[2024] JMSC Civ 90

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU2021CV02691

BETWEEN	**GEORGE EVANS**	**1st CLAIMANT**
AND	**EGERTON FORRESTER**	**2nd CLAIMANT**
AND	**G.A. HAMILTON AND COMPANY LIMITED**	**1st DEFENDANT**
AND	**GEORGE HAMILTON**	**2nd DEFENDANT**

AND

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU2022CV00528

BETWEEN	**GEORGE EVANS**	**1st CLAIMANT**
AND	**EGERTON FORRESTER**	**2nd CLAIMANT**
AND	**GEORGE HAMILTON**	**DEFENDANT**

Mr John Givans instructed by Givans & Company for the claimant

Miss Amanda Montague instructed by Myers Fletcher & Gordon for defendants

Heard: December 4, 2023, January 19, 2024, February 21, 2024, and September 27, 2024

***Application to strike out claim against the 2nd defendant - Whether Summary Judgment should be entered in favour of the 1st defendant on the counterclaim – Whether specific performance should be granted in respect of contract to sell land – Whether damages should be awarded in addition to specific performance – Whether damages too remote – Whether costs should be summarily assessed* – CPR 65.7 and 65.9**

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] Before me is an amended notice of application by which the defendants seek the following orders: -

1. Claim No. SU2021CV02691, is consolidated with Claim No. SU2022CV00528 (the "claims").

2. The claims are transferred to the Commercial Division.

3. Claim No.SU2022CV00528 is struck out.

4. The claim against the 2nd Defendant, George Hamilton in Claim No SU2021CV02691 is struck out.

5. Default Judgment, or in the alternative summary judgment, is issued in favour of G.A. Hamilton and Company Limited on its Counterclaim in Claim No.SU2021CV02691 in the following terms: -

    a. Specific performance of the Agreement for Sale dated February 7, 2019, and that the Claimants must deliver to G.A Hamilton and Company, the Certificate of Titles registered at Volume 1029 Folio 668 and Volume 950 Folio 438 endorsed in G.A Hamilton and Company's name, in exchange for payment of the balance purchase price;

    b. Damages for the use and occupation of the premises and /or mesne profits and special damages from September 26, 2019, and continuing, broken down as follows: -

        a) Motor vehicle storage fees - J$7,560,000.00

        b) Lost Lasco contract 2019/2020 - J$6,518,984.00

        c) Legal fees - J$1,500,000.00 + GCT

        d) Cost of doors -US$3,300.00

    c. Estimated loss of income from lost distribution contracts J$6,500,000.00;

    d. Interest on damages at the rate of 6% per annum on JMD sums and 3% on USD sums;

e. Attorney's fixed costs on issue and court fees, totalling J$30,000.00;

f. Costs to the defendants G.A. Hamilton and Company Limited and George Hamilton are summarily assessed in the sum of J$3,540,000.00 in addition to General Consumption Tax.

6. If necessary, summary judgment is issued in favour of G.A. Hamilton and Company Limited on the Claimant's claim in SU2021CV02691.

[2] The parties consented to the first three of these orders, consequently, this judgment is only concerned with the remaining three. The consent orders will nevertheless be reflected in the orders I make. I will consider whether to strike out the claim against the 2nd defendant, then go on to consider whether default judgment or summary judgment should be entered in favour of the 1st defendant on the counterclaim, and summary judgment in its favour on the claim. Before turning to the application however, a review of the pleadings is necessary.

The pleadings

The claim

[3] In a claim form filed on June 2, 2021, the claimants claim against the defendants jointly and/or severally for damages for breach of contract, economic loss, special damages of JMD$500,000.00, an order for specific performance and an order that caveat no. 2230040 be discharged from certificates of title registered at volume 950 folio 438 and volume 1029 folio 668 of the Register Book of Titles. It is pleaded in the particulars of claim that on or about March 5, 2018, the parties entered into an agreement by which the claimants agreed to sell, and the defendants agreed to purchase "lands and properties" in Rosemount, in the parish of St. James being

lands registered in volume 1029 folio 668 and volume 950 folio 438 of the Register Book of Titles ('the property') for JMD$85,000,000.00.

[4] It is alleged that the parties entered into negotiations for the sale and purchase of both the property and scrap metal situated on it ('the chattels'). The defendants' offer to purchase was by letter dated May 15, 2018, and the claimant's acceptance of that offer was by letter dated June 4, 2018. It is further pleaded that by letter dated July 10, 2018, written to Paris & Co., the claimants' then attorneys-at-law, by Hilma McNeil & Co., the attorneys-at-law for the defendants, confirmation was given that the purchase price was JMD$85,000,000.00, comprising JMD $55,000,000.00 for the property and JMD$30,000,000.00 for the chattels. That letter confirmed that the defendants would be obtaining mortgage financing from First Heritage Co-operative Credit Union Limited, and also sought a draft agreement for sale. By letter dated July 26, 2018, an agreement for sale in relation to the property and another in relation to the chattels were sent to the defendants' attorneys-at-law. The defendants' attorneys-at-law, in a letter dated September 12, 2018, informed the claimant's attorneys-at-law that the defendants had obtained a valuation of the property which put its value at JMD $56,000,000.00 and therefore they were revising their offer to reflect that valuation. It is alleged that the claimants' attorneys-at-law accepted the revised offer, and the parties negotiated the way forward to complete the sale for the global sum of JMD $85,000,000.00.

[5] The particulars of claim further pleads that arising from the parties "continued negotiations", on or about January 2019, the sum of JMD$21,000,000.00 for the sale of the chattels rather than the initial JMD$30,000,000.00, was agreed. Combined, both agreements would amount to JMD$77,000,000.00 and were intended to be completed at the same time and run concurrently. It is also alleged that an agreement for sale was fully executed between the parties by February 7, 2019, after the deposit of JMD$5,600,000.00 was paid on January 31, 2019.

