to as Evolve and that it was Mario and not Mr Staple who was the majority shareholder in that company.

[60] When asked how much he was supposed to pay for the Manor Park property he said it was Twenty-Five Million Dollars ($25,000,000) although the Agreement spoke expressly to Fifty Million Dollars ($50,000,000). He insisted that the essence of the Agreement was that they were to sell him the project for Sixty-Five Million Dollars ($65,000,000) but since there was no development or project there was no need for him to pay Sixty-Five Million Dollars ($65,000,000).

[61] He at first denied defaulting on the payment but later admitted that he did not pay the sums on the dates agreed which presented a clear inconsistency in his evidence. It was suggested to him that having breached the Agreement, the debt on the pre-existing loan was now Twenty-Six Million Five Hundred Dollars ($26,500,000). He however indicated that he gave them the Rose Garden apartment valued at Fifteen Million Dollars ($15,000,000) and thereafter the total sum owing was reduced to Seven Million Five Hundred Thousand Dollars ($7,500,000) which the Attorney-a-law for the Defendants Mr. Alando Terrelonge accepted. He insisted that this was in full and final payment for the Manor Park project.

[62] This raises the question as to what did the pre-existing debt amount to and what was the exact sum paid by Mr Duncan and whether the sums paid were on account of the pre-existing debt or whether they were on account of the Manor Park property.

[63] Mr Staple was also cross-examined and he started out by saying he knew of no development but then went on to admitting to starting a development. When asked if he had offered to sell Mr. Duncan the Manor Park property for Twenty-Five Million Dollars ($25,000,000) he denied this and insisted that it was Fifty Million Dollars ($50,000,000) as stated in the Agreement. He admitted that Twenty-Five Million Dollars ($25,000,000) was paid to him by Mr Duncan but insisted that it was in relation to pre-existing debt and did not relate to the Manor Park project.

[64] He admitted that most of the dealings between he and Mr. Duncan were not written because they previously enjoyed a very friendly relationship and that he would often help out Mr. Duncan even in the absence of a written agreement.

[65] Both Mr. Duncan and Mr Staple were evasive in their answers. It is also clear that both have not told the full truth and there is a lot left unsaid. I am left to sieve through and make sense of their various agreements and intention, a task which has proven to be challenging. However, when I assess all the evidence I found Mr. Staple's evidence to be more consistent with the written documents. I found his account to be more credible than that of Mr Duncan. According to him, the Claimant having defaulted, the Twenty-Five Million Dollars ($25,000,000) paid represented the pre-existing debt. His subsequent actions also lend credence to his account. He has sought to pay the mortgage and to continue the development. Short of filing the Claim in 2017, there is nothing to say the Claimant took any active steps towards the furtherance of the project between 2013 and 2017.

[66] Mr. Duncan has also failed to prove upon the failure of the Agreement, that there was any subsequent agreement as to how much was to be paid to acquire this property. Although the parties were in discussion via email and otherwise, there was no further agreement which identified any specific terms, for example there was no definite

purchase price, no time given for completion, no indication as to how the purchase price was to be paid, and no terms as to how possession was to be given. How then could Mr. Duncan unilaterally simply decide on the figure to be paid and expect that this would suffice? He would want the Court to accept that in 2013 the sum of Twenty-Five Million Dollars ($25,000,000) was paid to cover both the pre-existing loan which was then accruing at a rate of One Million Dollars ($1,000,000) a month plus the Manor Park property which no doubt by then would have increased significantly in value.

[67] It is also to be noted that although the original purchase price was Twenty Million Dollars ($20,000,000) for the land, it was not only the land that was being contemplated but the project itself which would no doubt be valued more than the land itself. By 2013 the pre-existing debt plus the agreed interest when added to the Twenty Million Dollars ($20,000,000) would no doubt have amounted to sums in excess of Fifty Million Dollars ($50,000,000). It does not make sense that the Defendants having paid the sum of Twenty Million Dollars ($20,000,000) to acquire this property and it having been subject to a mortgage of some Ten Million Dollars ($10,000,000) which was then increased to over Eighteen Million Dollars ($18,000,000), a mortgage which Mr Staple was obligated to service, he would then accept the sum of Twenty-Five Million Dollars ($25,000,000) in full settlement for the property plus the debt.

