



[2024] JMSC Civ. 118

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015 HCV 03124**

<b>BETWEEN</b>	<b>FREDRICK FAGAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>KENNETH PERRY</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

**Tamara Riley-Dunn and Cavel Cato instructed by Nelson-Brown, Guy and Francis for the Claimant.**

**Affia McBean instructed by legal Capital for the Defendant**

Heard: 22<sup>nd</sup>, 23<sup>rd</sup> of April, 11<sup>th</sup> of June and 27<sup>th</sup> of September 2024

***Land Law – Fraud – Defeasibility of title – Breach of contract of Sale for Land – Whether a contract was duly formed between the parties – Whether the Defendant/Purchaser completed payment of the purchase price – Whether the Defendant was a purchaser in possession or a Tenant – Whether the Registered Title was transferred to the Defendant by fraud – Whether a contract is still enforceable where there is fraudulent performance.***

**THOMAS, J**

**BACKGROUND**

[1] In the instant Claim, Mr. Frederick Fagan is alleging that he was deprived of property of which he was the registered proprietor by acts of fraud on the part of the Defendant Mr. Kenneth Perry. The gravamen of his claim is that in 2002 he entered into an oral agreement with the Defendant to sell him his property

registered at Volume 1333 Folio 804 of the Register Book of Titles (hereinafter referred to as the subject property) for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000.00). The subject property includes a shop located at Lot #27 Paisley Avenue, May Pen in the parish of Clarendon. He admits receiving the sum of \$800,000.00 as part payment of the purchase price from Mr. Perry, but contends that Defendant made no further payment on the purchase price and caused a sale agreement and transfer to be executed with signatures purporting to be that of the Claimant. and by virtue of these forged documents fraudulently caused the title to the subject property to be transferred and registered in the name of the Defendant.

**[2]** The Defendant Mr. Perry denies the allegations of fraud. He contends that he completed his obligations under the contract. He avers that he had paid the full purchase price which he alleges was \$900,000. He asserts that the documents to effect the transfer, that is the Agreement for Sale and the Instrument of Transfer were in fact signed by the Claimant. In summary, the case for the Defendant is that at no time did he or anyone acting on his behalf, forged the Claimant's signature or fraudulently procured the registration of the transfer of the subject property. The history of the matter also reveals that on September 27<sup>th</sup>, 2016 Judgment in Default was entered against the Defendant. This judgment was subsequently set aside on March 2<sup>nd</sup> 2018. I however note that a new certificate of title was issued in the name of Federick Fagan for the subject property on the 31<sup>st</sup> of March 2017. There was a subsequent transfer to Lucius Morrison on the 25<sup>th</sup> of September 2020.

**[3]** In the Claim dated the 16<sup>th</sup> of June 2015, the Claimant seeks the following orders;

- I. A Declaration that the Defendant whether personally or through his agents and/or servants fraudulently obtained and procured the vesting instrument/transfer bearing number 1309331 registered on July 15, 2004.

- II. A Declaration that the Defendant fraudulently uttered the said vesting instrument/transfer bearing number 1309331 registered on July 15, 2004 knowing the same to be fraudulent.
- III. A Declaration that the Defendant personally or through his agents and/or servants fraudulently and dishonestly procured the endorsement of the Defendant's name on the original Certificate of Title being all that parcel of land comprised in Certificate of Title registered at Volume 1333 Folio 804 of the Register Book of Titles.
- IV. An Order that the Certificate of Title comprised in Volume 1333 Folio 804 of the Register Book of titles be rectified and/or corrected to reflect the name Frederick Fagan as it had prior to the Defendant's fraud and/or conversion of the said title.
- V. That the Defendant deliver forthwith the duplicate Certificate of Title for all that parcel of land comprised in Certificate of title registered at Volume 1333 Folio 804 of the Register Book of titles to the Attorneys-at-Law for the Claimant to facilitate the rectification of the register, and if the Defendant shall fail and or refuse to do so within ten (10) days of the date of this Order then the Registrar of Titles is directed to cancel the said Certificate of Title and issue a new one for the said parcel of land in the Claimant's name.
- VI. General Damages
- VII. Mense Profit
- VIII. Interest thereon

**[4]** In the further Amended Particulars of Claim filed August 15, 2019 the Claimant pleads the following:

- I. The Defendant was at all material times a potential purchaser of the said property and the Claimant's tenant.

- II. The Defendant was required to pay the sum of \$12,000.00 for rent each month, payable on the 1<sup>st</sup> day of the month.
- III. In or about September 2002, the Claimant orally agreed to sell the said property to the Defendant for \$1,800,000.00 *with possession on payment of deposit*. It was further understood and agreed that on the completion of the sale all rental payments to the Claimant will cease' The Defendant was required to pay a deposit of \$900,000.00. The Defendant only paid \$800,000.00 of the required deposit.

[5] Despite not paying the sum of \$100,000.00 being the balance of the requisite deposit, the Claimant gave the Defendant possession of the said premises subject to the completion of the sale within ten (10) months.

[6] That without the knowledge of the Claimant the property registered at Certificate of Title registered in Volume 1333 Folio 804 of the Register Book of titles was fraudulently transferred on the 15<sup>th</sup> day of July 2004 by the Defendant, his servants and/or agents conspiring with person's unknown to assist in the conversion of the said Title into the Defendant's name.

### **PARTICULARS OF FRAUD**

[7] The particulars of fraud are detailed as follows;

- a) Making a false declaration contrary to the Voluntary Declaration Act
- b) Conspiring with others to procure the making of false declarations contrary to the provisions of the Voluntary Declaration Act.
- c) Whether personally or through his agents preparing or causing to be prepared a fraudulent Vesting Instrument.
- d) Uttering or causing to be uttered to the Registrar of Titles a fraudulent vesting instrument and causing the said instrument to be lodged

consequently allowing the subsequent transfer of the said property to the Defendant.

- e) Fraudulently obtaining an original Duplicate Certificate of Title registered in the name of the Defendant.
- f) Whether personally or through his agents and/or servants forged the name of the Claimant

## **Defence**

**[8]** In his Defence the Defendant avers that:

He entered into an Agreement with the Claimant to purchase from him the lands registered at Volume 13333 Folio 804 of the Registered Book of Titles for a price of \$900,000.00 He paid the purchase price in full by paying at first the sum of \$800,000.00 and a final payment of \$100,000.00, the receipt of which is acknowledged by the Claimant. The Agreement for Sale and the Instrument of Transfer are the Deeds of the Claimant and he at no time whatsoever, personally or by his servants or agents fraudulently procured the registration of a transfer of the lands comprised in the Certificate of Title in his name.

**[9]** He denies that the Claimant is entitled to the return of the Certificate of Title. He avers that the said Certificate of Title was delivered to the Defendant in order that the Transfer would be effected. He denies breaching the contract and asserts that the breach of contract is barred by the Limitation Act and is not maintainable in law.

## **The Evidence**

### **Of the Claimant**

[10] The evidence of the Claimant Mr is Frederick Fagan he is the owner of Privates Plaza located at Lot #27 Paisley Avenue, May Pen in the parish of Clarendon. The plaza has ten shops. Shop Number 4, is the shop to which this claim relates, and is comprised in Certificate of Title registered at Volume 1333 Folio 804 of the Register Book of Titles.

[11] He further states that: 'In or about 2002, the Defendant, who was then his close friend, enquired about renting Shop 4 which is located on the lower floor. He agreed to rent him the shop at the rate of \$12,000.00 per month, payable on the 1<sup>st</sup> day of each month. Soon thereafter, the Defendant expressed an interest in purchasing the shop. In or about September 2002, he orally agreed to sell the said property to the Defendant for \$1,800,000.00 with possession on payment of deposit. The Agreement was never written down on paper.'

[12] He says that they agreed to a deposit of \$900,000.00 and the balance of \$900,000.00 plus relevant costs would be paid to his attorney-at-law on completion, at which time the title would be transferred in Mr. Perry's name and that it was agreed that on the completion of the sale, all rental payments would cease.

[13] His evidences continue as follows:

*'On or about the 15<sup>th</sup> day of February 2002, I received from the Defendant the sum of \$800,000.00 as a down payment on the deposit. A receipt was prepared dated 15<sup>th</sup> day of February 2002 and signed by me and given to the Defendant upon receiving the sum of \$800,000.00. I told him to pay the balance of the deposit being \$100,000.00 to my Attorneys-at-Law who would be representing me in the sale, Messrs Scott, Bhoorasingh and Bonnick I told him that when the remaining \$100,000.00 deposit was paid to my Attorneys then they would prepare an Agreement for Sale at my direction and instructions'.*

[14] He says that on the basis of their friendship, he allowed the Defendant to remain in possession of the said premises subject to the completion of the sale within ten

(10) months. He asserts that he left Jamaica later that same year, 2002, and that he provided instructions to his secretary to hand the Certificate of Title for the said shop to the Defendant who was to bring it to his (Mr. Fagan's), attorneys-at-law along with the \$100,000.00, being the balance of the deposit, to enable them to begin the process of drafting documents relevant to the sale.

- [15]** Mr. Fagan also states that when the Defendant came to collect the documents, his secretary called him and he called the Defendant, who confirmed that the secretary had provided him with the said instructions as he had requested. He says that he never received a further sum of \$100,000 from Mr. Perry, and that he never signed a receipt for the sum. He alleges that the receipt for that sum was forged by Mr. Perry.
- [16]** Mr. Fagan asserts that, in March of 2004, the Defendant forged, or caused to be forged his signature, on an Instrument of Transfer and Agreement for Sale. He also asserts that the Defendant then caused the said documents to be lodged at the respective entities, being the Stamp Office and the National Land Agency to enable the transfer of his property to the Defendant, being well aware that they were fraudulent. He says these documents do not contain the agreed terms of purchasing the said premises nor did he sign the said documents. He contends that in reliance on these documents the Titles Office of Jamaica registered transfer No. 1309331 t on the 15<sup>th</sup> day of July 2004 on the said Certificate of Title transferring the subject property from himself to the Defendant.
- [17]** He says that the Defendant stopped paying him rent and, that the Defendant rented out the space. He avers that he found out about the Defendant's fraudulent acts in or about June 2012 when in the ordinary course of business, he made checks on his properties. He alleges that to date, the Defendant has not paid him the remainder of the deposit for the sale, being \$100,000.00 nor has he paid him the sum of \$800,000.00 being the balance on the purchase price.