[6] In paragraph 6 of the particulars of claim it is pleaded that: -

> **"**Regarding the other agreement, the Second Claimant met with the Second Defendant on July 23, 2019, at Grand a View Restaurant, Queen's Drive, Montego Bay, St James, where the parties affirmed their collective agreement that the sale/purchase price was JMD$77,000,000.00 comprising JMD $56,000,000.00 for the land and JMD$21,000,000.00 for the chattels. That both Claimants then met with the Second Defendant on October 31, 2019, at Jerky's Restaurant, Alice Eldemire Drive, Bogue, St James, where the Claimants both proposed to the Second Defendant that the payment of JMD$21,000,000.00 for the chattels should be made in one payment and not in two payments as had been previously agreed with the Defendants. The Second Defendant then agreed to get back to the Claimants on that request but failed to do so."

[7] It is further alleged that on February 18, 2020, a Notice to Complete dated February 4, 2020, was served on the claimants by the defendants' attorneys-at-law, and on March 5, 2020, the claimants' attorneys-at-law, served the defendants with a Notice to Complete. The defendants lodged a caveat on the certificates of title for the property and have failed to honour the terms of the "full contract", which includes the sale of both the chattels and the property. They are therefore in breach of contract.

The defence

[8] In an amended defence and counterclaim filed by the 1st defendant on January 27, 2023, it is denied that on or about March 5, 2018, both defendants entered into an agreement with the claimant to purchase the property for JMD$85,000,000.00. It is alleged that the 1st defendant and the claimant entered into an Agreement for Sale dated February 7, 2019, for the purchase of the property for JMD$56,000,000.00. The parties had preliminary discussions about the sale of the property and the chattels, and by letter dated May 15, 2018, the 1st defendant offered to purchase the property for JMD$85,000,000.00. By letter dated June 4,

2018, Vision Car Rentals, a company affiliated with the claimants, purported to accept the 1st defendant's offer 'subject to contract'. Arising from discussions between the attorneys-at-law for both parties, it was clarified in a letter from the 1st defendant's attorneys-at-law dated July 10, 2018, that the proposed purchase price of JMD$85,000,000.00 comprised of JMD$ 55, 000,000.00 for the property and JMD$30,000,000.00 for the chattels. In that same letter, a draft agreement for sale was requested, and in response, a draft agreement for the sale of the properties and an agreement for sale of the chattels were sent by email to the 1st defendant's attorneys-at-law on July 26, 2018.

[9] It is further pleaded that by email on August 14, 2018, the 1st defendant's attorneys-at-law wrote to the claimants' attorneys-at-law requesting a schedule of the chattels and by email in response dated August 15, 2018, the claimants' attorneys-at-law said that the chattels could not be itemised. The 1st defendant's attorneys-at-law by letter dated September 12, 2018, then indicated to the claimants' attorneys-at-law that the 1st defendant had obtained a valuation for the property which placed the market value at JMD $56,000,000.00. A revised offer to purchase the property at this price was sent and a request made for a draft agreement for sale. It is alleged that this offer was accepted by the claimants' attorneys-at-law in a letter dated October 31, 2018, with a promise to send a new draft agreement for sale. The agreement was executed on February 7, 2019, a deposit of JMD $5,600,000.00 and stamp duty were paid, and the transfer duly executed by the 1st defendant.

[10] The 1st defendant further contends that by letter dated September 26, 2019, its attorneys-at-law gave an undertaking to the claimants' attorneys-at-law, that they would pay the balance purchase price of JMD$ 51,741,350.00 in exchange for the executed transfer, certificate of title, letters of possession, up to date water receipts, letters to the utility companies and a certificate of payment of property taxes. It is denied that there is an agreement for sale in relation to the chattels. It is alleged that: a) the February 7, 2019, agreement set out the entire agreement between the parties; b) the letter dated June 4, 2018 from Vision Car Rentals

could not be regarded as an acceptance of the 1st defendant's offer since Vision Car Rentals does not own the property and had no capacity to sell ; c) the preliminary discussions were subject to contract; d) the June 4, 2018, offer was superseded by the September 12, 2018 offer; e) there was no consensus between the parties as to the price for the chattels or how they would be itemised and; f) there is a binding contract for the sale of the property. The 1st defendant alleges that the claimants have failed to produce the certificates of title for the property and are in breach of contract in relation to the agreement of sale dated February 7, 2019.The existence of any collateral oral agreement with the claimants for the sale of the chattels is denied. It is alleged that in any event, no consideration had passed for any such agreement to come into effect.

The counterclaim

[11] In its counterclaim, the 1st defendant essentially pleads all the averments contained in its defence (including the allegation of a breach of contract by the claimants). It is alleged that the 1st defendant is in the business of distribution of goods. The property houses a warehouse, and the intention was to use it for warehousing, housing warehouse workers, and as a storage lot for vehicles used in the business. In contemplation of acquiring the property, it entered into a distribution agreement with Lasco manufacturing to distribute goods to schools and other businesses. It is also alleged that the 1st defendant secured a loan of JMD$67,150,000.00, from National Commercial Bank (NCB) in July 2019, at an interest rate of 9.25% per annum to finance the payment of the deposit on the property as well as closing costs. The 1st defendant paid NCB a commitment fee of JMD$ 2,803,270.61, and since August 2019 has been paying JMD $ 691,102.60 monthly on the loan. To secure the loan, it cost JMD$593,300.00 for a valuation report from Allison Pitter & Co., and surveyor's ID report from Grantley Kindness & Associates.

