[2024] JMSC Civ 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 01093

BETWEEN	**NORTHGATE ENTERPRISES LIMITED**	**CLAIMANT**
AND	**VERONICA ARIS**	**1ST DEFENDANT**
AND	**VALNIE GORDON**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Katherine Minto instructed by Nunes, Scholefield DeLeon & Co for the Claimants

Mr. Garnett Spencer instructed by Robinson Phillips & Whithorne for the Defendants

Heard: December 19, 2019, July 8, 2021 and November 1, 2024

Interpretation of a Contract – Lease between initial tenants later assigned to Claimant – after death of landlord Claimant sought to exercise option to purchase – land occupied by the Claimant is larger than what is described in the lease – Construction of the term of the lease – Error in Contract – Whether business efficacy is a suitable method in interpreting contracts where an existing interpretation leads of an absurdity – Whether the Court should rectify the contract to reflect the true intentions of the parties – Specific performance – Damages

D. PALMER, J

Background to Claim

[1] The Claimant is a company based in St. Ann. It also operates a religious/charity organization known as “Northgate Youth and Family Development Foundation. The Defendants are executors of the estate of Lionel Aris (the deceased). This claim arose from a dispute between the Executors of the estate of Lionel Aris (the Claimant's landlord), and the Claimant, Northgate Enterprises Limited. The Claimant became the Assignee of the remaining 23-year term of a long lease of premises at White River, in the parish of Saint Ann on November 4, 2011. From all indications, the dispute arose after the death of Lionel Aris, the Claimant’s then landlord and the Claimant’s case is that there was no dispute during the life of Mr. Aris. The claim arises from an Option to Purchase exercised by the Claimant pursuant to the lease agreement between the Claimant and the deceased, about the said White River property, registered at Volume 1201 Folio 859 of the Register Book of Titles (“the property”). According to the Claimant, it was the Defendants’ duty, pursuant to the terms of lease agreement, to have a sale agreement prepared and submitted to the Claimant for its execution. According to the claim, the Defendants have failed to act on and/or specifically perform the said Option to Purchase by completing the sale, notwithstanding numerous written and other demands from the Claimant.

[2] By claim filed on May 31, 2017, the Claimant sought the following orders/declarations:

1. *A Declaration that the Claimant has validly exercised an Option to Purchase [the property], as prescribed by the lease agreement between the Claimant and LIONEL ARIS, deceased.*

2. *An Order directing the Defendants to specifically perform the aforesaid Option to Purchase by taking the necessary steps to complete the agreement for sale between the parties in the manner set out below, and/or in the manner required to have a certificate of title issued in the Claimant's name.*

3. *An Order directing the Defendants to submit to the Claimant within seven (7) days of the date hereof, an Agreement for Sale … for the Claimant's execution, in respect of [the property] which was leased to the Claimant, and for which the Claimant has exercised an Option to.*

4. *An Order that the Registrar of the Supreme Court be empowered to execute any and all documents necessary to complete the sale and transfer of [the property], in the event that the Defendants fail or neglect to do so.*

5. *A Declaration that the Pre-Checked Plan Numbered 354506 which was prepared by Rixon E. Richards Commissioned Land Surveyor at the instance of LIONEL ARIS, and based on a survey which was conducted in the presence of LIONEL ARIS, represents the portion of land which was leased by LIONEL ARIS to the Claimant, and for which the Claimant has exercised an Option to Purchase.*

6. *A Declaration that the Pre-Checked Plan Numbered 354506 which was prepared by Rixon E. Richards Commissioned Land shall be appended to the Agreement for Sale at Order (3) herein and shall be used in the description of the property as set out, in the said agreement.*

7. *Damages for breach of the said Option to Purchase, Lease Agreement, and/or Agreement to sell.*

8. *Interest at such rate and for such period as this Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act*

9. *Liberty to Apply.*

10. *Attorney's Costs.*

11. *Such further and/or other relief as the Honourable Court deems just*

AMENDED PARTICULARS OF CLAIM (FILED MAY 27, 2019)

[3] In its particulars of Claim, the Claimant stated that the original lessees, Richard Toyloy and Melanie Yap-Shing entered into a written lease with Lionel Aris on or about May 27, 2009 ("the assignors"). Mr. Aris agreed to lease the property to the assignors for a period of twenty-five (25) years. According to the Claimant's case, there was no dispute between the deceased and the assignors as to the physical boundaries of the leased premises, and Mr. Aris made no objection (written or otherwise) to the area and/or size of the said property. The Claimant's position is that in view of the absence of any objection by Mr. Aris, the Defendants are estopped and precluded by their conduct and that of the deceased from seeking to do so now.