- [18] Mr. Fagan also explains that he received a Default Judgment from the Court on account that Claim Form, Particulars of Claim, Prescribed Notes for the Defendant, Acknowledgment of Service and Defence forms were served on the Defendant and he failed to file a Defence. He informs that having received the said Judgment, he instructed his Attorneys-at-Law to take the necessary steps to have the title cancelled and the same registered in his name. As a result, on March 31, 2017 a new Certificate of Title was issued in his name. He has since sold the property to Lucious Morrison.
- [19] Mr Fagan also asserts that he is entitled to recover compensation from the Defendant for the damages which he suffered as a result of being out of possession of the property from the 15<sup>th</sup> day of July 2004 to the 31<sup>st</sup> day of March 2017. He says as the defendant was his tenant, he was entitled to receive rent from the Defendant in the sum \$12,000.00 per month until the sale was completed. The rent he says was to be paid from the 15<sup>th</sup> day of February 2002 in the sum of \$12,000 per month, onwards. He wants the Defendant to compensate him for his losses in the sum equivalent to the market value of the property during the period of wrongful occupation.
- [20] On amplification of his witness statement, Mr Fagan testifies that at the time the Defendant offered to purchase he was already his tenant and was already in possession. He says the name of his then Attorney at law was Scot Bhoorasingh and Bonnick. The total price was \$1.8 million. The balance is 1million dollars. He states that he has a valid and expired passport was issued while he was in Canada. (The expired passport was admitted into evidence)
- [21] On cross-examination, Mr. Fagan was shown his Particulars of Claim Fagan filed June 18, 2015. This was filed along with the Claim Form. He admits that he signed this Particulars of Claim. He was referred to paragraph 4 which reads: *“That the Defendant paid a deposit of \$900,000.00 in two installments in the amount of \$800,000 and \$100,000. Exhibited hereto are receipts marked “B” reflecting the same”* He was asked to look at the exhibited receipts dated the 15.2 2002 and the

23<sup>rd</sup> of August and to say whether those were the receipts he was referring to. He says "One receipt"

**[22]** He further says that he is not sure who provided these receipts to his attorney- at-law. He admits that the balance stated on the receipt that he admitted that he signed is \$100,000.00. He agrees that there is nothing on that receipt that says balance on deposit. He however says that he and the Defendant had a verbal agreement that \$ 900,000 was for the deposit. He says he cannot place a date on the verbal agreement but it was way before he wrote the receipt. Mr Fagan testifies that he entered into tenancy arrangement with Mr. Perry before they discussed the sale but he cannot say exactly when. He says also that he is not exactly sure for how long Mr Perry paid rent but it could have been for a couple of months. He states that he would collect the rent when he was available and when he was not, the lady who runs his property rental business would. He says that between 2006 to 2012 the Defendant was not paying rent. He admits that he did not make any demand for rent at that time.

**[23]** He says he returned to Jamaica in 2011. He indicates that whilst overseas he was working in a number of countries but for security reasons, he cannot disclose the names of the countries or his assignment. When asked how Mr. Perry got hold of the title, Mr Fagan says it was because he knew Mr. Perry, and he had already, paid \$ 800,000. He further explained that he a got call from Ms Melhado that Mr Perry was ready to complete. As a result, he instructed Ms Meldado to handover the Title to Mr. Perry. He says, he told Mr. Perry to take the title to Ms. Bonnick as she would do all the transfer that was to be done, after he paid the balance of the 1million dollars.

**[24]** He says the countries to which he was travelling to work, did not require him to produce a passport. He says he returned to Jamaica in November 2011, but agrees that he did not call Mr. Perry to enquire whether or not he took the title to his attorney Ms. Bonnick, but he did call his attorney about the payment. The title

he said was passed to Mr. Perry in 2004 and the time he called his attorney to enquire about the payment could have been in 2011.

**[25]** He however denies taking 7 years to make contact with his attorney to find out if Mr, Perry had made the payment of 1 million dollars. He says that it was possibly 5 or 6 years. He maintains that it is not his signature on the transfer He denies signing both receipts He also says he knows his attorney Ms Bonnick did no sign the sales agreement as it is not her signature that is on it.

**[26]** He says he knows for fact that Mr. Perry did not hand over the rest of the cash because he spoke to his attorney. He disagrees that the purchase price was \$900,00 and not \$1.800,000. He says he did not demand rent from Mr. Perry because knew that he had the \$800,000.00 from which he could collect the rent.

### **The Evidence of the Expert Witness**

**[27]** Mr William Smiley, Certified Document Examiner and Retired Deputy Superintendent of Police states that has studied and was trained in Document Examination including the examination and identification of handwriting/signatures and have over thirty (30) years practical experience in this field.

**[28]** He reports that he successfully completed a ten (10) months course in Document Examination including the examination and identification of handwriting/signatures, conducted. through the International Criminal Investigative Training Assistance Programme and sponsored by the United States Department of Justice. He indicates that he has participated in a number of seminars and workshops relative to document examination including the examination of signature He has also lectured Police Investigators, Bank Personnel, and other interest groups relative to Document Examination.

**[29]** In his main report he identified the Documents he received from Nelson-Brown, Guy and Francis, attorneys-at-law for the Claimant, and the examination he conducted as follows:

### **Documents Received**

- Copy Agreement for Sale, dated 30.3.2004, (Three pages) between Fredrick Fagan and Kenneth Perry (purportedly signed by Fredrick Fagan et al) which I marked 'Q-1'
- Copy Transfer of land, dated 30.3.2004, (two pages) between Fredrick Fagan and Kenneth Perry (purportedly signed by Fredrick Fagan et al) which I marked 'Q-2'
- Copy Receipt dated 23.8.2002 (purportedly signed by Fredrick Fagan) which I marked 'Q-3'
- Original Jamaican Passport #1213284 in the name Fredrick Augustus Fagan bearing expiry date 28.5.1991, signed 'Fredrick Fagan', copy of which I marked 'K-1'
- Original Jamaica Public Service Company Ltd. Conditional Contract dated 16.8.2012, signed 'Fredrick Fagan', copy of which I marked 'K-2'
- Original Jamaica Public Service Company Ltd. Conditional Contract dated 14.5.2015, signed 'Fredrick Fagan', copy of which I marked 'K-3'
- Original Agreement for Sale dated 2.5.2014, signed 'Fredrick Fagan' et al, copy of which I marked 'K-4'.
- Original Agreement for Sale dated 2.5.2014, signed 'Fredrick Fagan' et al copy of which I marked 'K-5'.

- Original Affidavit of Fredrick Fagan, dated 30.4.2019, signed 'Fredrick Fagan' et al, copy of which I marked 'K-6'.
- Original Claim Form, dated 16.6.2015, signed 'Fredrick Fagan', copy of which I marked 'K-7'.

**NB.** Document listed at 1-3, (marked 'Q-1' to 'Q-3' respectively) were presented to me as bearing the questioned signature of Fredrick Fagan and documents listed at 4-10 (copies marked 'K-1' to 'K-7' respectively) were presented to me as bearing the known or acknowledged signature of Fredrick Fagan.

### **Examination Requested**

**[30]** To determine if the questioned signature on copy documents marked 'Q-1' to 'Q-3' respectively is identified with known/acknowledged signatures on original documents, copies marked 'K-1' to 'K-7' respectively.

### **Examination Done**

**[31]** He further states that Responding to certain request, on October 5, 2021, he attended the National Land Agency, 93 Hanover Street, Kingston, and was given an original Transfer Document, dated 30.3.2004, signed a 'Fredrick Fagan' et al (copy of which he had received on October 1, 2021, and marked 'Q-2'). He examined and compared the questioned signature on the original Transfer Document with known signature on documents marked 'K-1' to 'K-7' respectively).

### **Opinion/Findings**

**[32]** He states his opinion and findings as follows;

- "The questioned Signature on original Transfer document dated 30.3.2004 is not identified with known signatures on documents marked 'K-1' to 'K-7'

respectively i.e. the questioned and known signatures were written by different authors.

- The questioned signatures bear no resemblance to the known signature and the letters for the most part that define the signature are absent. There are a number of lines in the questioned signature which are absent in the known signature.
- *The known signature which on the other hand is consistent, though purportedly written over a number of years. The letters are well defined for the most part especially the capital letter 'F'.*
- The examination/analyst included, but was not limited to factors such as space, speed, size, and stroke.
- The questioned signature on copy documents marked 'Q-1' and 'Q-3' respectively does not appear to have been written by the author of known signature on original documents (copies marked 'K-1' to 'K-7' respectively).
- The unavailability of the original questioned documents precluded a conclusive opinion as it cannot be ascertained if the copies are true representations of the original documents.
- The documents were subsequently returned to the Offices of Nelson-Brown, Guy and Francis.

**[33]** On the request of Counsel for the Defendant an Order was made by the court for Mr. Smiley to conduct further examination. The details of those examinations and the results were provided in his addendum which are outlined as follows;

### **SUMMARY OF ADDENDUM OF EXPERT REPORT**

**[34]** On Tuesday, May 14, 2024 he received from Nelson Brown, Guy and Francis Attorneys-at-Law two (2) copy receipts dated February 15, 2002 and 23<sup>rd</sup> of August 2002.

Responding to a court order he examined and compared the signature on both copy receipts, one against the other.