[68] Despite the 1st Claimant and the 2nd Defendant having shared a friendly relationship, it was obvious that in 2013 the relationship they shared was less than amicable. Despite my finding that a lot of things in the way the parties conducted their financial affairs did not make sense or rather would be an affront to ordinary business transactions, it doesn't make sense that the sum paid would be accepted as settling all outstanding obligations. I find Mr. Staple's position to be more consistent with the truth. I therefore do not accept that all the sums paid by Mr Duncan were towards the Manor Park property. On a balance of probabilities, it is more likely that the sums were used to offset this pre-existing debt.

Whether the Defendants accepted an Undertaking from the Claimants' attorney-at-law to pay the sum of Seven Million Five Hundred Thousand in full settlement of all sums owed.

[69] The Attorneys-at-law were brought in to bring some clarity and to resolve the issues that were being encountered by the parties. Mr. Alando Terrelonge was engaged to represent the Defendants and Ms. Jade Hollis to represent the Claimants. When the discussion with the two attorneys commenced they referred to both set of properties that is the Manor Park project and the Rose Garden apartments.

[70] There were several emails sent between the attorneys-at-law. They are as follows:

> On March 21 Ms Hollis wrote to Mr Terrelonge referring to a letter dated March 18, 2013 and thereafter indicating the following:
>
> *Your letter accurately reflects the basic terms for the Undertaking save that:*
>
> *On settlement of the mortgage debt, the title is to be transferred into our client's name free and clear of any lies in favour of your client; and*
>
> *Our undertaking is to be given solely on behalf of Mr Gregory Duncan and not Global Designs and Builders Limited.*
>
> *As it relates to item 1 above, we understand that Mr Duncan had discussions with your client Mr. Dion /staple, subsequent to our meeting and agreed to same.*

[71] Mr Terrelonge responded on March 22 and made several statements to include the following:

> *"My clients are prepared to sign the transfer with respect to the property situate at Manor Park, and that I hold same pending the settlement of the mortgage to the NCB in full and the further receipt of the balance of $45M pursuant to the LOU to be received from you…*
>
> *…As noted in the said agreement, both Gregory Duncan and Global Designs and Builders Limited are described jointly and severally as "The Developers" and they agreed that their total indebtedness to my clients is $65,000,000.00…"*

[72] On the said day March 22, Ms Hollis responded as follows:

> *"I have forwarded your email to my client and am awaiting his instructions. I called Mr Duncan prior to forwarding the email and urged him to respond as quickly as possible. I will continue to call him throughout the day"*

[73] On March 27 Mr Terrelonge wrote;

> *"Further to our correspondence last week, kindly advise as to the status of the LOU. Our clients are anxious to complete the matter this week, and finalise the details for the payment of the mortgage to NCB and for Mr Duncan to formally enter the premises to proceed with the development"*

[74] Ms. Hollis responded on April 1 as follows:

> *"My client has instructed us to proceed with the LOU, however he is firmly of the view that what was agreed between the parties was that on payment of the balance due on the NCB mortgage (approx. $18M), the title to the property would be transferred to him.*
>
> *Mr Duncan feels that the professional undertaking for the remaining sums due to your clients should suffice in the circumstances. Failing which, he will have no security in exchange for the payment of the $18M to NCB."*

[75] No further communication was exhibited until the communication by Mr Terrelonge on September 9 which had as its subject *"Caveat lodged against Unit #10 Rose Garden, Kingston 19, St Andrew- Vol 1466 Fol 615".* In that letter he wrote inter alia:

> *"As discussed we maintain our clients' veritable right to have lodged the subject caveat in light of your clients' breach of contract and their persistent failure to instruct you to let us have an unconditional and irrevocable letter of undertaking, to remit the sums due and owing, pursuant to the relevant agreement, to our clients."*

[76] On September 9, Ms Hollis wrote as follows:

> *"Pursuant to our several teleconferences today, my client has just advised me that he is agreeable to our providing an undertaking to pay to you $7.5M in exchange for the three withdrawal of caveats for Units 5, 10 and 16. I informed my client of your undertaking that he had previously agree to $8M, however he states that he*

agree to $7M but is prepared to agree to $7.5M as a final offer of settle in order to conclude the matter as quickly as possible."