[4] Although the leased premises had not been surveyed as at the time of the lease and the exact measurements remained uncertain at that date the parties were able to identify, and indeed recognized, acknowledged and accepted the leased premises and its physical boundaries as it existed "on the ground". By virtue of a release dated July 7,

2011, the deceased agreed to release the assignors from their obligations to complete the remaining term of years of the said lease and consented to the Claimant being substituted as the lessors. A formal Assignment was subsequently entered into between the Claimant and the assignors on November 4, 2011, whereby the assignors agreed to assign the Claimant the remaining term of the said lease, as well as all their estate and interest under the said lease including the Option to Purchase.

[5] According to the Amended Particulars of Claim, in reliance on clause 4(8) of the said lease, the Claimant subsequently notified the Defendants of its intention to exercise the option to purchase under the lease, and remitted two cheques in furtherance of that expressed intention in the sum of Two Million Seven Hundred Thousand Dollars ($2,700,000.00) for the option to purchase. The Claimant contends that the Defendants have rejected the Pre-Checked Plan and have not provided the Claimant with a Survey Diagram or plan that identified any errors in the pre-checked plan submitted.

[6] The Claimant contends that with the written consent and approval from the deceased, the Claimant proceeded to effect significant improvements on the leased premises, including additions to the additional building and structure. The Claimant also made extensive plans for the Development of its school based on the leased area as per the pre-checked diagram. The Claimant says it has been delayed in its building expansion project which is necessary for the growth and development of its school, which has adversely affected the projected growth in the school's population, facilities and annual income.

DEFENCE TO AMENDED PARTICULARS OF CLAIM (FILED JUNE 14, 2019)

[7] The Defendants say that during the lifetime of the deceased there were disputes between himself and the original lessees/assignors in relation to the boundaries of the said land. Further, it is to be noted the physical features of the land and the use of the remaining lands as a marker is not helpful in determining the boundaries of the land as the dispute relates to the location of the common boundaries of the leased land and the remaining lands of the deceased.

[8] They say that is not within their knowledge whether the deceased ever objected to more land being occupied by the assignors than they leased, but that does not expand the area of the leased premises beyond that described in the lease. The Defendants deny that they or the deceased have been guilty of any conduct which prevents them from objecting to the area and/or size of the property that the Claimant claims occupies as the leased premises.

[9] They assert that the Claimant's Attorney-at-law initially indicated that the area quoted in the lease should form the subject property of the sale. However, the Claimant's attorney subsequently changed course and now insists that the area in the lease should be ignored and instead the land pre-checked diagram prepared by Rixon E. Richards should be what is sold pursuant to the option in the lease and this has been the reason for the stalemate. The area of the land now occupied by the Claimant was not the area of land occupied by the assignors.

[10] The area of the land now occupied by the Claimant was not the area of the land occupied by the assignors and appears, according to the Defendants, to have expanded over time. The assignors had a survey done by Janet Taylor and presented a plan showing an area of 3,647.268 square meters (copy of diagram attached and marked "B" for identification) and the Claimant is now seeking to exercise the option to purchase in relation to 4401.449 square meters. The Defendant's position is that the Claimant's option should relate to 1,944.248 square meters, that is, the area in the lease or such greater amount of land is necessary to include the entire building on the leased premises.

[11] It is not admitted that the Defendants' refusal to submit an agreement for sale to the Claimant is a breach of contract as the area of the land to be sold is in dispute. The pre-checked diagram is not for the land contained in the lease and was not done in the presence of the deceased. It turns out that the Claimant is occupying more than twice the area leased. It is denied that the Defendants are estopped and precluded from denying that the pre-checked plan represents the leased premises.

[12] The Defendants say that the Claimant is put to strict proof that it has relied on the conduct and omissions of the deceased and the Defendants to its detriment. The 1st Defendant will further say that she does not recall signing the foot of the Claimant's letter dated April 24, 2012.

Claimant's case

Burchell James

[13] Mr Burchell James, the Claimant's main witness, is a Financial Consultant and Cost Accountant as well as a member of the Northgate Centre for Global Impact Church ("Northgate") and has provided them with administrative support since 2006. It is his evidence that in or about 2010/2011, the church had been looking to relocate and came the property which at the time was occupied by Richard Toyloy and Melanie Yap- Shing.