- [35]** It is Mr. Smiley's opinion that the signatures do not appear to have been written by one and the same person, that is, the signatures appear to have been written by different authors. He reports that on his examination;

*"The bottom loop of the letter "F" in receipt dated February 15, 2002 appears rounded whilst on the receipt dated the 23<sup>rd</sup> of August 2002, it is triangular. The loops of the letters in signature on receipt dated February 15, 2002 appear smaller than those on the other receipt. The signature on receipt dated February 15, 2002 appears to take up more space horizontally and has what appears to be more letters/strokes than the other signatures".*

- [36]** He however says that the unavailability of the original receipts for examination /analysis precluded a conclusive opinion as factors such as line quality, speed and stroke among other factors could not be ascertained with certainty. Mr. Smiley was cross examined Counsel for the Defendant, Ms. McBean

- [37]** He was referred to the Claim form filed on the 18<sup>th</sup> of June 2015 and in particular Mr Fagan's signature. He was asked, as it relates to the first "F" in the document in terms of the bottom loop, it is rounded or triangular? His response is, that that it is elongated. He also affirms that it is different from a rounded loop He agrees that the Amended Particulars of Claim and the receipt of February 15<sup>th</sup>, 2002, appear to contain variations of Mr. Fagan's signature.

- [38]** He says that when he compared the signature purported to be that of Mr. Fagan on the Agreement for Sale that on the receipt of the February 15, 2002 the loop on the F in the Agreement for Sale would be rectangular whilst it is rounded on the receipt. He says that he sees no similarity between the signature on the transfer and that on the Amended Particulars of Claim, as on the transfer document the loop is wide, tall and it has a smaller loop to the bottom so it is a double loop. The

f is a double loop (the first F), whilst in the Amended Particulars of Claim it's just one narrow, elongated loop.

- [39] Mr. Smiley was also asked to compare the signature on two Particulars of Claims admittedly signed by the Claimant on the 16<sup>th</sup> of June 2016. He admits that the loops of the first F on both documents are not the same but that there are variations in the loops. He explains the variations as follows;

*“The loop of the first F in the original particulars of claim loop is open and elongated, whilst on the other one the loop is elongated and retraced instead of open, instead of having a loop, it is retrace, retraced mean lines going up and down.”*

- [40] Mr. Smiley says he considers these variations to be significant. When asked if having seen all these signatures, if it is at all possible that they all might be variations of Mr. Fagan's signature. He said he would not be able to answer this without the original document. He admits that in relation to the addendum to his report he examined the copy receipt. He however insists that without the original document he would not be able to give a conclusive answer.

### **The Evidence of the Defendant**

- [41] Mr. Kenneth Perry states that in *or about* late 2001, he entered into a tenancy agreement with the Claimant for shop #4. located within a commercial plaza, being part of No. 27 Paisley Avenue in the parish of Clarendon registered at Volume 1333 Folio 804 of the Register Book of Titles. Shortly thereafter, in or about early 2002, he says he approached the Claimant to sell the shop to him.
- [42] He says that The Claimant indicated that he wanted One Million Dollars (\$1,000,000.00) for the shop, however after some negotiations he told him to give

him Nine Hundred Thousand Dollars (\$900,000.00) with instructions to retain the sum of One Hundred Thousand Dollars (\$100,000.00) for the paperwork. He says further, that he entered into the verbal agreement with the Claimant herein to purchase shop for the sum of Nine Hundred Thousand Dollars (\$900,000.00) in or about February 2002.

**[43]** He states that on the 15<sup>th</sup> day of February, 2002, he made payment in the sum of Eight Hundred Thousand Dollars (\$800,000.00) to the Claimant, with the receipt capturing a balance of One Hundred Thousand Dollars (\$100,000.00). On the 23<sup>rd</sup> day of August, 2002 he says he paid the balance of One Hundred Thousand Dollars (\$100,000.00), and that he received receipts for both payment, He says from his understanding, the Attorneys for the Claimant would have conduct of the sale.

**[44]** Mr. Perry states that he noticed that the agreement for sale had the sum of Five Hundred Thousand Dollars (\$500,000.00) instead of the sum of Nine Hundred Thousand Dollars (\$900,000.00), but against his better judgment he signed it and did not question the reason. He also says that he and Claimant executed an instrument of transfer that was also prepared by the said Claimant's Attorneys-at-Law. He says further that after the signing was completed, the Claimant handed him the duplicate Certificate of Title for him to pay the necessary duties and to do the registration on the title. He says, he continued in possession of the property as the owner thereof. He asserts that to the best of his knowledge, information and belief, the Claimant has been in the Island at all material times and throughout the years.

**[45]** Mr. Perry says that in late 2002, he rented the shop to a Mr. Fearon who operated a car parts business. It was his intention to operate a lottery shop there, however Supreme Ventures had turned down his application. It was then he made the decision to rent same. He says Mr. Fearon remained in the shop without interference for a number of years and each month he would collect his rent from him without issue.

- [46]** Mr. Perry says further that Mr. Fearon stopped paying rent to him, after he was told by the Claimant that the shop belonged to him. He says when Mr. Fearon left he had rental arrears of approximately Two Million Dollars. He noted that the Claimant owned all the shops on the property, which comprise of about 10 shops in total and that he was informed and do verily believe that in or about the year 2007, some 5 years after his purchase, the Claimant sold Shop #5 to another gentleman whom he knows as Mr. Morrison for the sum of One Million Six Hundred Thousand Dollars (\$1,600,000.00). All of the shops in the plaza were generally the same size.
- [47]** On cross examination, he admits that he used to charge Mr. Fearon \$12,000 for rent, but when he raised the rent Mr. Fearon stopped paying. He agrees that he had an agreement with Mr. Fearon to sell the shop for \$5 million. He however denies that this agreement took place in 2009, he said it was in 2012. He admits though that the discussion with Mr. Fearon commenced in 2009. He also admits that he received payment from Mr. Fearon pursuant to this agreement. He says he can't recall if the amount was \$1,850,000. He says Mr. Fearon forfeited that sum because he owed him too much rent.
- [48]** Mr. Perry admits that his signature appears on the last page of the Agreement for Sale. He says the initial that appears on the last page of the Transfer, above the word "March", he did not write it. When asked if he lodged the Sales Agreement at the Stamp Office he says he does not "know nothing about Stamp Office, but he carried the Sales Agreement to the Tax office and he paid \$100,000. He then agreed that it was \$102,490 that he paid.
- [49]** He insists that it was Mr Fagan who told him to take the documents to the Tax office and ask for Mr. Brown. He says he was not the person who delivered the transfer to the titles office. He admits that he paid a fee at the titles office for registration of the transfer.

- [50]** When it was suggested to him that he is not being truthful that he did not take the documents to the titles Office, he answered “yes” he carried them to the titles office after Mr, Fagan filled them in and everything.
- [51]** Mr. Perry further asserts that Mr. Fagan filled in all the documents and brought them to him and said “go and get your title now.” He denies that he got the title from Ms Melhado. The money he paid at the Tax office he says was out of the \$100,000 that he was told by Mr. Fagan to hold back. He further states that he paid Mr. Brown and Mr. Brown sent off the documents to the Titles Office.
- [52]** When it was suggested to him that he paid only \$800,000 to Mr. Fagan he responded, “That’s not right” He says that he did not pay any money Scott Bhorasingh and Bonnick. He says he can’t recall if he had full control of the shop in 2004. He was shown the Sales Agreement and the Transfer, he admits that the signature of the person who witnessed his signature on both documents looks to be the same. He further states that he cannot remember who witnessed his signature. He says he did not go in front of any one and signed the documents.
- [53]** He maintains that “These papers were taken to” him. He says that when he took the document to the Tax Office Mr Fagan did not go with him but insists that Mr. Fagan was in Jamaica at that time. He also states that he did not see Mr. Fagan sign the Documents.
- [54]** On re-examination Mr. Perry states that, He did not know Mr. Brown before; He did not receive the documents back from the Tax Office, they called him from the Titles Office to pick up the title; It was at the shop that Mr. Fagan gave him the Agreement for Sale and the Transfer; He cannot remember if when he got those documents from Mr Fagan, they were already signed; He just gave him the documents said “go get your title now” and walked away.
- [55]** The court asked Mr Perry “When did you sign.” He says he signed before Mr. Fagan walked away. He showed him where to sign before he walked away. Arising from, this question Ms. Riley Dunn. asked Mr. Perry if he carried the

documents anywhere before going to the Tax Office He says he took them to Mr. Young's office but Mr. Young did not do anything to them. He says Mr. Young was not his Lawyer. He states that Mr. Young just looked at them and gave them back to him. When asked why he took the documents to Mr. Young, Mr. Perry's response is that he took them to Mr Young to ask him if he could look about the title, but while he was there he got a call from Mr. Fagan to take the title to Mr. Brown. He was shown the Transfer and Agreement for Sale and asked if Mr. Young's signature is on the Documents. He is adamant that it is not.

**[56]** Arising from the questions posed by the Court Counsel for Mr. Perry, Ms. McBean asked Mr. Perry if Mr. Fagan's signature was already on the document when he took them to Mr. Young. His response is that he cannot remember if the signature was there or not.

### ***The Issues***

**[57]** The issues which I am required to determine in this case are;

- I. Whether there was a valid contract between the parties for the purchase of property registered at Volume 1333 Folio 804 of the Registered Books of Title
- II. If the answer to (i) is yes; Whether the Defendant completed payment of the purchase price under this contract
- III. Whether the legal title bearing Volume 1333 Folio 804 of the Register Book of Titles was transferred from the Claimant to the Defendant under an instrument of transfer duly executed by the parties or whether the transfer was procured by Fraud
- IV. Where there is a finding of fraud, whether there can be a finding of a valid enforceable contract

## Whether there was a valid contract between the Parties

### The Law

[58] Several authorities such as **Scammell v Ouston** [1941] AC 251; **Hillas v Arcos** [1932] All ER 494; **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG** [2010]; (**British Steel Corp v Cleveland Bridge and Engineering Co Ltd** [1984] 1 All ER 504) **Keith Garvey v Ricardo Richards** [2011] JMCA Civ.16; have defined the principle of law relating to the existence of a valid enforceable contract. They have outlined the elements that must be present for there to be an enforceable contract. These are offer, acceptance, consideration, and intention to create legal relations and certainty of the terms.