[12] It is averred that since the 1st defendant was not given possession of the property, it suffered the following losses: -

a) Motor vehicle storage costs of JMD $ 7,560,000 from 2019 to 2021.

b) Lost income of $6,518,984.00 from a Lasco contract for the year 2019/2020.

c) Estimated loss from distribution contracts of JMD $ 6,500,000.00.

d) Cost of doors of USD$ 3,300.00 and,

e) Legal fees of JMD$1,500,000.00.

It mitigated its losses by returning the sum of JMD$36,036,986.00 to NCB on December 16, 2021, and it moved the motor vehicles to a storage facility in Montego Bay.

[13] The following are the remedies sought on the counterclaim:

(i) Specific performance of the Agreement for Sale dated February 7, 2019, and that the Claimants deliver the Certificates of Title for the properties duly endorsed in the 1st Defendant's name, in exchange for payment of the balance purchase price; and

(ii) Damages for use and occupation of the premises and/or mesne profits and special damages from September 26, 2019, and continuing, broken down as follows:

a. Motor vehicle storage fees- **JMD$7,560,000.00**;
b. Lost Lasco contract 2019/2020**- JMD$6,518,984.00**;
c. Legal fees**- JMD$1,500,000.00**
d. Cost of the doors- **USD$3,300.00**

(iii) Estimated loss of income from lost distribution contracts **J$6,500,000.00** per annum, and continuing;

(iv) If the Court is not minded to grant (i), the Claimant shall pay damages for breach of contract as follows:

a. Damages listed at (ii) and (iii) above; as well as
b. Return of the deposit of **J$5,600,000.00** with interest at NCB's rate thereon;
c. NCB Loan commitment fee- **J$2,803,270.61**; and
d. Cost of Valuation and Surveyor's ID Report- **$593,300.00**

(v) Interest on damages at the rate of 6% per annum on JMD sums and 3% per annum on USD sums;

(vi) Costs;

(vii) Attorneys fixed costs on issue and court fees, totalling $30,000.

(viii) Such further and other relief as the Court deems fit.

[14] In the written submissions made on behalf of the 1st defendant, the court has been asked to summarily assess costs under CPR 65.7 and 65.9. at JMD$3,540,000.00.

Reply to defence and counterclaim

[15] On March 2, 2023, the claimants filed a document titled: "**Reply to Amended 1st Defendant's Defence and Counterclaim**". In it, they join issue with the 1st defendant on each allegation contained in its defence and counterclaim. It is

disputed that the property contains a warehouse or that there is a warehouse on site. No admission is made to the allegations in the counterclaim. It is further pleaded that the claimants were not aware of any particular plans of the defendants, as none of those purported plans pleaded in the counterclaim, formed a part of or was a term or warranty of the negotiations or the contract. It is stated that any losses suffered by the 1st defendant were because of its breach of contract and/or the negotiated terms between the parties.

The evidence in support of the application

[16] The evidence in support of the application is the affidavit of the 2nd defendant filed on May 30, 2023. In it the 2nd defendant says that he is the chief executive officer of the 1st defendant, and that the 1st defendant is involved in several businesses including distribution, development, warehousing and construction. He says that in 2018, the 1st defendant was seeking to expand its warehousing and distribution arms and looked for land to achieve this goal. It identified the property which houses a warehouse and 11 one-bedroom apartments. According to him, the intention was to use the property for warehousing, to store vehicles used in warehousing and distribution and to refurbish the apartments to house warehouse workers.

[17] The relevant evidence of the 2nd defendant, in large part mirrors the averments in the defence and counterclaim which were recounted earlier in this judgment and therefore need not be repeated here. In addition to that evidence, the 2nd defendant alleges that in contemplation of the acquisition of the property, the 2nd defendant entered into a distribution agreement with Lasco Manufacturing to distribute goods to schools and businesses in Montego Bay. He also alleges that the attorneys-at-law for the 1st defendant informed him that on July 9, 2018, they had a telephone conversation with the claimant's attorneys-at-law in which it was clarified that the purchase price of JMD$85,000,000.00 represented JMD$55,000,000.00 for the property and JMD$ 30,000,000.00 for the chattels.

[18] The 2nd defendant says further that by an email of August 14, 2018, the 1st defendant's attorneys-at-law requested of the claimants' attorneys-at-law, a schedule of the chattels being sold for the sake of certainty. In a response contained in email dated August 15, 2018, the claimants' attorneys-at-law said that the chattels could not be itemised. Both emails are exhibited to the 2nd defendant's affidavit. According to him, the only agreement executed by the parties is the Agreement for Sale dated February 7, 2019, and it relates only to the sale of the property.

[19] Further still, the 2nd defendant says that the preliminary discussions in relation to the chattels were subject to contract, and no contract was executed in relation to them. There was no consensus between the parties regarding their price, or how they would be itemized and so: "that discussion was not pursued". According to him, the email correspondences show that after August 15, 2018, there was no discussion between the parties about the sale of the chattels as that proposal was abandoned. Additionally, the offer the 1st defendant made by letter dated June 4, 2018, to purchase both the property and the chattels, was superseded by its later offer to purchase the property only, contained in letter dated September 12, 2018.

[20] Prior to entering the February 7, 2019, agreement to purchase the property, the 2nd defendant says that the 1st defendant operated a warehouse in Freeport, Montego Bay, and after entering into the agreement, it gave up that warehouse with the expectation that the properly would service its warehousing needs. The losses the 1st defendant pleaded in its counterclaim, and which appear at paragraph 12 of this judgment, are also repeated by the 2nd defendant in his affidavit. He further says that because the 1st defendant does not have possession of the property, it has been unable to undertake any distribution contracts. Accordingly, based on the value of the lost Lasco contract, the 1st defendant estimates that it lost income per year beginning 2021- 2022 amounting to JMD $ 6,500,000.00, and continues to lose income due to its inability to undertake or perform distribution contracts. USD$3,300.00 was spent by the 1st defendant purchasing 11 doors to refurbish the apartments, but because it has not been put

in possession of the property, these doors cannot be used. Additionally, it has incurred legal fees of JMD $1,500,000.00 to date and continues to incur these fees.