[14] It is his evidence that there was one single storey structure on the land which was subject of the lease and such portion was part of a larger property owned by Lionel Aris. He described the property as fenced with chain linked, barbed wire and stake fences which served to highlight boundaries. He was first shown the property by Mr. Richard Toyloy who occupied the fenced area. In cross-examination he stated that more than one walkthrough of the disputed property was conducted with Mr. Aris being present.

[15] He stated that in or around June 2011, he met Mr. Lionel Aris to verify the portion to be transferred to Northgate and to confirm details he had learnt from Mr. Toyloy, as at that time there was no survey diagram. In cross-examination he was unable to confirm when these negotiations had ended. It is his evidence however, that a plan was later tendered, prepared by Ms. Janet Taylor at the request of Mr. Toyloy, which was done before the survey for the pre-checked plan was conducted. In his cross-examination, he confirmed that the diagram showed that Mr. Toyloy and Mr. Aris were present when the survey was being done.

[16] In or around July 2011, he met with Mr. Aris and showed him the said survey diagram. He states that Mr. Aris deemed it as inaccurate as a portion to the right rear side

of the property, close to the reserve road, which was confirmed to form a part of the leased land, had been left off of the diagram. However, Mr. Toyloy had desired to retain that portion for the use of a storage container. It is his evidence that the 1st Defendant was present during these discussions.

[17] On the same occasion, he deposes, Mrs. Aris at the request of Mr Aris brought to him a Subdivision Plan and Mr. Aris had done a comparison showing him the portion that had been left off in the Janet Taylor Diagram. He was then provided with one of the eight copies of the Subdivision Plan by Mr. Aris. He indicated to Mr. Aris that it was the Claimant's intention to purchase the property.

[18] Having received the confirmation from Mr. Aris, of the portion of land subject of the lease, the Claimants entered into a twenty-two-and-a-half-year lease of the disputed property in sum of One Million Dollars ($1,000,000.00) and received a signed release and consent from Mr. Aris dated July 7, 2011 and subsequently an Assignment of Lease from Mr. Richard Toyloy and Melanie Yapp- Shing dated November 4, 2011. The Claimant took possession in late 2011. In cross-examination he stated that at the time of the conclusion of the lease, the Claimants had a subdivision plan and two survey diagrams, and the land was described as being more than 3000 square meters but less than 4000 square meters.

[19] In cross-examination, he gave evidence that the lease included a description of the property, however the measurement of 1944. 248 square meters, though within the contents of the lease was not included in the description of the property. He went on further to depose that the description did outline that the premises was bound southerly and easterly on lands owned by Mr Aris, and expressed that there was no issue identifying those boundaries without the measurement being involved in the description as the Claimants sought to ascertain the size of the land, and Mr. Aris was able to supply them with that information.

[20] It is his evidence that shortly after taking possession, the Claimants received permission to build from Mr. Aris, he stated that the expansion was done on the reliance

that Mr. Aris was aware of their intention to exercise their option to purchase. However, if the option was not exercised there would be no recourse for the construction done.

[21] His evidence is that they sought to ascertain whether Mr. Aris would be ready to complete the transfer and he had admitted that he had not received subdivision approval, but was able to get title for another portion of land based on a pre-checked plan. It is his evidence that they were provided with a Pre-checked plan numbered PE354506, and based on their discussion with Mr. Aris it was to be used for the sale. According to his evidence, Northgate wrote a letter dated April 24, 2012 confirming receipt of the plan and expressing an intention to exercise the Option.

[22] In cross-examination, he gave evidence that what became the leased property was what was contained in the pre-checked plan Mr. Aris had given to them, which was more than what Mr. Toyloy and Ms. Yapp- Shing had agreed to lease. He stated that it was the Diagram of Mr. Toyloy they had relied on and they had always maintained that the additional portion of land was neither here nor there. However, the Diagram he had been shown by Counsel, he described it as the document they received from Mr. Aris. Thereafter, they submitted an application for Building Approval which was executed by both Mr. and Mrs Aris along with the title and pre-checked plan to the parish Counsel.

[23] It was revealed by Mr. James in cross-examination that they received preliminary approval and began their construction, and they now seek damages for the loss suffered from their inability to complete the buildings due to the dispute, which consequentially affected their obtaining final approval. He deposes that they had never submitted to the municipal counsel in relation to the development of the entire land because of the dispute.