### Submissions

#### By Counsel for the Claimant

[59] Ms. Riley Dunn made the following submissions on this issue:

- I. The Defendant seems to be saying that even if the signature on the Agreement for Sale and the Instrument of Transfer is not the Claimant's there was nevertheless a binding agreement between the parties that this Honourable Court should not disturb. The court ought to be reminded of the maxim, "*ex turpi causa non oritur actio*" **and** the dictum of Lord Mansfield in the case of **Holman v Johnson (1775) 1 Cowp 341**:

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

- II. The assertion that there was a binding agreement must fail for this agreement lacks all three certainties required at law, which are offer, acceptance and consideration, in addition to the intention to create legal relations. (She relies on the authorities of **Keith Garvey v Ricardo Richards** [2011] JMCA Civ.16; **Gordon, Phyllis v Gordon, Pamela** [2017] JMCA Civ. 125.)

- III.** With respect to the price, it is maintained that there is no certainty of contract capable of being acknowledged and enforced by this Honourable Court, as the terms are so uncertain no binding legal intent could be presumed. The accepted fact is that the Defendant paid \$800,000.00 towards acquiring the property. This is complicated when one sees a purchase price of Five Hundred Thousand Dollars (\$500,000.00) placed on the Agreement for Sale and Instrument of Transfer presented by the Defendant to the Stamp Office and the Office of Titles. This Agreement for Sale presented to the Stamp Office, for \$300,000.00 less than the deposit paid, cannot be relied upon as being a truthful indicator of any discussion or agreement between the parties. A contract ought to be a concluded and comprehensive agreement between parties without ambiguity and inconsistencies. The alleged Agreement for Sale dated the 30<sup>th</sup> of March 2004 between the Claimant and the Defendant cannot be enforced as a definitive, as the consideration cannot be determined.
- IV.** The cost for total assessment was \$102,490.00, which exceeded the sum of \$100,000.00 which was allegedly withheld. No evidence was brought forward by the Defendant of him asking the Claimant for any shortfall. In fact, the Defendant went on to pay registration fees of \$2,500.00, with absolutely no assistance from the Claimant. Even the price the Defendant claims was agreed between he and the Claimant is highly suspicious for two reasons. The first being that in 2009, less than seven years after this deal was apparently struck between the Claimant and the Defendant, the Defendant attempted to resell this property for **Five Million Dollars (\$5,000,000.00)**.
- V.** We urge this Honourable Court to find that these inconsistencies in the Defendant's version of the terms of this agreement cannot be upheld under closer scrutiny. There is no positive evidence that a contractual obligation was ever hatched between the parties to this claim.

## Submissions on Behalf of the Defendant

[60] Counsel, Ms McBean made the following submissions:

- (i) The Claimant's original statement of case supports the Defendant's contention that the property was purchased for the sum of Nine Hundred Thousand Dollars (\$900,000.00) which was duly paid, and receipt acknowledged by the Claimant in the two receipts of payments.
- (ii) The Claimant avers to the fact that he entered into a contract with the Defendant for the sale of the property. He further avers to the fact that he received the sum of Eight Hundred Thousand Dollars (\$800,000.00) from the Defendant on the 15<sup>th</sup> day of February 2002. The fact that the 15<sup>th</sup> day of February 2002 receipt had written "**balance of \$100,000**" is abundantly clear, there is therefore no need for interpretation
- (iii) It is trite law that the payment of a deposit after an oral agreement for the purchase of land is sufficient as a memorandum in writing for the sale of land. A receipt for the payment of money for land is an act of part performance sufficient to give rise to a valid and enforceable contract (She relies on the case of **Steadman v Steadman [1976] A.C. 536**)
- (iv) The fact is that there was a valid enforceable contract since February 15 2002. The Claimant should not be allowed to renege on his averments in his own statement of case in the form of the receipts that were first submitted by the Claimant himself, one such receipt representing "**Final payment on sale of shop #4, 27 Paisley Ave, May Pen**". At no time did the Claimant ever deny not writing that receipt. In fact, he admitted to writing the receipt.

- (v) The Defendant admits that the expert report carries some weight, however, it ought not to be accepted over compelling evidence.

## **Discussion**

- [61]** Counsel for the Claimant urges this court to find that there was no binding agreement between the parties' She has grounded this submission on the basis that the contract lacked the certainty of offer, acceptance, and consideration. She is also of the view that the evidence does not establish an intention to create legal relations.
- [62]** She points to inconsistencies in the Defendant's version of the terms of the agreement especially with respect to the price. In this regard she maintains that there is no certainty of consideration on which the court could find that there was any intention to create legal relations or that there was a binding contract between the parties.
- [63]** However, counsel for the Defendant contends that the Claimant's own statement of case supports the contention of the Defendant that there was a valid enforceable agreement between the parties. Nonetheless, I commence my analysis of the evidence with the recognition that in all aspects of this case the Claimant bears the legal burden on a balance of probabilities to prove his case.
- [64]** In his evidence the Claimant denies signing a written agreement with the Defendant. As such he disputes the authenticity of the written agreement relied upon by the defendant to facilitate the transfer of the subject property. The Defendant on the other hand is asserting the authenticity of the written agreement. Counsel for the Claimant is asking this court to find that there is a conflict between the oral evidence of the Defendant and the written document regarding the essential terms of the Contract. She makes particular reference to the purchase price that is stated in the written agreement as \$500,000 whereas the Defendant's

evidence is that the agreed price was \$900,000. As such she posits that there is no enforceable contract where a definitive consideration cannot be determined.

[65] She posits that the court ought to find there was uncertainty regarding the essential elements of the contract. She further urges the court to reject the written agreement on the basis of it being invalid, not being prepared by the then attorney for the Claimant nor was it signed by the Claimant.

[66] It is quite apparent that the Agreement for Sale relied on by the Defendant indicates terms contrary to the terms alleged by him. This does indeed affect his credibility regarding the terms of the arrangement between himself and the Claimant relating to the subject property. Nonetheless, this of itself does not resolve the issue as to whether there was a valid contract between the parties. Essentially, it does not by itself point to the non-existence of a valid agreement.

[67] In essence, where there is other independent evidence pointing to a settled contract price, and settlement between the parties regarding the other essential terms of an agreement for the sale of the subject property, then the Court is entitled to find that a valid contract had been formed between them despite the existence of this conflict on the Defendant's case. Furthermore, the court is also entitled to find that the conflict on the Defendant's evidence regarding the price emanates from his attempt to deviate from the price that was already settled between the parties.

[68] It should also be noted that the determination as to whether the essential elements necessary for the formation of a contract were settled between the parties is an objective one. In the case of **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK (Production)** 2010 3 All ER 1, at paragraph 45 of that Judgment Lord Clarke stated;

*“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads*

*objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”*

[69] Additionally, it is trite law that a valid contract for sale of land should be in writing. (See the Statute of Fraud 1677). However, it has also been a long established principle that in the absence of a written contract, but where there is evidence of part performance referable to an oral contract for land, in an effort to prevent injustice the court of equity will step in to enforce such a contract. (See the cases of **Walsh v Lonsdale** (1882) 882) 21 Ch D 9; and **Maddison v Alderson** (1883) 8 App Cas. 467; **Steadman v Steadman** [1976] A.C. 536)

[70] Further, Harris, J A in the case of **Keith Garvey v Ricardo Richards** [2011] JMCA Civ.16, restated the principle of law regarding the basis on which the court can find that a valid enforceable contract exists. At paragraph 10 and she said,

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

*Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship.”*

[71] In the instant case, the Claimant admits that there was a verbal agreement between himself and the Defendant. His evidence is that in or about September 2002, he orally agreed to sell the said property to the Defendant. The price he quotes is \$1,800,000.00 with possession on payment of deposit. He however says that he and the Defendant had verbally agreed that \$ 900,000 was for the deposit

and that the balance of \$900,000.00 plus relevant costs were to be paid to his attorney-at-law on completion, at which time, the title would be transferred to the Defendant.

**[72]** He nonetheless states that the agreement was never written down. Therefore, on the Claimant's own evidence, the court should not look to a written contract for the terms of the agreement between himself and the Defendant as there was none. I find that this is somewhat inconsistent with counsel's argument that in making a finding regarding the certainty of the contract price I should, on the basis of the inconsistency between the contract price in the written document, ("The Sales Agreement") and the oral evidence of the Defendant, find that the contract price was not settled.

**[73]** However, considering the evidence of both parties, I do not find it necessary at this juncture to examine the written document purporting to be the formal Sales Agreement to determine whether a valid contract existed. In fact, I cannot begin to consider the terms of this document prior to making a pronouncement on its validity. This will be considered further on in the judgment in my determination on the issue of fraud.

**[74]** Nevertheless, taking into account, the evidence of both Mr. Fagan and Mr. Perry, it is evident that that there was a verbal arrangement between them for the purchase of the subject property. Based on Mr. Perry's evidence the negotiations for the sale of the shop commenced in early 2002. The Claimant's original offer was, a sale price of One Million Dollars (\$1,000,000.00). However, on Mr. Perry's account after some negotiations, they settled at a Price of \$900,000, on the basis that Mr. Perry would cover the expenses for the paper work. Mr Perry 's account of the settlement of the purchase price is as follows; *"he told me to give him Nine Hundred Thousand Dollars (\$900,000.00) with instructions to retain the sum of One Hundred Thousand Dollars (\$100,000.00) for the paperwork"*.

**[75]** The evidence of the Defendant further points to the terms being settled by February 2002. He says in or around February 2002, he entered into a verbal agreement with the Claimant to purchase the shop for the sum of Nine Hundred Thousand Dollars \$900,000. So it is pellucid that despite the fact of their disagreement as to what the agreed purchase price was both the Claimant and the Defendant are saying that, the sale price for the land was settled. The Claimant also admits that the defendant paid him \$800,000 and that he issued a receipt for that sum on February 15, 2002. This sum he says was down payment on an agreed deposit of \$900,000.00, It therefore stands to reason that the date of September 2002 could not have been the date the negotiation for the sale of the property commenced as on Mr. Fagan's evidence, in February 2002 when he received the sum he says was down payment on the deposit they had already settled the terms of the agreement.

**[76]** It is therefore more than likely that he is mistaken when he testifies that it was in September 2002 that they entered into the agreement. However, what it does establishes is an admission on the part of Mr. Fagan that he was in fact present in the island in September 2002. Evidently, on the evidence of both parties, there was an oral contract in which all the essential terms were settled.