Whether the claim against the 2nd defendant should be struck out

[21] The defendants contend that the claim discloses no reasonable grounds to bring it against the 2nd defendant in his personal capacity. Counsel Miss Montague for the defendants argued that there is nothing in the claim that demonstrates that the 2nd defendant, a director of the 1st defendant, intended to bind himself to the agreement for sale. She said that throughout the correspondences, it was the 1st defendant who was the purchaser. Miss Montague also submitted that with respect to the sale of the chattels, the intended purchaser was also the 1st defendant. Mr Givans, counsel for the claimant, submitted that there is sufficient material before the court to support an argument that the 2nd defendant has been properly joined as a defendant. According to him, the documentation bears out that there was an agreement to purchase not only the property but the chattels and both transactions went hand in hand. He argued that paragraph 6 of the particulars of claim (referred to earlier at paragraph 6 of this judgment), makes no mention of any negotiations with the 1st defendant, but instead refers to meetings with the 2nd defendant, and those meetings dealt with both the property and the chattels. He said that the claim against the 2nd defendant is based on the breach by him of the agreement he made with the claimants to purchase the chattels for JMD $21,000,000.00 and this is reflected in the pleadings. He submitted therefore that there is sufficient material on the face of the pleadings to support the contention that the 2nd defendant has been properly joined, and it is only at trial, after hearing all the evidence, that any doubts surrounding whether the 2nd defendant was properly joined can be resolved.

[22] Striking out pleadings for disclosing no reasonable grounds to bring or defend a claim is a draconian step reserved for clear and obvious cases. In determining whether to take such a step, regard is to be had only to the pleadings. (See **Sebol Limited v Selective Homes and Properties Limited and Ors, SCCA No.**

115/2007, delivered on December 12, 2008). In each case where it is alleged that a claimant has failed to demonstrate in the claim, any reasonable grounds to bring it, the court is to scrutinise the pleadings to see whether there is any reasonable cause of action against the defendant, borne out by them. As I consider whether to strike out the claim against the 2nd defendant, I will therefore not have any regard to the affidavit of the 2nd defendant.

[23] I do not agree with the submissions of Miss Montague, that the decision in **Elaine Dotting v Carmen Clifford (Executrix of the Estate of Dr Royston Clifford) and The Spanish Town Funeral Home, unreported Supreme Court decision delivered on March 19, 2007**, is good authority for the proposition that the court can consider affidavit evidence when deciding whether to strike out a statement of case for not disclosing any reasonable grounds to bring it. Counsel relied for her submission on the statement made by the learned judge in **Elaine Dotting** that: "a statement of case may be struck out where it is fanciful , entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based", on which the decision in **Three Rivers District Council v Bank of England (No.3) [2003] 2 A.C.1** was cited as the supporting authority. The learned judge in **Elaine Dotting** then went on to indicate that in considering the application to strike out the claimant's statement of case, she had examined both the pleadings, and the evidence contained in the application for summary judgment, which was also before her.

[24] My first observation is that in **Three Rivers District Council (supra),** one of the several issues the court grappled with was whether to strike out the claimant's statement of case either because the pleadings failed to disclose a reasonable cause of action or because they did not disclose a real prospect of success**,** the latter being the test for summary judgment. Lord Craighead in his judgment made the point that whether the pleadings disclose a reasonable cause of action relates to their adequacy and whether the case is made out on them. The second observation I make is that the decision in **Elaine Dotting** was delivered before the court of appeal's own decision in **Sebol** (supra)**,** which, in my view, put the issue

beyond any doubt that in applications to strike out pleadings for failing to disclose reasonable grounds for bringing or defending a claim, regard must be had only to the pleadings. The result then is that while on an application to strike out a statement of case for failing to disclose any reasonable grounds to bring or to defend it[1], the court is limited to the pleadings; on a summary judgment application, the court may, among other orders it is entitled to make, strike out the respondent's statement of case [2]; but in those applications it must look not only on the pleadings but also on all the evidence before it.

[25] Before me are several documents which are attached to the particulars of claim, referred to in paragraphs 3 and 4 thereof, and marked "GEEF3". Those documents and the averments in relation to them, provide key insights into whether there exist reasonable grounds to bring the claim against the 2nd defendant. The first of these documents is letter dated May 15, 2018. It is written on the 1st defendant's letter head, signed by the 2nd defendant as its managing director, and addressed to the claimants. The two sentences in it read as follows: -

> "We hereby tender the offer of Eighty-Five Million Dollars ($85,000,000.00) for your property located at Rose Mount Pen, Montego Bay to Salt Spring Parochial Road in the Parish of St James being all that parcel of land with existing structures, known as Lot A, and registered as Volume 950, Folio 438.
>
> We look forward to your favourable response."

It seems to me, based on this letter, that the offer to purchase was made by the 1st defendant and was communicated to the claimants by letter signed by the 2nd defendant in his capacity as managing director of the 1st defendant.

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[1] CPR 26.3(1)(c)
[2] CPR 15.6(1)(b)

[26] The second document is letter dated June 4, 2018, signed by both claimants on the letter head of Vision Car Rentals and written to the 1st defendant, with the subject line: “Your offer to purchase properties known as Rosemount Pen St James”. In that letter, the claimants write that they have accepted “your” offer to purchase, for the sum of JMD$85,000,000.00, “subject to contract”. This letter suggests to me that the claimants acknowledged that the earlier offer to purchase was that of the 1st defendant.