[24] According to Mr. James, they began development of the building into a L-shaped structure and the expansion was observed by Mr. Aris, as he was on the site almost daily. Mr. Aris made no objections about them encroaching or occupying more than their leased area, save from one instance regarding a drain installed beyond their boundary, which was removed. In cross-examination he also described what was done as a modification of the existing building which they did until they obtained approval for the new building.

[25] In early April 2012 they expressed their readiness to exercise the option to purchase. After numerous attempts at securing a meeting with Mr. Aris and his Attorney they met and were told that they were required to pay the sum of Twenty Seven Million Dollars ($27,000,000.00) in exercise of the option as they had missed the first option stage by 2-3 days. Mr. James explained that they disputed that the delay in commencing discussions was not on their part, but on the part of Mr. Aris' Attorney, but revealed in further cross-examination that the option to exercise was not put in writing. He stated that Mr. Aris remained adamant and his Attorney insisted that they should have exercised the option in writing and submitted the deposit before the meeting. The Claimant proceeded to exercise the option as required, but, Mr. James lamented, Mr. Aris passed away and the issues with the property began.

[26] He stated that subsequent to Mr. Aris' death, Mrs. Aris and her brother met with him and Mr. Boynes, when Mrs. Aris communicated that the Claimant should purchase the property for more than $27,000,000.00 because of the many activities and improvements which they had done to it as the church had the resources to do so. Mrs. Aris later raised an issue about the strip of land left out of the Taylor diagram, stating that it did not form part of the leased premises and they were to pay separately for it. He asserted that he reminded her that it had been included in the pre-checked plan and the subdivision plan. Mr. James deposes, that there had been a shooting on the property and Mrs. Aris then asked them to clear the said portion she had claimed not to be a part of their leased premises due to security concerns. It is his evidence that he was aware of Mrs. Aris taking a surveyor on to the property but a diagram was never tendered.

[27] According to Mr. James, on April 8, 2015, the Claimant exercised its option to purchase the leased premises. At the meeting with the Defendants' Attorney-at-Law on or about April 21, 2013, they were notified that the option had not been properly exercised as the deposit was not paid in full. After receipts of the cheques paid for the deposit were confirmed, however, the Claimant was advised that the option could only be exercised in respect of 1944.248 square meters of land as was specified in the lease.

[28] Mr. James deposes that this issue had never been raised before despite several meetings with Mr. and Mrs. Aris about purchasing the property. According to Mr. James, it had been clear to him that during the course of the negotiation the leased portion had never been surveyed and therefore the lease did not contain the exact measurements and he had done his due diligence in going directly to Mr. Aris for verification.

[29] In his evidence he lamented that the pre-checked plan supplied to them by Mr. Aris was signed by the Survey Department and was of the leased premises. The overt actions of Mr. Aris, all of which Mrs. Aris was aware of, conveyed the clear position that the measurement contained in the lease was not an issue. He gave evidence that they were assured that a title could be issued based on the pre-checked plan as they were concerned that Mr. Aris would not be able to complete the sale in a timely manner.

[30] It is his evidence that Mr. Donaldson remained adamant that the measurement was 1944.248 square meters and that the Claimant had to pay for anything above that measurement. Despite their attempts at writing to Mrs. Aris' Attorneys, and having Mr. Toyloy get involved, it proved futile, and the sale remains incomplete. This, he asserts, has resulted in the school suffering significant loss. It is his evidence that if they had effected the expansion they would have increased their cash flow and liquidity.

[31] It is his evidence that due to the Defendants' failure to act, there has been an increase in construction costs over the period, as in 2019 the cost of construction would have increased by approximately 35% since 2015, which is an estimated Ten Million Five Hundred Thousand Dollars ($10,500,000.00), they have suffered loss of income as they were not able to add required classrooms, to the sums of Twenty-Six Million Dollars ($26,000,000.00). Interest rates are now higher because of unsecured loans they have had to take to subsidize the pay roll which is quantified at the sum of Three Million Dollars ($3,000,000.00). Loss in having to pay rent as over the period they had paid Two Million Eight Hundred Thousand Dollars ($2,800,000.00) in rent. He also added they suffered a loss on their investment on the sale amount by paying their deposit, and have quantified One Million Three Hundred and Fifty Thousand Dollars ($1,350,000.00) as their loss.