**[77]** Additionally, arising on the case of either party there is evidence of part performance referable to this oral agreement. Mr. Fagan has not denied that the payment of \$800,000 for which he issued the receipt dated the 15<sup>th</sup> of February was referable to the oral contract. He however says that this was part payment on the agreed deposit of \$900,000. Mr. Perry is however adamant that the agreed price was \$900,000.00, that this \$800, 000 was part payment on the purchase price of \$900,000 leaving a balance of \$100,000 which he contends that he later paid on the 23<sup>rd</sup> of August of 2002.

**[78]** Considering the dispute between the parties as to the agreed price, the court has to now upon an assessment of the credibility of each party, objectively determine which one of the prices now being put forward by either party was the agreed price.

The Claimant admits that he signed and issued the receipt of the February 15, 2002. It is apparent on the face of this receipt that he stated that the outstanding balance was \$100,000.

- [79] Essentially, there is no ambiguity on the face of the receipt regarding the purchase price as there is no reference to deposit on this receipt. The ambiguity arises on the oral evidence of the Claimant, when he says the \$ 800,000 was part payment on the deposit of \$900,000. However, as pointed out by Ms. McBean, in her submissions, notably absent from this receipt is any reference to the \$800,000.00 being part payment on a deposit of \$900,000 or that the balance of \$100,000 was the balance on the deposit. Additionally, I find it rather unusual that the deposit would be half the purchase price. However, I am mindful of the law that contracting parties are at liberty to agree to their own terms in a contract, once there is no violation of any rule of law.
- [80] Counsel for the Claimant submits that the price the Defendant claims was agreed between the parties is, highly suspicious for two reasons. (i) Because in 2009, approximately 7 years later he attempted to resell the property for **Five Million Dollars (\$5,00,000.00)**, without there being any improvement to it. However, bearing in mind the responsibility of the Claimant to prove his case I see nothing on the evidence to allow me to compare the inflation rate between 2002 and 2009. As such there is nothing to indicate to me that a particular value, or sale price, of \$900,00, in 2002 of the subject property was so improbable.
- [81] Furthermore, in my assessment of the parties Mr. Fagan impresses me as a man with sound intelligence and one who would not act contrary to his own interest. Therefore, he being the creator of the receipt, I find that he would have ensured that he would not have written a document, where the content was detrimental to his interest. It is therefore my considered view that Mr. Fagan is not being truthful when he says that the \$800,000 payment reflected on the receipt was down payment on an agreed deposit of \$900,000. Additionally, I find that he is being less than frank when he says the balance of \$100,000 stated on the receipt reflects the

balance on the deposit and not the balance on the purchase price. I find that if this were so he would have ensured that this was so stated on the receipt. I therefore find the Defendant more credible than the Claimant on this issue.

**[82]** Consequently, I find that the receipt dated the 15<sup>th</sup> of February 2002, reflects the settled price of the land and not the deposit. I find that the evidence points more in favour of the agreed purchase price being \$900,000. Additionally, the completion time of 10 months which was stated by Mr. Fagan has not been challenged by Mr. Perry.

**[83]** Therefore, on the evidence before me, I find that in the agreement between the parties there was certainty of the subject matter, that is the land with the shop registered at registered at Volume 1333 Folio 804 of the Register book of titles. There was certainty of consideration, that is \$900,000.00. There was also certainty regarding the time for completion. That is 10 months

**[84]** Consequently, I find that on February 15, 2002 a valid contract was formed between Mr Fagan and Mr Perry in which Mr. Fagan agreed to sell the subject property registered at Volume 1333, Folio 804 of the Register Book of Titles to Mr. Perry at a Price of \$900,000, the agreed completion date being 10months from the 15<sup>th</sup> of February 2002.

**[85]** In light of my finding that the agreed purchase price was \$900,000.00 if I accept Mr. Fagan's contention that he did not receive the balance of \$100,000 that is reflected on the receipt of August of 2002 Mr. Perry would have failed to complete performance under the contract. Nonetheless, Mr. Perry is insisting that he paid this balance. Considering the fact that Mr. Fagan is denying he signed or issued to Mr. Perry the receipt dated the 23<sup>rd</sup> of August 2002 the next issues to be determined are as follows:

(i) What is present status of that contract.

(ii) Whether Mr. Mr. Perry has completed payment under the contract or

(iii) Whether he failed to pay the balance of the \$100,000 but

forged Mr. Fagan's signature of the receipt dated the 23<sup>rd</sup> of August 2002

**[86]** It is the submission of the Claimant's attorney-at-law that the Defendant retained the \$100,000 and he or his agents fabricated the August 23, 2002 receipt in an attempt to convince this Court that the purchase price was \$900,000.00 and that it was paid in full. She further contends that the evidence of the Defendant falters when, in his witness statement he states that the same \$100,000.00 he alleged that he gave the Claimant, wasn't given but instead kept by him to allegedly pay for the vendor's share of the stamp duties, transfer tax and registration fees.

**[87]** However, that is not my reading of the Defendant's evidence. My appreciation of his statement is that during the negotiation the initial asking price by Mr. Fagan was \$1,000,000.00 (1million dollars) but concession was made by Mr. Fagan whereby he agreed to reduce the price to \$900,000.00, that is \$100,000.00 less on condition that the Defendant, Mr. Perry pay the relevant expenses for the transfer of the property to himself.

**[88]** Counsel for the Defendant submits that at no time did the Claimant ever deny not writing that receipt. She refers to his original statement of case and ask the Court to note that this contains an acknowledgement of the two receipts.

**[89]** I note that the Claimant is relying on the evidence of the expert Mr Smiley to support his assertions that the receipt of the 23<sup>rd</sup> of August 2002 was not signed by him. He is equally relying on this evidence to support his allegations of fraud in his contention that his signature on the Agreement for Sale and the Instrument of Transfer, facilitating the transfer of the Title of the subject property to the Defendant were forged. In this regard prior to addressing the foregoing issue, I will first examine the law relating to the proof of fraud. I will then examine the evidence to include that of the expert to determine firstly whether the Claimant has proven on a balance of high probabilities that the receipt of August 23<sup>rd</sup> 2002 was forged and

then whether it has been proven that the Agreement for Sale and the Instrument of Transfer were forged.

### The Law

[90] It has also been noted that the title is no longer in the name of the Defendant but in the name of a 3<sup>rd</sup> party to whom the Claimant has admitted that he sold the property after the Registrar of Titles acting of the Default Judgment reissued the title in his name. However, the Default Judgment having been set aside, the Defendant still denying the fraud, thereby contending that the Claimant was not entitled to the return of the title, and with the Claimant still seeking damages based on allegations of fraud, it is my view that the following principles would nevertheless apply.

[91] Section 68 of the Registration of Title Act provides that the certificate of title is conclusive evidence that the person named therein is the registered proprietor of the estate named therein. It reads:

*“No certificate of title registered and granted under this Act shall 'be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power”.*

[92] **Section 88** addresses the effect of the registration of an instrument of transfer It reads:

*“The proprietor of **land**, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in*

*one of the Forms A, B, or C in the Fourth Schedule hereto; and a woman entitled to any right or contingent right to dower in or out of any freehold **land** shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant.”*

[93] However, it is the provisions of **sections 70 and 71** that have created the exception to the paramountcy of the registered title. These sections provide as follows:

*“70. Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from the -Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to my qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:*

*Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument*

*71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any land, lease, mortgage, or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for,*

*which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

[94] Additionally, **Section 161** creates a bar to recovery of land as against the registered proprietor except where certain specified elements are established. One such element being proof fraud. The section reads:

*“No action of ejectment or other action, suit or proceeding, for the recovery of any **land** shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say —*

*(a) the case of a mortgagee as against a mortgagor in default;*

*(b) the case of an annuitant as against a grantor in default;*

*(c) the case of a lessor as against a lessee in default;*

*(d) the case of a person deprived of any **land** by **fraud** as against the person registered as proprietor of such **land** through **fraud**, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through **fraud**;*

*(e) the case of a person deprived of or claiming any **land** included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*

*(f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

*and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding*

[95] In the consolidated appeal of **Harley Corp. Guarantee Inv. Co. Ltd v. Daley (Rudolph) et al and RBTT Bank Ja. Ltd v. Daley (Rudolph) et al** that [2010] JMCA Civ 46 Harris JA addressed the conclusive character of ownership of land under the Act in the absence of fraud. At paragraph 51 she had this to say:

*“Sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud”.*

*“In the absence of fraud, an absolute interest remains vested in a registered proprietor. All rights, estate and interest prevail in favour of the registered proprietor. Harley Corporation being registered as the proprietor of the land holds a legal interest therein which can only be defeated by proof of fraud.”*

[96] Further in the case **Thomas Anderson v Monica Wan** [2020] JMCA Civ. 41 at paragraph 37 the court stated that:

*“Section 70 makes it plain that fraud is the principal exception to the indefeasibility of title secured by section 68. Fraudulent conduct on the part of the registered proprietor therefore defeats a registered title.”*

### **What must be proven in order to establish Fraud**

[97] In the case of **Timber Company Limited** [1926] AC 101 by Salmon LJ, at page 106 had this to say

*“Now fraud clearly implies some act of dishonesty. Lord Lindley in **Assets Co. v. Mere Roihi** (2) states that: ‘Fraud in these actions’ (i.e., actions seeking to affect a registered title) ‘means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.’”*

[98] In the Privy Council case of **the Assets Company v Mere Roihi and ors.** – [1905] UKPC,11. at pages 27 & 28 of that judgment, Lord Lindley, on behalf of their

Lordship outlined what the Claimant must prove in order to establish fraud. He said:

*“fraud in these Acts is meant actual fraud, i.e dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon”.*

[99] Additionally, in the case of, **Harley Corp. Guarantee Inv. Co. Ltd v. Daley (Rudolph) et al and RBTT Bank Ja. Ltd v. Daley (Rudolph) et al**; Harris JA at paragraph 60 stated that:

*“Fraud for the purposes of sections 70 and 71 of the Act must be born out of acts which are “designed to cheat a person of a known existing right” - see Waimiha Sawmilling Company v Waione Timber Co; Bannister v Bannister [1948] 2 All E.R 133 and Binnons v Evans [1972] Ch 359. It is clear that, as shown in Asset Company Limited v Mere Roihi (1905) AC 176, 210, acts founded on contrived ignorance or wilful blindness would be such acts arising out of constructive or equitable fraud.”*

## **Submissions**

[100] Counsel for the Claimant made the following submissions on this issue:

- i) It is admitted that legal title can only be challenged by fraud. If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent. Fraud will no longer be imputed to a proprietor registered under the

Act unless some consciously dishonest act can be brought home to him. (She relies on the cases of ***Allison, Violet v Lawrence-Johnson, Josephine & Cousins, Patrick*** [2019] JMSC. Civ 149; ***Gardener & Ors v Lewis*** [1998] 1 WLR 1535; ***Sawmilling Company Limited v Waoine Timber Company Limited*** [1976] A.C. 101)

- ii) To prove that the signatures on the receipt dated the 23<sup>rd</sup> of August, 2002, Instrument of Transfer and the Agreement for Sale dated March 30, 2004, were forged the Claimant relies on the expert evidence of Mr William Smiley. Mr Smiley concluded that the questioned signatures do not identified with known signatures. That is, the questioned and known signatures were written by different authors. The Defendant has offered up no evidence to refute the findings of Mr Smiley. At no time during the Defendant's written or oral testimony did he say that he saw the Claimant affix his signature to any of these documents. The Defendant could not speak about any of the signatures on the said documents, including his own. Of particular note, the Defendant could not even inform this court who witnessed his signature on both documents.
- iii) In respect of the signature of the person who witnessed his signature, the Defendant said that while he went to an Attorney's office who he knows only as Mr. Young for legal advice, he cannot say if that was Mr. Young's signature. He cannot say who witnessed his signature. The agreement for sale upon which the Defendant relies for the indefeasibility of his title states that the Attorney with carriage of sale is Scott Bhoorasingh & Bonnicks, but it was admitted by the Defendant that he never carried the documents or any money to the firm of Scott Bhoorasingh & Bonnicks.
- iv) He admitted that he was the person who lodged the agreement at the stamp office and paid the duties assessed. He even admitted that he carried the disputed document to a certain person instead of processing the document in the usual manner. Dishonesty can be imputed by this action as if the document

was processed as it ought to have been the firm whose name appears on the document who would have been alerted of the assessment

- v) When the Defendant presented the agreement to the Stamp Office he knew, or he ought to have known, that the signature that appeared on the document was not the Claimant's. When the Defendant presented the agreement for sale to the stamp office through a "designated" person he committed fraud. This was an act of the Defendant to knowingly cheat the Claimant out of a known right and to engage in fraudulent activities. Furthermore, the fabricated receipt is a clear indication of the Defendant's dishonest actions and character. The Claimant maintains that since he did not sign the Instrument of Transfer, and had no dealings with same, then it must have been procured and secured by the Defendant, his agents/servants or he conspired with persons who are unknown to the Claimant to secure registered proprietorship of the disputed property. The falsely executed Instrument of Transfer only benefitted the Defendant. The acts of Defendant were designed to cheat the Claimant of his known existing right as a property owner.

### **For the Defendant**

[101] Ms. McBean made the following submissions on behalf of the Defendant;

- i) Where a claimant alleges that a defendant fraudulently procured a certificate of title, the legal burden of proof rests on him to prove his case and establish fraud on a balance of probabilities. There ought to be overwhelming and compelling evidence. The claimant must prove actual fraud or dishonesty. There ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud "designed to cheat a person of a known existing right" (She relies on the cases of (*Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al*; *Waimiha Sawmilling Company v Waione Timber Co*; *Bannister v Bannister* [1948] 2 All E.R 13[1972] Ch 359; *Asset Company*

**Limited v Mere Roihi (1905) AC 176, Linel Bent and Linel Bent v Eleanor Evans)**

- ii) The Claimant has not proven a case of fraud against the Defendant. This is so because the Defendant acquired the property through legitimate means.
- iii) The Court over time has balanced evidence presented by experts and has rejected such evidence where appropriate. (She relies on the case of **Clarke v. Beckford et al JM 1993 CA 33**). One's signature changes over time. The fact that the expert found that the signature contained on the receipt dated August 23, 2002, is not that of the Claimant clearly supports that fact. The expert himself under cross examination indicated that there were variations in the Claimant's signature. The court remains at a disadvantage as the documents used by the expert to form his report was not submitted as part of his evidence, as such no inference can be drawn from the various specimens. The court is being asked to reject the evidence given by the expert as there are more compelling evidence before this tribunal. (She relies on the case of **Fuller v Strum [2000] All ER (D) 2392**)
- iv) The Defendant reiterates that the Claimant has not made out a case of fraud against him. The court is being asked to accept that after receiving payment, the Claimant signed the instrument of transfer and handed the original Registered Title to the Defendant to complete the transfer process and to reject the Claimant's contention that the title was handed to the Defendant to take to his (the Claimant's) Attorneys-at-Law. That version seems all too convenient.
- v) The contention made by the Claimant should be rejected, that he waited for over a decade to enforce the contract between himself and the Defendant, all while, the Defendant rented the property to third parties and has been exercising all acts of ownership during the period. The Claimant has not presented the court with overwhelming and compelling evidence of fraud

against the Defendant. He has therefore failed to discharge his legal burden and evidential burden. The Court need not look beyond the receipt dated August 23, 2002, to find that there was a legitimate sale and transfer of property between the Defendant and the Claimant. The Claimant therefore must fail in his attempt to establish that the Defendant obtained the property through fraudulent means. Further, the Claimant must fail in his claim against the Defendant for breach of contract for the sum stated, as the contract is statute-barred.

### **Discussion**

[102] In light of the foregoing authorities, in order to defeat the transfer of the title of Defendant the Claimant must prove that the title was transferred by fraud of which the Defendant had knowledge. That is, even if he did not himself commit the fraud, it was with his knowledge and for his benefit. Therefore, the Claimant must prove on a balance of high probabilities that it was by virtue of some act of dishonesty on the part of the defendant or for his benefit and with his knowledge that the title was transferred to him. The evidence adduced to establish such fact must be clear, cogent, indisputable and conclusive, (See ***Maureen Beverley Simpson (Executor of Estate of Winnifred Simpson) and Anor v Ronald Simpson and Anor*** [2021] JMCA Civ. 31; ***Sunshine Dorothy Thomas v Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus Brown, deceased) et al*** [2015] JMCA Civ 22, ***McCormick v Grogan*** (1869) LR 4 HL.)

[103] The contention of the Claimant, Mr. Fagan is that the Defendant whether by himself or through his agent forged, or caused the forgery of Claimant's signature on the Sales Agreement and Instrument of Transfer, and uttered these documents, causing them to be lodged at the Stamp Office and the National Land Agency, to enable the transfer of the subject property to the Defendant. The Defendant, Mr. Perry, on the other hand is contending that the Claimant's signature was not forged on these documents but that they were duly signed by him.

- [104]** Additionally, Mr. Fagan's evidence is that he was not in the country in March of 2004, the time when the Agreement for Sale and Instrument of Transfer were signed. He says he left Jamaica later in the year 2002 and returned in 2011. His explanation as to how Mr. Perry came into possession of the title is that he instructed his secretary to hand the Certificate of Title to the Defendant for him to take it to his attorney at law along with the \$100,000.00. However, the Defendant contends that it was the Claimant himself who handed him the duplicate Certificate of Title for him to pay the necessary duties and to do the registration of the transfer.
- [105]** The passport produced by Mr. Fagan was issued in 2005. This he said was issued while he was in Canada. It does indicate that he landed in Jamaica in November 2011 but does not indicate a departure date. However, if this passport was in fact issue while out of the Island that is in Canada, I would not expect to see a departure date recorded in it. However, the fact that there is no landing date recorded in this passport in another country it is reasonable to infer that, Mr. Fagan, left the island prior to the issuance of this passport in 2005.
- [106]** It is also a reasonable inference that prior to the issuance of the passport in 2005 and November 2011, Mr. Fagan was not in the island. Additionally, Mr. Perry is insisting that Mr. Fagan was in fact in the island in August 2002 and in March 2004 and that it was he who signed the August 2002 receipt and the instrument of transfer and agreement for sale in March 2004. However, Mr. Perry has not denied that it was he who caused the said documents to be lodged at the Stamp Office and the National Land Agency to enable the transfer of the property to himself.
- [107]** Mr. Perry has also not denied that the instrument of transfer No. 1309331 was registered by the Registrar of titles on the 15th day of July 2004 on the said Certificate of Title, registered at Volume 1333, folio 804, transferring the title from Mr. Fagan to himself. However, his defence is that he did so on the instructions of Mr. Fagan. The court is therefore endowed with the task of the determining which account is credible. If it is found that Mr. Fagan's account is in fact credible he would have sufficiently established actual fraud on the part of Mr. Perry.

However, if Mr. Perry's account is found to be credible Mr. Fagan would have failed to establish fraud on the part of Mr. Perry.

**[108]** I am also reminded that the Claimant is also relying on the evidence of the expert Mr. Smiley to establish that it was not his signature on the Instrument of Transfer, Sales Agreement or the receipt of August 2002. In examining the evidence of the expert I bear in mind that he, having expertise in the particular area, his evidence would normally carry some weight. I however also bear in mind that I have a responsibility to assess his evidence against the weight of all the evidence in the case to determine on a balance of probabilities whether it lends credence to the Claimant's case.

**[109]** The evidence of Mr. Smiley regarding his training and expertise has not been challenged. I accept his evidence that he has studied and was trained in Document Examination including the examination and identification of handwriting/signatures. That he has received certification in the area and has thirty (30) years of practical experience in this field.

**[110]** I take note of his evidence in chief that, having examined and compared the agreement for sale and the instrument of transfer, as also the receipt dated the 23<sup>rd</sup> of August, with the known signature of Mr Fagan, he has concluded that the signature on these document bears no resemblance to the known signature of Mr. Fagan. That they were written by different authors.