[27] The third document is letter dated September 12, 2018, from Hilma McNeil of Hilma McNeil & Co. attorneys-at-law to Paris & Co., attorneys-at-law, indicating that a valuation done of the property revealed a market value of JMD$56,000,000.00. Although Hilma McNeil refers in this letter to her client by the pronouns “he” and “his”, the letter’s subject line is: “Proposed Sale of Land Part of Rosemount Pen, St James, Vol.1029 Fol. 668 and Vol. 940 Fol. 438 – Vision Car Rentals to G.A. Hamilton & Co. Ltd.”. In it, she refers to “previous correspondence herein”, which is an obvious reference to the earlier correspondences of May 15, 2018, and June 4, 2018.

[28] The fourth document is Paris & Co’s response, which is a letter dated October 31, 2018, in which Dawn Paris states that her instructions are to accept the offer of JMD$56,000,000.00 for the property. It carries the subject line: “Proposed Sale of Land part of Rosemount Pen, St James Volume 1229 Folio 68 and Volume 940 Folio 438 - Edgerton Forrester et al to G.A Hamilton & Co. Ltd.” The third and fourth documents, like the two previous ones mentioned, clearly indicate that the purchaser of the property was the 1st defendant.

[29] The fifth document is the Agreement for Sale of the property dated February 7, 2019. In it, the purchaser is named as the 1st defendant and the vendors as the two claimants. Also significant are the two Notices to Complete as well as the Transfer, all of which refer to the purchaser as the 1st defendant.

[30] The pleadings do not indicate that the 2nd defendant entered into a binding agreement with the claimants to purchase the chattels. The alleged negotiations in or around January 2019 for the sale of the property for JMD $56,000,000.00 and the chattels for JMD $21,000,000.00, rather than JMD$30,000,000.00; and the meetings with the 2nd defendant in July 2019 and October 2019, are pleaded as being part of the parties' "continued negotiations". Language such as "the parties affirmed their collective agreement", and "the Claimants both proposed to the Second Defendant that the payment of JMD$21,000,000.00 for the chattels should be made in one payment and not two payments as had been previously agreed with the Defendants", used in paragraph 6, clearly suggest the existence of prior discussions and negotiations. As I have earlier observed, the documents on which the claimants rely and which they attach to their pleadings, plainly show, that in those prior discussions and negotiations, the purchaser for both the property and the chattels was the 1st defendant. I therefore cannot agree with Mr Givans that a claim against the 2nd defendant for breach by him of a contract to purchase the chattels is evident from the particulars of claim.

[31] In the result, I find that there is no cause of action borne out by the pleadings against the 2nd defendant and therefore he is not properly joined as a party to the claim. The claim against him must consequently be struck out.

Whether default judgment or summary judgment should be granted in favour of the 1st defendant on the counterclaim

Whether there should be summary judgment in favour of the 1st defendant on the claim

[32] As the question whether summary judgment should be granted in favour of the 1st defendant on the counterclaim as well as on the claim, raise similar issues of fact and law, it is convenient to deal with them together rather than separately.

[33] Counsel Miss Montague argued that there is no defence to the counterclaim but only a reply to the defence, but even if the court were to accept that the document though styled as a reply was in fact also a defence, it amounts to a bare denial of the counterclaim and does not disclose that the claimants have a real prospect of defending the counterclaim. She submitted that summary judgment should therefore be entered on the counterclaim in the 1st defendant's favour. According to learned counsel, the damages suffered by the 1st defendant are all because of the claimants' failure to complete the agreement of February 7, 2019. She argued that since the claimants contend that they were unaware of the 1st defendants' plans for the property and deny that the 1st defendant is entitled to relief for breach of contract then they should at least put forward their version of the facts.

[34] In relation to Miss Montague's first point, Mr Givans conceded that the claimants' reply should have been given a name to indicate that it was both a reply to the defence and a defence to the counterclaim. He submitted however, that the name given to it ought not to prevail over the fact that in substance, it amounts to a complete answer to the counterclaim. He cited the Privy Council decision in **Eldemire v Eldemire, (Privy Council Appeal No 33 of 1989)**,in which Lord Templeman in commenting on the question of the inappropriate use of an originating summons where there are disputed facts, said:-

> "In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification"

[35] While I agree with Miss Montague, that what the claimants filed in response to the defence and counterclaim should have been styled a reply and defence to counterclaim, I am of the view that despite its name, in substance the document contains the claimants' answer to the claim as well as to the counterclaim. I will accept it as the claimants' defence to the counterclaim and their reply to the defence and will therefore not enter default judgment against the claimants on the counterclaim.

[36] The claimants clearly plead that they join issue with all the allegations in the defence. They then specifically deny the allegation in the counterclaim in relation to a warehouse being on the property and allege lack of knowledge of any plans the 1st defendant had for the property. They say that any loss the 1st defendant suffered is due to its own breach of contract, but they do not say what constitutes that breach. Whether this answer to the counterclaim is enough to withstand the 1st defendant's summary judgment challenge is the issue to which I now turn.

[37] Miss Montague relied on the affidavit of the 2nd defendant, which she argued was not challenged by the claimants as they have not filed any affidavit in response. She submitted that the evidence shows that there is a binding contract between the claimants and the 1st defendant in respect of the property which the claimants have breached, since they have failed to complete despite the deposit being paid and the agreement duly executed and stamped. It was also submitted that there was no collateral oral agreement with the 1st defendant to purchase the chattels, as the offer by the 1st defendant in relation to that purchase was superseded by the subsequent offer to purchase only the property for JMD$56,000,000.00. Besides, argued learned counsel, the claimant's letter indicating an acceptance of the earlier offer to sell both the property, and the chattels was subject to contract.