[32] He stated that not all their losses have been quantified as Northgate operates a bookstore, that they have had to take loans to replenish its stock for the commencement of the school term and by then there was no longer a demand for books. It was revealed in cross-examination that the bookstore does not operate from the school, but from Ocean Village Shopping Center in Ocho Rios. He contended that any loss suffered by Northgate's bookstore was due to the inability to develop the property, for which the Defendants are responsible.

[33] In cross-examination, Mr James was asked about the audited financial statements and he stated that in 2014 they had projected a profit of over Five Hundred Thousand Dollars ($500,000.00), that would have been for the period of September 2014 to August 2015 based on a population of forty-five students. However, they had amassed a loss of nearly Three Million Dollars ($3,000,000.00). He had projected that for the next school year they would have a population of eighty-five students for which the projected income would have been Eighteen Million Dollars ($18,000,000.00) however, this was not met because they were unable to build the classroom because they have not received a sales agreement and as such cannot get building approval. It was revealed that the capacity of the school was seventy-five students, however they were now down to thirty-nine, but in re-examination confirmed that by the month of December they had thirty-five.

[34] Counsel questioned the Claimant's ability to complete the sale, however, Mr. James stated that had they received the sale agreement they would be in a position to, as they would have also benefited from the contribution of Church Members.

[35] Mr. James gave evidence that he attended the survey of the disputed premises on April 16 and 23, 2019. It is his evidence that Mrs. Aris was unable to identify the boundaries, and her Attorney-at-Law, presented a May 2000 diagram with measurements of 932 meters with an additional quarter acre added, in order to arrive at 1944.248 square meters and no mention was made of the Toyloy Diagram or the Pre-checked Plan tendered by Mr. Aris.

[36] He deposes that the portion of land in dispute was now identified as the left rear of the property which is a grassy area used as a parking lot by the church which was proposed land for their building construction, and no longer the portion of land at the right rear of the property which was the additional portion of land that was left off of the Toyloy Diagram which is no longer in dispute. Mr. James' evidence upon seeing this diagram is that it places the boundaries directly through the original structure which was leased to Northgate, as well as the additions that were permitted and observed by Mrs. Aris and her husband.

Wesley Boynes

[37] Wesley Boynes is the Chairman and Founding Member of Northgate Enterprises Limited, which he describes as a Christian Ministry comprising, a Church, a Charity Foundation, a school which is an arm of the Enterprise that also has a book shop and stationary supply store located in Shop 44 Ocean Village Shopping Center. In cross-examination it was revealed that Northgate is a Group of Companies owned by Philadelphia Life Centre. It was also revealed that the school was being operated under Northgate Enterprises and was then brought under the Northgate Charity three years prior.

[38] He gives evidence that in or around 2010, the church needed a new home, and responded to a 'For Lease' sign which was posted by the disputed property. They then met with Mr. Toyloy, the then lessee, who had twenty-three years remaining on his lease, and walked the property with him. He deposes, however, that Mr. Toyloy did not have a Survey Diagram, but they were subsequently provided with an unsigned version of one before they took the assignment of the lease. In cross examination, he stated that he did not notice the measurement for the land contained in the diagram received.

[39] His evidence is that they met with Mr. Aris, who lived a short distance from the property, in April or May of 2011 and they presented to him the diagram tendered by Mr. Toyloy, it is his evidence that Mr. Aris stated that the disputed property was more than what was shown in the diagram. He then provided them with a Subdivision Plan for the

overall development which had not been approved. Mr. Aris gave his consent to the assignment and the Claimant expressed their intention to exercise the Option to purchase in the lease.

[40] Mr. Boynes deposes that during their negotiations square meter measurements were never discussed, they were simply told that the leased premises were one acre more or less. He described the property as being bushy, but delineated with metal and stake fences which assisted with identifying boundaries. Once they were settled on the boundaries they entered into the lease, in cross examination he stated that the property was described in the lease to the hundredth square meter.

[41] He deposes that once they took possession, their first step was to carry out landscaping and they did so with the permission of Mr. and Mrs. Aris. Mr. Aris supplied them with a Pre- Checked Diagram No. 354506, and signed to the Building Approval they required to carry out their additions and renovations. He deposes however, at this point subdivision approval had not been granted. In cross examination it was revealed that the diagram had been labelled “checked’ and dated December 12, 2011, and it was his evidence that by that date the Claimants had already entered into an arrangement with the then lessees, however, it was noted that the diagram contained several dates.