**[111]** I also take note of the details of his analysis that the known signature is consistent, though purportedly written over a number of years. That the letters are well-defined for the most part especially the capital letter 'F'. That his examination/analyst included, but was not limited to factors such as space, speed, size, and stroke.

**[112]** As it relates to his comparison of the receipt dated February 15, 2002 and the receipt dated the 23<sup>rd</sup> of August 2002, I note his observation that the bottom loop of the letter "F" in the receipt dated February 15, 2002 appears rounded whilst on

the receipt dated the 23<sup>rd</sup> of August 2002, it is triangular, that the loops of the letter “F” in the signature on receipt dated February 15, 2002 appears smaller than those on the other receipt; That the signature on receipt dated February 15, 2002 appears to take up more space horizontally, and has what appears to be more letter/strokes than the other signatures.

- [113]** It is his opinion that the signatures do not appear to have been written by one and the same person, that is, the signatures appear to have been written by different authors. Additionally, I take note of his evidence on cross-examination., that he agrees that the F in the Claimant’s signature on the Claim form filed the 18<sup>th</sup> of June 2015, as also on the Particulars of Claim was not triangular but elongated, and that he agrees that was different from a rounded loop. I note also that he says that in comparing these signatures with the signature on the receipt dated February 15, 2002 he would agree they are variations of Mr. Fagan signature and that all variations are significant.
- [114]** However, I also take note of his evidence that he does not see any similarity between the signatures on the Claim Form and the Particular of Claim with the signatures on the Questioned Documents. I also take into account his evidence that he cannot give a conclusive answer as to whether it is possible that the signatures on the Agreement for Sale and the Transfer could be a variation of Mr. Fagan’s signature because he did not have the original documents.
- [115]** Nonetheless, as I have previously indicated, I do not assess the evidence of Mr. Smiley in isolation but I assess it against the weight of the other evidence in this case. In addition to the variations admitted to by Mr. Smiley, which I have observed with my own naked eye, I observe not slight but significant variations in the signature of Mr Fagan in other documents filed in the Claimant’s case.
- [116]** In the Claim Form dated 16.6 15 there is no loop at all in the F. On the Particulars of Claim dated the 19.7 2019, the loop in the F is wide and appears to be triangular in shape. On the Exhibit Sheet dated the 20<sup>th</sup> of January 2021 the F has no loop

at all. In his statement dated the 2<sup>nd</sup> of June 2023 the loop is narrow and elongated. Consequently, based on my own observation Mr. Fagan's signature lacks consistency.

[117] Therefore, in light of my own observations and the inclusivity of the conclusion of the expert on cross-examination I have determined that I will not rely on the evidence of the expert Mr. Smiley, that the signature on the challenged documents do not appear to be that of Mr. Fagan. In this regard I have to determine that this issue, in light of my own observations, and the other evidence in the case. Essentially, I will examine the other evidence in the case to determine the credibility of Mr Fagan's assertions that he did not sign the challenged documents.

[118] I will first analyse the evidence as it relates to receipt dated the 23<sup>rd</sup> of August 2002 as this will also determine the issue as to whether Mr. Perry had concluded payment under the contract.

**Whether The Claimant has proven that his signature on the Receipt Dated the 23<sup>rd</sup> of August 2002 was forged.**

[119] I have already determined that at some point prior to 2005 and November 2011, Mr Fagan was not in the island. He said he left the island in 2002 and returned in 2011. However, considering the fact that in his evidence he said he entered into the oral in September 2002, from his own evidence he has admitted that up until September 2002 he was still in the island. Therefore, he would have had the opportunity to sign the receipt dated August 23<sup>rd</sup> 2002.

[120] Additionally, in the Particulars of Claim filed with the Claim Form in 2015 Mr. Fagan not only admitted that the Defendant paid the \$900,000 but that it was done in two instalments. Notably also, is that in that particular pleading, he sought to rely on the receipt of the 23<sup>rd</sup> of August 2002 as evidence of those payments. This is a clear contradiction with his subsequent pleadings and evidence in court. This

contradiction has not been explained or cleared up by Mr. Fagan. Essentially his attempt to correct this later in the Further Amended Particulars of Claim dated July 19<sup>th</sup> 2019 without any plausible explanation points directly to an attempt to disguise the truth.

[121] Accordingly, I find that there was a previous admission by the Claimant that he is the author of the receipt dated the 23<sup>rd</sup> of August 2002. As such I find that the evidence weighs in favour of Mr. Perry paying the full purchase price under the contract and that the signature of Mr. Fagan on that receipt was not forged.

### **The other Documents**

[122] The cases have indicated that where the tort of fraud is advanced the court must require clear evidence of it. It is also said that a court when considering a case of fraud in a civil matter should, require a higher degree of probability than in a case of negligence (See *Hornal v. Neuberger Products Ltd.* (1957) 1 Q.B. 247; *Horizon Resorts Services Ltd, Norma Lee-Haye and Jackson C. Wilmot vs. Ralph Taylor* Suit C.L. H 176 of 1996.) *Jones J. in Oman Ltd. v Bevad Ltd.* Suit C.L. 009 of 2002 (delivered 15/11/2005).

[123] However, having found that the receipt of August 23,2002 was issued by the Claimant, I will state at this juncture that on my analysis of the evidence, and having observed the parties' demeanour, I have found that both the Defendant and the Claimant have not been forthright and truthful in their dealings with each other.

[124] In spite of the fact that, due to the significant variation in the Claimant's signature, and my rejection of his evidence regarding his denial of signing the receipt of August 23,2002, I hold a contrary view regarding the preparation and signing of the Instrument of Transfer and the Agreement for Sale. The law recognizes that fraud can be proved from circumstantial evidence just as well as it can be

established by direct evidence. Nonetheless that proof must be by the clearest and most indisputable evidence (See **McCormick v. Grogan** (1869) L.R. 4 H.L. 82).

- [125] As regarding the aforementioned documents, I find that there is cogent clear indisputable evidence of the Defendant's conduct that points to acts of forgery, with an attempt to deceive the Registrar of Titles. I now highlight the aspects of the evidence that support these findings. I commence with the purchase price in the Agreement for Sale. This is stated as \$500,000. Mr. Perry says he noticed that the Agreement for Sale had the sum of Five Hundred Thousand Dollars (\$500,000.00) instead of the sum of Nine Hundred Thousand Dollars (\$900,000.00), but against his better judgment he signed same and did not question the reason. I find that this account lacks credibility. If Mr. Fagan personally handed him the Sales Agreement, he and Mr. Fagan being friends for many years, I find it quite incredulous that he would sign the Sales Agreement without questioning his friend about the contract price which was grossly understated in comparison to the amount that he paid.
- [126] Additionally, I have identified another inconsistency in the evidence as regards the Sales Agreement for which Mr. Perry has not provided an explanation. The agreement for sale is dated the 30<sup>th</sup> of March 2004, yet the date for completion is stated as the 30<sup>th</sup> of November 2002. He has not indicated why he would have signed the Sales Agreement, handed him to by Mr. Fagan without demanding an explanation for these glaring contradictions.
- [127] Moreover, Mr. Perry's evidence is that he and the Claimant executed an Instrument of Transfer that was also prepared by the Claimant's Attorneys-at-Law. Observing the said Sales Agreement, the body of it does indicate that the Attorney-at-law with the carriage of Sale was Scott Bhooransingh and Bonnick. However, looking at the Agreement for Sale with naked eye I observe that the last letters in the signature of attorney at law spell: "Young".

**[128]** Mr. Perry also admits that the signature on both looks alike. He says, Mr. Fagan filled in all the documents and brought them to him and said “go and get your title now”. He also says that he did not go in front of any body and signed. In essence here is Mr. Perry, admitting that he knowingly signed a document where his signature was not really witnessed as indicated on the document, because the witness would have affixed his or her signature outside of his presence, prior to him signing the document.

**[129]** Additionally, in his evidence on re-examination, Mr. Perry testifies that he cannot remember if when he got the documents Mr. Fagan’s signature was already there or not on the documents He also says he cannot remember if Mr. Fagan had already signed when he took these documents to Mr. Young. However, this is inconsistent with his evidence on cross-examination that Mr. Fagan filled in the documents, gave them to him, saying, “go get your title now” and walked away. This points to Mr. Perry’s lack of credibility.

**[130]** Furthermore, based on Mr. Perry’s version, Mr Fagan did not handle the documents after he handed them to him and walked away. He admits that he took the documents to a Mr. Young. While Mr. Perry admits that Mr. Young handled the documents in his presence, there is nothing on the evidence that connects Mr, Fagan to Mr, Young, the name that appears as the signatory on the instrument of Transfer and the Agreement for Sale.

**[131]** Consequently, I find that these amount to clear cogent evidence pointing to the fact that it was Mr. Perry who procured the signature of the witness” Young” on the Instrument of Transfer and the Agreement for Sale. As such, I find that there is clear cogent evidence for me to accept the evidence of Mr. Fagan that he had nothing to do with these Documents. He did not hand them to Mr. Perry, and he did not sign them. I so accept his evidence and reject the evidence in Defence of Mr. Perry on this issue. Accordingly, I find that it was Mr. Perry who knowingly procured what is purported to be Mr. Fagan’s signature on the said documents.

**[132]** Whereas, in this case, Mr Perry, by virtue of completing his obligations under the contract would have had an acclaim to an equitable right in the property, that extended only to be enforced by legal mean against the title. However, in spite of him having that right, he knowingly sought to enforce it by illegal means. That is the forgery of the signature of Mr. Fagan with an intent to deceive the Registrar of Titles that they were the authentic signature of Mr. Fagan, facilitating the transfer of the title to himself.

**[133]** Therefore, assessing the totality of the evidence, I find that Mr. Fagan was not convincing in his evidence that he did not receive the balance of the \$100,000 from Mr. Perry. I find him to be untruthful in his evidence that he did not sign the receipt dated August 23,2002. However, I find his evidence that he did not sigh the instrument of Transfer or The Sales Agreement more convincing.