[38] According to Mr Givans, the pleadings support the causes of action on which the claimants rest their claim. He argued that they show that the parties entered into two validly binding agreements, one for the sale of property and the other for the sale of the chattels. These agreements were concurrent but separate. Learned counsel submitted that all the essentials for a valid contract are in place for the sale of the chattels, and there is nothing in the affidavit of the 2nd defendant to contradict any of the claimants' pleadings. He submitted that it does not matter that the claimants did not file an affidavit in answer to the 2nd defendant's affidavit, because based on the pleadings the parties were operating under one transaction. Relying on the decision in **British Guiana Credit Union Corporation v Clement Hugh Da Silva, Privy Council Appeal No.43 of 1963**, Mr Givans argued that

once there was a concluded contract on July 10, 2018[3], what transpired afterwards cannot relate back to affect it. According to him, there exists all the elements of a binding contract for the sale of the chattels and therefore it cannot be said that the claimants have no real prospect of succeeding on their claim. Support for this argument was said to be the decision in **MRI Trading AG v Erdenet Mining Corporation LLC [2012] EWHC Civ 1988 (Comm)**. Applying the principle in **Hadley v Baxendale (1854) 9 Exch 341.** Mr Givans said that the 1st defendant cannot succeed on the counterclaim, as the claimants have pleaded in their defence that they were unaware of the plans the 1st defendant had for the property.

[39] Nothing in the February 7, 2019, agreement refers to a concurrent but separate agreement to sell the chattels. There is also nothing in it which stipulates that an agreement to sell chattels, is a condition precedent to its enforceability. The claimants' contention is that there was an acceptance by them of the 1st defendant's offer to purchase both the property and the chattels for JMD$85,000,000.00, but the letter of June 4, 2018, on which they rely, states that this acceptance was subject to contract. On the face of it, this suggests that the agreement to purchase both the property and the chattel would not be legally binding until the finalisation and signing of a formal contract. The claimants' pleadings do not indicate that there was any such formal contract signed by the parties in relation to the chattels. Although a draft agreement was sent by the claimants' attorneys-at-law to the 1st defendant's attorneys-at-law by the email of July 26, 2018, it is common ground that it was never signed by either party.

[40] The email dated August 14, 2018, from the 1st defendant's attorneys-at-law requesting a schedule of the chattels to avoid uncertainty about what was being sold, reads as follows: -

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[3] This is the date of the letter from the 1st defendant's attorneys-at-law to the claimants' attorneys-at-law referred to in paragraph 4 of this judgment.

> "I am in receipt of your draft Agreements. Should we not have a Schedule of the items being sold attached to the Chattel Agreement. Otherwise, there would/could be uncertainty and discrepancy with respect to what the Vendors are selling and what the Purchaser believe (sic) it is purchasing."

The claimant's attorneys-at-law's response in email dated August 15, 2018, was: -

> "I am not sure we can itemize the scrap metal because of the nature of scrap metal. That is why it is described by weight. You may want to take instructions on this point".

The 2nd defendant's evidence that the parties had not agreed the price of the chattels or how they would be itemised and that the proposal to purchase the chattel was abandoned, has not been answered by the claimants in any affidavit in response. I believe that what was to be sold as the chattels, is an essential term which would have had to be agreed for there to be a legally binding contract. The email correspondences between the attorneys-at-law for the parties of August 14, 2018, and August 15, 2018, demonstrate that there was no agreement on what constituted the chattels, whether an itemised description or a description by weight.

[41] The claimants' own averment in paragraph 6 of the particulars of claim is that in a meeting with the 2nd defendant in July 2019, the price of JMD$21,000,00.00 for the chattels was agreed and in a subsequent meeting in October 2019, there was no agreement on how the price of JMD $21,000,000.00 for the chattels was to be paid, whether in one instalment or in two. They plead that the 2nd defendant was to get back to them on their proposal for the payment to be in one instalment rather than two, but he did not. It seems to me therefore, that on the claimants' pleaded case, there was no legally binding agreement for the sale of the chattels, since there was no agreement on how the purchase price for them would be paid. How the purchase price was to be paid, is in my view, an essential term of the pleaded agreement for the sale of the chattels. In the absence of agreement on it, there could be no legally binding agreement. I cannot therefore agree with Mr Givans

that there was agreement on all the essential terms required to make the pleaded agreement to sell the chattels enforceable.

[42] In both **MRI Trading AG** (supra) and the subsequent appeal to the Supreme Court in **MRI Trading AG v Erdenet Mining Corporation LLC [2013] EWCA Civ 156**, the following non exhaustive list of principles to be applied in determining whether a legally binding agreement exits between parties, outlined in **Mamodoil – Jetoil Greek Petroleum Co. Ltd [2001] 2 All ER (Comm) 193**, by Rix LJ was approved: -

i. Each case must be decided on its own facts and on the construction of its own agreement.

ii. Where no contract exists, the use of an expression such as “to be agreed” in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that “you cannot agree to agree.”

iii. Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.

iv. However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

v. Where a contract has once come into existence, even the expression “to be agreed” in relation to future executory obligations is not necessarily fatal to its continued existence.

vi. Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest*.

vii. This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long-term relationship or has had to make an investment premised on that agreement.

viii. For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.

ix. Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in s 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in s 15(1) of the Supply of Goods and Services Act 1982).

x. The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.'