[42] He maintained that during the development of the property they had never been met with objection by Mr. Aris. The only objection they had ever faced was when they built a drain on the outside of the boundary and he objected to it. In cross examination, he agreed that there was a strip of land that fell outside of the fence of the property that they did not occupy but had plans for. He stated that that strip of land was contained in the pre-checked diagram they received from Mr. Aris. He agreed with Counsel that a significant portion of land within the fence was not developed but stated that other developments took place.

[43] Mr. Boynes evidence is that while they were carrying out extensions to the property they sought to exercise their option to purchase, and after numerous attempts at a discussion Mr. Aris had organised a meeting with his Attorney Mr. Richard Donaldson to

discuss the venture, however, the date of that meeting was after May 27, 2012, outside of the required period for exercising the option as such they were unable to do same and planned to do so for the May 27, 2015 period.

[44] It is his evidence that after Mr. Aris' death in 2013, Mrs. Aris called a meeting and sought to have the Church pay more in rent because of their extensive use of the land. According to his evidence, she found issue with the use of the land to the rear right of the premises and stated that it did not form part of the leased land and the church would have to pay a separate sum to lease it. She however later asked the Claimant to clear the bushes in that area for security reasons, as there had been a shooting there. His evidence is that the strip of land had been included in the Pre-Checked Diagram Mr. Aris had given to them.

[45] According to Mr. Boynes, On April 8, 2015, the Claimants wrote to Mrs. Aris exercising the option to purchase and enclosed two cheques representing the deposit. The Claimants were then told that the Option was not in relation to 1944.248 square meters of land and they would have to pay the estate for any area of land occupied outside of that measurement. In cross examination it was revealed that they had requested that the deposit be placed in an escrow account and that the five percent yearly increase be halted as they did not know exactly what they were renting.

[46] Mr. Boynes deposes that Mrs. Aris would not accept the Pre-Checked Diagram which, Mr. Aris had given to them, and when the land had been surveyed as per the courts order the diagram produced they discovered it had boundaries which cut through the original dwelling structure that was leased to the claimants and the additions that had been made with Mr. Aris's Consent.

[47] Mr. Boynes spoke of the two occasions on which the parties met for the survey of the leased premises. On the first occasion, they did not proceed because Mr. Aris was not present and had to be there to point out the boundaries. On the second occasion, Mr. Aris was unable to identify the boundaries, and so Mr. Richard Donaldson had told the Surveyor of a diagram produced in May 2000 for 932 square meters, which he stated

should have been the starting point. He stated that a ¼ acre was added to that when the premises were leased to a Violet Jenny, which brought it up to1944.248 square meters. He deposed that Northgate was never made aware of this diagram.

[48] It is Mr. Boynes evidence that the school has suffered great financial loss because of their inability to expand the school to meet their goals to accommodate up to four hundred students, to build a laboratory with open access to other schools in Ocho Rios and to Build a Conference Room to be rented for seminars. According to Mr. Boyne the school is a private school and the tuition is Two Hundred and Thirty-Four Thousand Dollars ($234,000.00) a year. It is his evidence that the school currently has seventy students and still has to offer the same number of subjects and have teachers available for same.

[49] He further deposed that the Claimant has had to take several loans in order to subsidise expenses and to cover their staff bill. They have also made their plans of expansion known to parents and stakeholders, and the delay has affected their credibility which is how they secure contributions from benefactors. It was their hope, according to his evidence, to purchase the property and use it as security to expand the school. It is his evidence that their financial losses amount to Forty-Three Million Six Hundred and Seventy-Two Thousand Nine Hundred and Eleven Dollard ($43,672,911.00), and to date, they have received no Agreement for Sale and their plans remain at a standstill despite efforts.

The Defendants' Case

Veronica Aris

[50] Veronica Aris is the widow of Lionel Aris who died on May 30, 2013, and an executor in his estate. She deposes that Mr. Aris was the registered proprietor of all that parcel of land part of White River in the parish of Saint Ann. In cross-examination it became clear that during Mr Aris' lifetime majority of the dealings with the land were conducted by him, but that Ms. Aris had some knowledge of same. It was revealed that

prior to his dealings with Northgate he had been dividing portions of land and transferring it to other persons.