**[134]** In spite on the inconclusiveness on cross examination of the evidence of Mr Smiley that he cannot say if the signature on the Transfer or the Agreement for Sale were variations of Mr. Fagan's signature; and my own observation of the variations in his signature; I find that the other evidence that I have highlighted; lead me to conclude that Mr. Fagan's signature on the Sales Agreement and the Instrument of Transfer were forged which amounts to actual fraud.

**[135]** However, I find that this was not with an intention to defraud Mr. Fagan, as having paid the full purchase price Mr. Perry was entitled to enforce the contract and have the title legitimately transferred to him. However, I find that Mr. Perry's conduct was with an intention to deceive the Registrar of Titles that Mr. Fagan consented to the transfer by signing it. That is, instead of choosing the legal route to enforce his right under the contract he chose to do so acts of forgery.

**[136]** Therefore, I find that on a balance of probabilities the Claimant has proven that Mr. Perry caused the title registered at Volume 1333 Folio 804 to be transferred to himself by actual fraud. I find that Mr. Perry caused the forged documents to be submitted to the Stamp Office and the Land Agency, for the title to be transferred

to him. I find that he did so knowing that Mr. Fagan had not consented to this by signing. On that basis I have to conclude that the transfer was occasioned by actual Fraud

### ***What is the Status of the Contract***

[137] Counsel for the Defendant submits that any action under the contract is Statute Barred. Counsel for the Claimant submits that the contract is unenforceable on the basis of its illegality

### **Is the contract Statute Barred?**

[138] I have no evidence before me as to the precise date that Mr. Perry gave up possession of the premises. However, I find on the evidence that up to 2012 Mr. Perry was treated by Mr. Fagan as a purchaser in possession of the property under an oral agreement for sale. He never made any attempt to collect rent and never exhibited any concern about Mr. Perry's occupation because he knew he had paid the full purchase price. What spurred him into action was the discovery that Mr Perry had caused the transfer to be effected without his knowledge and consent.

[139] Additionally, there is no evidence before me that prior to 2012 either party sought to make time of the essence. The general principle of law is that if neither party makes time of the essence, then time is not of the essence (See ***Rainen v Miles and Anor.*** [1980] 2All ER 145). Another applicable principle is that time does not run against a person who is in possession of land which is subject to an equitable remedy. (See (see ***Parker v Taswell*** (1858) De G & J 559, 571; 44 ER 1106 and ***Leiba v Thompson*** (1994) 31 JLR 183, 189D-E) and restated by Brooks JA in the case of ***Leo Hogg v Neville Evans*** [2024] JMCA App 22.

[140] Consequently, I find that action under the oral agreement would not be statute-barred.

### **What is the effect of the Illegality on the contract?**

[141] The maxim, “*ex turpi causa non oritur actio*” dictated by Lord Mansfield in the case of ***Holman v Johnson (1775)*** 1 Cowp 341 is a well-known principle of Law that,

*“... No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”*

[142] In the case of an ***Arbitration Between Mahmoud and Ispahani*** [1921] 2 KB 716, the court appears to make a distinction between a contract that is void ab initio based on illegality and contracts which are entered legally but a party employs acts of illegality in the performance. Scrutton at page 729 said;

*“ ... If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract. ...In my view the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract. The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That in my view does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition...”*

[143] Additionally in the case of **Archibald (Freightage) Ltd v Spanglett Ltd** [1961] 1 QB 374; The parties entered into contract for the shipping of a consignment of whisky to London. The shippers were not in possession of the required licence for the transportation vehicle. This was not known to the Claimant. The shippers failed to deliver the consignment of whiskey as it was stolen. The Claimants sued for breach of contract. In their defence, the shippers contended that the contract was illegal and could not be enforced. Therefore, the Claimants were not entitled to damages.

[144] However, the courts held that the contract which was to ship a consignment of whiskey was not illegal. Nonetheless, the method of performance that is, the use of the transportation without the required licence was found to be illegal. It however found that due to the fact that the claimants were unaware of the illegal method of transportation they were entitled to enforce the contract, and claim for damages.

[145] In the instant case the contract is one that could be performed lawfully, but the Defendant, Mr, Perry elected to effect the completion unlawfully, without the knowledge of the Claimant. Accordingly, I find that whereas the Claimant could have opted to enforce the contract the Defendant cannot plead the illegality.

[146] There is no doubt that the illegality of fraud is one of a very serious nature, that the court cannot condone. Indeed, I cannot sympathize with the position Mr. Perry placed himself in, despite my findings that he had completed payment under the contract. As such I find that, in light of the serious nature of the illegal act on the part of Mr. Perry, to hold that Mr. Perry can now enforce the contract, would be tantamount to treating with the act of forgery which is considered to be a criminal offence, lightly.

[147] In light of that, by virtue his illegal act Mr. Perry would have rendered the contract that was created legally, for a legal purpose voidable. Mr. Fagan in initiating this action is choosing to terminate the contract, in essence treating it as void

#### **Whether the Claimant is entitled to Damages/ Mesme Profit**

[148] Mesne profits serve as a remedy for a party who has been deprived of the use of their property as a result of wrongful possession. Such profits should reflect the fair rental value of the property during the period of unlawful occupation. (See *Persad v Singh* [2017] UKPC 3; *Joseph Horsford v Lester Bird and others* [2006] UKPC 3,) Therefore the Claimant must provide sufficient evidence of the rental value and the period of wrongful possession in order to succeed

[149] Mr. Fagan claims that he is entitled to recover compensation from the Defendant for the damages which he suffered as a result of being out of possession of the property from the 15<sup>th</sup> day of July 2004 to the 31<sup>st</sup> day of March 2017. Mr. Perry has pleaded that he paid the full purchase price for the property and that Mr. Fagan was not entitled to the return of the title. It is my view that Mr. Perry is laying claim to the subject property not only by virtue of the transfer of the legal title which I have declared invalid but also by his full performance under the oral contract.

[150] Despite Mr. Perry not making specific reference to the concept of unjust enrichment it is my view that his evidence refers to the fact that the Claimant has been enriched by his payment of \$900,000. That the enrichment was at the expense of Mr. Perry the Defendant; and thirdly, that the enrichment was unjust. Mr. Fagan would have received the full benefit of Mr. Perry's payment of the full purchase price under the oral contract, as such it would be unjust for him to retain title, purchase price, and in addition to be awarded damages. (*See the case of Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd [2023] UKPC 26*)

[151] In essence, in the instant case, there are two doctrines that are at play. The doctrine of unjust enrichment and the doctrine that the court does not sit to enforce an illegality. It is now for the court to resolve the issue fairly, in the interest of justice.

[152] So whereas the court cannot endorse the fraudulent transfer of the property based on illegality, Mr. Fagan received the full purchase price, and by his conduct accepted and treated Mr, Perry as Purchaser in possession whom he allowed to treat with the property as the equitable owner. That is with the exception of the illegal transfer of the title, Mr. Perry's occupation and benefit from the property was agreed to by Mr. Fagan. That is, he exhibited no concern or indication of being deprived of any benefit until 2012 in circumstances where he was well aware that the Defendant was in possession of and treating the property as his own. The conduct I refer to is he not seeking to collect any rent, any further payment under

the contract, nor seeking recovery of possession, or in anyway exercising any right to the subject property until 2012.

**[153]** Consequently, it is my view that the transfer of the legal title from the Claimant to the Defendant by an act of Forgery, despite being an act that will not be condoned by this court did not deprive the Claimant of any financial benefit that he would have been otherwise entitled to.

**[154]** As such as it relates to question of Damage I find that the Claimant is not entitled to damages as the Defendant had paid the full purchase under the contract from which he benefitted, bearing in mind it he who delayed the completion of the contract. That is, the execution of the transfer to the Defendant. Therefore, to allow him to benefit from occupation rent, having had the benefit of the full purchase price from 2002, to my mind would amount to unjust enrichment.

## **FINDINGS**

**[155]** In light of the foregoing, I make the following Findings

- I. I find that The Claimant and the Defendant entered into a valid contract in February 2002 whereby the Claimant agreed to sell Property Registered at Volume 1333 Folio 804 at the Registered Book of Title to the Defendant for the sum of \$ 900,000 with a completion date of 10 months from the 15<sup>th</sup> of February 2002.
- II. I find that the Defendant made payment of \$900,000 to the Claimant, being the full contract Price.
- III. I find Defendant fraudulently procured the signature of the Claimant on the instrument of transfer bearing registration number 1309331.
- IV. I find that the Defendant Fraudulently uttered and caused the said instrument of transfer to be registered on Certificate of Title registered at volume 1333

Folio 804 at the registered Book of Titles to registered in the name of the Defendant

- V. I find that the Claimant has failed to prove that he suffered any damage from the Fraudulent Transfer.
- VI. I find that The Defendant is entitled to the return of the purchase price of \$900,000.
- VII. I find that the Defendant is not entitled to interest on the purchase price as at no time did he make time of the essence, and he also benefitted from his occupation as purchaser in possession as during the period he collected rental from the premises.

[156] On my complete evaluation of the evidence I enter judgment for the Claimant as follows;

### **DECLARATIONS**

- (i) I declare that the Defendant fraudulently procured the signature of the Claimant on the instrument of transfer bearing registration number 1309331
- (ii) I declare that the Defendant Fraudulently uttered and caused the said instrument of transfer to be registered on Certificate of Title registered at volume 1333 Folio 804 at the registered Book of Titles to be registered in the name of the Defendant

### **ORDERS**

[157] I Make the Following Orders

- (i) The Claimant was entitled to have the title registered at volume 1333 Folio 804 at the registered Book of Titles in the name of the Defendant cancelled and a new title issued in his name.

(ii) The Claimant is not entitled to Damages.

(iii) The Claimant is not entitled to retain the purchase price of \$900,000.00

(iv) The Claimant to repay to the Defendant the purchase price of \$900,000.00.  
To be paid on or before the 30<sup>th</sup> of March 2025.

(v) In light of the fact that the Claimant has succeeded on only part of his Claim the Defendant is to pay to the Claimant 50% of the Claimant's cost, which is to be agreed or taxed.

**A. Thomas  
Puisne Judge**