[43] Of these principles, number (iii) is particularly relevant to the case before me. With no written contract in place, and with there being no agreement on two essential

terms, I find that on both the claimants' own pleadings and on the evidence of the 2nd defendant, there was no legally binding agreement between the claimants and either defendant for the sale of the chattels. With no legally binding agreement for the sale of the chattels, and a bare denial of the counterclaim that the claimants are in breach of the February 7, 2019, agreement, I find that the claimants have no real prospect of successfully defending liability on the counterclaim for breach of contract.

Specific performance

[44] The 1st defendant has asked for specific performance of the agreement as well as for damages for use and occupation of the property and/or mesne profits; special damages in the form of motor vehicle storage fees, a lost Lasco contract, legal fees; the cost of doors; and loss of income from lost distribution contracts. In his affidavit, the 2nd defendant says these are losses suffered by the 1st defendant because it was not given possession of the property. The claimants have not raised any objection to the grant of specific performance as a remedy for the breach, but in respect of the claim for damages, Mr Givans argues, based on the principle in **Hadley v Baxendale** (supra), that the damages claimed are too remote.

Should damages be awarded in addition to specific performance

[45] Case law confirms that it is permissible to award damages in addition to specific performance, for delay in completion of an agreement for the sale of land. In **Ford - Hunt v Singh [1973] 2 All ER 700,** Brightman J in considering whether an enquiry as to damages should be added by supplemental order to an earlier order for specific performance in favour of purchasers, determined that he was entitled to make the order. In coming to his decision he cited the authority of **Jaques v Millar (1877) 6 Ch D 153,** for the proposition that a vendor who seeks specific performance is entitled to damages for delay if he can prove that he suffered damage. He expressed no doubt that had the purchasers sought an enquiry as to damages when the matter was first before the court, it would have been added to

the order for specific performance. The learned judge then said he would make the supplemental order for an enquiry into damages suffered by the purchasers due to the vendor's delay in completing the sale agreement. Citing **Jaques v Millar** (supra), Brightman J said at page 703(g) that: -

> "The damages so recoverable will be confined in the usual way to –
>
> '**the damages which may reasonably be said to have naturally arisen from the delay or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the … breach of contract**.'"

[46] This quote from **Jaques v Millar** is in fact the application of the **Hadley v Baxendale** test for remoteness of damages in breach of contract. In the latter case Alderson B said[4]: -

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally , i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it."

[47] It certainly seems to me by their defence, that the claimants are invoking the 2nd limb of the **Hadley v Baxendale** test. The 2nd defendant's evidence provides no satisfactory answer to this challenge to the 1st defendant's claim for damages. There is nothing in the evidence to suggest that the 1st defendant's intentions to expand its distribution business; to use the property to facilitate that expansion and as storage of vehicles, was ever discussed with the claimants during the parties'

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[4] Supra page 354

negotiations, such that the losses claimed would have reasonably been in the parties' contemplation at the time of the contract. Additionally, on neither the evidence nor the pleadings is there any indication that these damages sought by the 1st defendant arise: "according to the usual course of things from such breach of contract itself." I find in the result that they are too remote. But should I be wrong on this, I will go on to consider each of these losses in turn.

[48] All that the 2nd defendant says in relation to the lost Lasco distribution contract is that it was entered in contemplation of the 1st defendant acquiring the property, the 1st defendant was unable to perform the contract because it was not put in possession of the property, and as a result, lost income of JMD$6,518,984.00 for the year 2019/2020. There is no evidence of the date when the 1st defendant entered into the contract with Lasco, and precisely how the delay in completion, led to that contract being lost. The evidence of the 2nd defendant is that the 1st defendant is involved in the business of distribution, development, warehousing and construction, but there is no evidence why its existing distribution business could not have handled the Lasco distribution contract when it realised that there was delay in completion.

[49] Although the 2nd defendant says that the 1st defendant gave up its Freeport warehouse, there is no evidence as to when this occurred. He simply says it was after entering into the February 7, 2019, agreement. It seems to me, without more, that it would not make good business sense to give up the property on which a going concern is operated, before being certain of the readiness of the property to which the business is to be relocated and expanded. I say this especially in the context of the evidence that the 1st defendant was not ready to complete 120 days after the signing of the agreement, which was the agreed completion date. Mathematically, that date would be around June 7, 2019. The 2nd defendant's evidence is that the 1st defendant secured the NCB loan in July 2019 to allow it to complete; on September 6, 2019, the claimants' attorneys-at-law had issued a notice to complete, and on September 26, 2019, its attorneys-at-law were requesting the signed instrument of transfer. So it appears that it was not until

around September 26, 2019, that the 1st defendant was ready to complete. With no evidence of the details of the Lasco contract, including when the 1st defendant's obligations under it arose, there is insufficient evidence showing how the loss of JMD$6,518,984.00 for the year 2019/2020 occurred, and that it was caused by the claimants' delay in completing. On the evidence I am not satisfied that this loss is as a result of the claimants' delay.

[50] In relation to storage costs, the 2nd defendant's evidence is that from 2019 to 2021, vehicles were stored at Nihon Trucking in Kingston at a cost of JMD $7,560,000.00. He says this was because the 1st defendant could not find appropriate secure storage in Montego Bay, when the claimants failed to deliver up possession of the property. The invoice from Nihon Trucking, which is exhibited, covers the period "1.9.2019 - 4.6.2021". If this start date is September 1, 2019, it raises the question why vehicles were being stored at Nihon Trucking as of September 1, 2019, when, based on the evidence, the 1st defendant was not ready to complete until around September 26, 2019, and therefore would not have been entitled to possession on September 1, 2019. In other words, since the earliest date possession could have taken place was around September 26, 2019, why are the claimants' being levied with storage costs from September 1, 2019? There is no explanation for this on the evidence.