[51] According to her evidence the property was leased to a Violet Jenny and then to Mr. Richard Toyloy and Melanie Yapp- Shing. The lease was for the sum of Seven Hundred and Twenty Thousand Dollars ($720,000.00) with a 5% increase every year. Based on her evidence the lease included an option to purchase which was exercisable for six years into the lease. In the first three years for the sum of $25,000,000.00 and for the remainder at $27,000,000.00. That lease commenced on April 2, 2009 for twenty-five years.

[52] It is her evidence that the lease was assigned to the Claimants in 2011. In July 2011 a Survey was conducted of the premises by Janet Taylor on the request of Mr. Toyloy and she deposes that she saw this diagram. According to her evidence, another one was done at the instance of Mr. Aris and was assigned survey department examination number 354506 done by Rixon Richards.

[53] In cross examination she stated that she did not know when Mr. Aris had granted permission for the Claimants to do an extension on the leased premises and as such she could not say if that were truly so and maintained she was not involved. She however admitted that permission was necessary under the lease for the extension to be made and that the extensions were done while Mr. Aris was alive.

[54] In cross examination she stated that that he did not stop them from doing the expansions and agreed that there was no dispute as to massive expansion to the property, though when initially asked she was unsure. When shown a copy of the document with her and her husband’s signature giving permissions, she stated that it was not her signature, but confirmed Mr. Aris’ signature. She recalls that Mr. Aris had two disagreements with the Claimants and that was there encroachment on the remainder of his property and a dispute in relation to the moving of a survey peg at the front of the property.

[55] It is her evidence that after the death of Mr. Aris, the Claimants sought to exercise their option to purchase in their fourth year of the lease for the sum of $27,000,000.00 and submitted cheques representing their deposit in the sum of $2,700,000.00. it is her evidence that at this time Mr. Aris' will had not yet been probated.

[56] In her evidence, she expressed that her main concern was that the lease described the land by estimation as 1994.248 square meters, however, the claimants occupied more. She deposes that it was clear to her that the structure on the land should have been concluded but found the measurement of the portion to which they were entitled to be a challenge, as she did not agree that one could purchase a portion of land of a particular size, for a particular price and then the option be exercised in relation to more than is particularised.

[57] She gave evidence that if the Claimants occupy all the parcel of land outlined in diagram number 354506 then they should pay for that excess portion of land. She did not agree with the Claimants relying on the measurement in the survey prepared by Rixon Richards as the size is substantially different from that which is particularised in the lease. In cross examination she stated that though she saw the differences in measurements in the survey she had not consulted Mr. Richards, who was her husband's surveyor to verify it, but in cross examination stated that she had her lawyer contact him.

[58] It was revealed in cross examination that she had hired her own surveyor but could not recall when, this was done when there was an issue surrounding the location of a peg. According to her evidence, this survey had been conducted to the right or left side of the disputed property. However, throughout her cross examination it was clear that she was not sure which portion of the land had been surveyed. She admitted however that the Claimant was never notified of the survey conducted and in re- examination stated that she never received a diagram in that regard. She deposed that she had not hired her own surveyor to help settle the size of the disputed property.

[59] According to Mrs. Aris on April 26, 2019 she was present at a survey of the disputed premises which was done by Charles Johnson, which she admitted she had also

consented to being done. It is her evidence that the report shows that the land occupied by the Claimants is 3,923.023 square meters. She states that the difference in square meters is too substantial and when one takes into account the survey completed by Janet Taylor it is clear that the boundaries are shifting.

[60] She deposed that she has not applied for subdivision approval because of the dispute with the accuracy of measurements for the property and she will not be able to proceed with that process until the size of the land is settled, and she is not able to provide the claimant with a survey diagram until the issues are resolved. In cross examination she was presented with a copy of the subdivision plan by counsel and shown her signature thereon, she insisted that she had no knowledge of the plans that Mr. Aris had for his land, or that of Northgates. She also deposed that since the dispute there has been no annual increase in the rent as per the lease agreement.

Valnie Gordon

[61] Valnie Gordon is a production Manager and Justice of the Peace for the parish of St. Mary, as well as co-executor of the estate of Lionel Aris and brother of the 1st Defendant and an in-law to the deceased Mr. Aris. He was forthright in admitting that he had no knowledge of the land dealings which had occurred during the lifetime of Mr. Aris. It was after his death that he had seen the lease that had been assigned to Mr. Toyloy and Ms. Yapp – Shing and then later assigned to the Claimant with the consent of Mr. Aris. He describes the premises in dispute as a parcel of a land with a house thereon containing by estimation 1944.248 square meters.