[77] On September 17, Mr Terrelonge responded that:

> *"My clients will accept your irrevocable and unconditional undertaking to accept the sum of 7.5mil from the proceeds of sale of the units. Their decision is premised on our discussions that the sale of the units have been completed and that the mortgage institution will be noting its interest and honouring its commitment to you shortly. As discussed you expect to wrap up completion in another 2 weeks."*

[78] It was after this on the same date that a formal letter was written providing the Undertaking and which read as follows:

> *Re: Global Designs and Builders Limited- Withdrawal of Caveat*
>
> *Reference is made to the captioned and to recent correspondence herein.*
>
> *In exchange for your prompt delivery of the Withdrawal of Caveats for Units 5, 10 and 20 and Rose Garden, situated at 1 Hillside Drive, Belvedere in the parish of Saint Andrew and registered at Volume 1466 and Folios 610, 615 and 625 of the Register Book of Titles respectively, we hereby give you our professional undertaking to forward to you payment in the sum of Seven Million Five Hundred Thousand Dollars from the proceeds of the sale of Unit 10 Rose Garden, on the following conditions:*
>
> *1. That the sale of Unit 10 Rose Garden is actually completed and the proceeds of the mortgage is disbursed to us by the Purchaser's mortgagee.*
>
> *2. That your clients accept the abovementioned sum in full and final settlement of all sums due and owing to them by Global Designs and Builder Limited and or Mr Gregory Duncan.*

[79] When the thread of emails is examined, it is apparent that when the discussions first commenced they related to the pre-existing debt, the Manor Park property and the

mortgage to be discharged but that by September 2013 the focus was on discharging the caveats on the Rose Gardens apartments.

[80] The email dated March 22, 2013 from Mr Terrelonge addressed to Ms Hollis on behalf of Mr Staple and Mr Blake is consistent with the position that Mr Staple has taken. The email acknowledged the total indebtedness to be Sixty-Five Million Dollars ($65,000,000) but indicated that the clients were prepared to sign the transfer with respect to the property at Manor Park pending the settlement of the mortgage to NCB in full and the further receipt of the balance of Forty-Five Million Dollars ($45,000,000) pursuant to the Letter of Undertaking to be received from Ms. Hollis. Mr. Duncan's response was to suggest instead the sum of Eighteen Million Dollars ($18,000,000) as the outstanding sum. There was no agreement to this and in fact after that time there was a break in the communication until the Defendants lodged the caveat. This lends credence to Mr. Staple's position that there was no agreement arrived at and that at that time on March 22, 2013 Mr Duncan would have been aware that at the very least the Defendants were insisting that he pay the sum of Forty-Five Million Dollars ($45,000,000) on account of the Manor Park property plus the sum to discharge the mortgage which by then had amounted to somewhere in the region of Eighteen Million Dollars ($18,000,000). This would have dispelled any misconception that he had that he was only required to pay the sum to discharge the mortgage. It was clearly pointed out by Mr Terrelonge that any transfer to be effected of the property was conditional upon him paying Forty-Five Million Dollars ($45,000,000) as well as the settlement of the mortgage to NCB.