[51] I recognise that the counterclaim seeks all the losses from September 26, 2019, but the invoice in support of the storage costs from Nihon Trucking in the amount claimed of JMD$7,560,000.00, has a completely different start date of September 1, 2019. No explanation has been given for this disparity. Of course, if the start date on the invoice is January 9, 2019, and not September 1, 2019, the obvious observation is that this would be inconsistent with the counterclaim that the use of Nihon Trucking, was consequent upon the claimants' failure to deliver up possession.

[52] The 2nd defendant's evidence also raises the question whether these vehicles were part of the 1st defendant's existing fleet used in its distribution business or

whether they were vehicles acquired specifically for use in the expanded business to be conducted on the property. If the answer to the former is in the affirmative, then the question is where were these vehicles being stored prior to “1. 9.2019”, and why did that location cease being used on or around September, 2019? If the vehicles were acquired for the use in the expanded business, the question then becomes, when were they acquired, given that the 1st defendant was in no position to complete until around September 26, 2019? These are questions, the answers to which are relevant in determining whether the loss claimed was because of the claimants’ delay. In the absence of evidence addressing them, I am not satisfied that this alleged loss is recoverable.

[53] The loss of income of $6,500,00.00 per year beginning 2021/2022 for other distribution contracts which the 1st defendant was unable to undertake, is not only said to be an estimation, but it is predicated on the lost Lasco contract. Without any evidence of the details of the Lasco contract, the terms of the typical distribution contract the 1st defendant has had, the number of distribution contracts it has had in the past three or so years prior to 2021 , and details of potential distribution contracts it has had to forgo due to the claimants’ failure to complete, it is impossible to determine whether this alleged loss has been reasonably incurred. In the absence of this evidence, I am not satisfied that this loss arises from the claimants’ delay in completing.

[54] As to the cost of the doors for refurbishing the apartments, I will not order that the 1st defendant recover this expenditure since it should now be able to make use of these doors with an order for specific performance which I intend to make. In relation to legal fees, while the 2nd defendant gave evidence that the 1st defendant has incurred legal fees of $1,500,000.00: “and continuing”; no evidence has been given on exactly how and when these fees were incurred. No invoices, bills or proof of payment were produced in relation to them. Given the dearth of evidence, I am not satisfied that this was an expenditure that was incurred due to the claimants’ failure to complete.

Assessment of costs summarily

[55] On the question of summarily assessing costs, the representations made by the defendants do not sufficiently satisfy CPR 65.7 and 65.9 to allow me to properly exercise my discretion to do so. The submissions on costs have not been detailed sufficiently to indicate for example, how many hours were spent on each particular item of costs claimed. There is also no indication of counsel's post qualification years at the bar, to assist with determining whether the hourly rate claimed is reasonable. Costs to the defendants will therefore need to be either agreed or taxed. It is well that all counsel consider the decision in the **Director of State Proceedings and The Attorney General v Detective Tyrone Findley [2015] JMCA Civ 15**, in which the approach to summarily assessing costs was carefully outlined by the court of appeal

Conclusion

[56] In summary my findings are these: -

a) there are no reasonable grounds to bring claim SU2021CV0269 against the 2nd defendant as throughout the transaction, he acted on behalf of the 1st defendant as its managing director;

b) the claimants' reply to the 1st defendant's defence and counterclaim in claim SU2021CV02691 amounts to a bare denial of the allegation that they are in breach of the Agreement for Sale dated February 7, 2019.

c) the reply to the counterclaim does not disclose any real prospect of successfully defending the counterclaim on the question of liability for breach of contract;

d) on neither the evidence nor the pleadings is there any indication that the damages sought by the 1st defendant in the counterclaim were foreseeable and typically arise from the breach itself or were in the

reasonable contemplation of the parties when that agreement was made, as a probable result of the breach;

e) the damages claimed by the 1st defendant for the lost Lasco contract, lost distribution contract and motor vehicle storage fees are too remote. In any event, if I am wrong and the damages claimed are not too remote, I find that they have not been satisfactorily proven.

[57] Summary judgment will be granted on the counterclaim in favour of the 1st defendant in terms of an order for specific performance of the Agreement for Sale dated February 7, 2019. Since there will be specific performance of the February 7, 2019, Agreement for Sale, it would not be equitable to allow the 1st defendant to recoup the cost of the doors purchased for refurbishment, since the 1st defendant should now be able to utilise them. Considering the claimants own pleadings and the evidence of the defendants, it is plain, that there is no real prospect of the claimants' succeeding at trial in proving that there was a legally binding agreement for the sale of the chattels to either defendant. Claim No.SU2021CV02691, must accordingly be dismissed.

[58] Based on my findings, it is unnecessary to either consolidate Claim No.SU2022CV00528 and Claim No. SU2021CV02691, or to transfer them to the Commercial Division.

[59] I do not have sufficient material before me to assess costs summarily.

. **Orders**

[60] Having regard to the foregoing, I make the following orders

i. The claim against the 2nd defendant in Claim No. SU2021CV02691 is struck out.

ii. Summary Judgment is granted in favour of the 1st defendant on the counterclaim in Claim No. SU2021CV02691in the following terms: -

a. The Agreement for Sale dated February 7, 2019, is to be specifically performed and carried into execution by the claimants.

b. The claimants are to deliver to the 1st defendant the Certificates of Title registered at Volume 1029 Folio 668 and Volume 950 Folio 438 duly endorsed in the 1st defendant's name in exchange for payment of the balance purchase price.

iii. The claim against the 1st defendant in SU2021CV02691 is dismissed.

iv. By consent Claim No. SU2022CV00528 is struck out with costs to the defendant to be agreed or taxed.

v. Costs on the claim and the counterclaim in Claim No.SU2021CV02691 to the 1st defendant to be agreed or taxed.

A Jarrett
Puisne Judge