[81] Between April and September, the Defendants decided to take further action by lodging caveats on the properties being held as security. After this the attorneys were then addressing their mind to the issue regarding the lifting of the caveat. By the end of the transaction and when the final undertaking was given, the caption related only to Rose Gardens. This letter of Undertaking made no reference to Manor Park and although it spoke to being in full and final settlement of all sums due and owing I am of the view that it related to the current issue of the lifting of the caveats and did not contemplate the Manor Park project. I have also considered the content of the letter written by Mr. Terrelonge to counsel Mr. Dwayne Trowers on November 30, 2021 in which he provided

his version of the background to the matter. He pointed out that he was in dialogue with counsel Ms. Jade Hollis who acted for Mr Gregory Duncan. He stated that he was retained to settle the breach of contract and said the following:

> *"That we were retained to settle the breach of contract in regards to the Agreement dated September 9, 2012. We never negotiated any other transaction with counsel Jade Hollis in respect to loans disbursed to Gregory Duncan and Global Designs and Builders Limited by Dion Staple. DGS Chartered Accountants and Business Advisors Limited and Proactive Lifestyle Limited; unless they touch and concerned said Agreement.*
>
> *That the Undertaking we accepted from Counsel Jade Hollis for settlement; regarding the sum transferred being Seven Million, Five Hundred Thousand Dollars is solely and exclusively in respect of the "the debt" per contract dated September 9, 2012. The Undertaking did not touch and concern the project per Agreement dated September 9, 2012, being lands at Manor Park with Volume 1405 and Folio 464.*

[82] Mr Terrlonge's position provides support for the contention of Mr Staple that the sum of Seven Million Five Hundred Thousand ($7,500,000) paid was in respect of the caveats and not the Manor Park property and did not therefore settle all sums outstanding between the parties.

Whether payments made by the Claimants represent an act of part performance so as to entitle the Claimants to Specific Performance?

[83] The Claimant has sought orders for Specific Performance, Damages for Breach of Contract and Interest. It was submitted on his behalf that he acquired an equitable interest in the property when he made the payment and by virtue of the acts of part performance and in reliance on **Lysaught v Edwards** and **Marjorie Knight v Lancelot Hume** counsel contended that the Defendants, by those acts, bound themselves to complete the bargain.

[84] The doctrine of part performance can enable a Claimant to obtain specific performance if he paid the full purchase price and if he entered into possession. The principles in the cases cited however, would not avail the Claimant for the reason that it was he who breached the contract. He who comes to equity must come with clean hands.

He has also failed to prove that he paid the full cost for the property and although he said he was given possession of the property there is no indication that he commenced the development. He has therefore failed to prove that there were sufficient acts of part performance to entitle him to obtain a remedy of specific performance.

[85] Specific Performance is an equitable remedy available for breach of contract. In order to succeed in an action for Specific Performance the Claimant must first establish that the contract was breached by the Defendants. He has also sued for Damages. Strictly speaking damages is a remedy that would be available only if he could prove breach of contract on the part of the Defendants. He has also failed to establish this.

The Woodpecker Avenue Property

[86] The Claimant is the registered owner for the property referred to as the Woodpecker Avenue property. Although the Claim set out the details in relation to this property, the Claimant did not lead any evidence to substantiate this. The only evidence he gave on this point was to the effect that during the proceedings the Claimants became fifty percent successful in the claim after the Defendants determined their Counter claim and delivered up duplicate certificate of title registered at Volume 1432 Folio 79 to the Claimants to settle the said Counter Claim. The Defendants did not present any evidence in relation to this aspect of the Claim. I have not been able to find any Order on the file that relate to this. As such the 1st Claimant's evidence stand as being uncontested. He would therefore be entitled to the Orders ought herein in respect of the property registered at Volume 1432 Folio 79.

[87] My Orders are as follows:

1. Judgment for the Defendants

2. The Claimant is not entitled to clean Title and all the legal and equitable interest in property registered at Volume 1405, Folio 464 of the Register Book of Titles.

3. The claim for Specific Performance, Damages, Interest fails.

4. The Claimant is entitled to the recovery of the Duplicate Certificate of Title registered at Volume 1432 Folio 79 of the Register Book of Titles.

5. Costs to the Defendants to be agreed or taxed.

……
S. Jackson-Haisley
Puisne Judge