[62] Mr. Gordons evidence is that after Mr. Aris' death the Claimants exercised their option to purchase, however, the co-executors, which includes himself, decided not to complete the sale due to the uncertainty surrounding the accurate measurements of the disputed property. He deposes that there are three different Survey Diagrams each of which outline different estimates for the disputed property, and none match the estimate outlined in the lease. This uncertainty, he deposed, has prevented him from having the land subdivided and from providing the Claimant with a diagram for the leased property.

[63] In cross examination he revealed that he attended a meeting at the church when invited to a meeting with Pastor Boynes, he stated that it was Mrs. Aris' who told him of this invitation. He stated that Pastor Boynes had wanted to see the way forward regarding the property. He stated that it was on this occasion that Mrs. Aris asked them to pay more rent as they occupied more than what was contained in the lease and stated that at that time she had been relying on the survey of Rixon Richards.

[64] His evidence is that on April 29, 2019, all interested parties attended a land survey done by Charles Johnson, and the report concluded that the claimant occupies 3923.023 square meters of land, which is less than was outlined in the Rixon Richards Survey which they now seek to declare as the land leased to them by the deceased Lionel Aris. In cross examination he accepted the measurement 3923 square meters in the survey completed by Charles Johnson, and stated based on that survey he no longer agrees that the premises is 1944.228 square feet. He however stated that he had not seen the survey and was relying on what his Attorney had told him.

Expert Witness - Charles Johnson

[65] Mr. Charles Johnson gave evidence to the effect that on April 23, 2019 he visited the disputed premises located at White River in the parish of Saint Ann, he was accompanied by representatives of the Claimants and their Attorney Ms. Minto and the Defendants along with their Attorney- at -Law Mr. Garnett Spencer and Mr. Richard Donaldson, who accompanied Mr. Spencer.

[66] He deposes that the defendants were asked to identify the boundaries in contention and through their Attorneys, the boundaries were described to be all the lands delineated in duly pre checked diagram bearing Plan Examination No. 278557 prepares by Mr. Patrick G. Curtis Commissioned Land Surveyor prepared on Mary 5, 2000 on the request of Mr. Aris and an additional ¼ 1011.7 square meters hinging from the eastern most point of the pre-checked plan which was bound by existing barbed wire and chain link fences which extended southwards and then westward from the most south-westerly point of the diagram.

[67] Upon his survey, he gives evidence that he found the area of the leased premises as contended by the Defendants to be 1,942.2 sq. metres (.48 Acres), and an additional 1,1011.7 square meters added to section 1 in the lease. He found that the boundaries of the premises which the Defendants contend were leased passes through the building occupied by the Claimants.

Claimant Submissions

[68] Counsel for the Claimant recounted that the late Lionel Aris was the sole proprietor of all land adjoining or abutting the leased property, except for public roads. As early as 1995, he had begun dividing and selling portions of his land, and due to his history with the property, clearly had an intimate knowledge of its boundaries and size. The Claimant asserts that, even without a surveyor, Mr. Aris would have been aware if any survey pegs were misplaced, further eliminating any doubt about the accuracy of property boundaries during his lifetime.

[69] The Claimant company contends further that from the outset of the lease it, through its servant and/or agent, informed Mr. Aris of the intention to purchase the leased premises and to expand the existing building, which was used as a school during the week and a church on weekends. Accurate determination of the size and boundaries was essential for these plans and for accepting the assignment of the lease. It further contends that the Defendants cannot dispute these matters, especially as Mrs. Aris admitted having “no personal knowledge” of her late husband’s business, and Valnie Gordon, another executor, is similarly without any personal knowledge of the deceased’s affairs.

[70] For convenience, Counsel provided a timeline of key events that preceded the assignment of the lease, and which in light of no evidential challenge to its veracity, can be adopted by the Court as I come to determine this matter. Counsel submits for the Claimant that these facts demonstrate its specific request for a survey diagram to ensure clarity on the leased premises' size and boundaries:

- July 7, 2011 - Landlord agrees to Release Richard Toyloy and Melanie Yap-Shing from the May 27, 2009 lease in favour of the Claimant,

- July 9, 2011 - Surveyor Janet Taylor attends on the leased premises to conduct a Survey at the instance of Richard Toyloy, Assignor;

- August 2, 2011 - Landlord's Surveyor Rixon Richards attends at the premises to conduct his own Survey

- November 2011 - Subdivision Plan of the entire White River property (parent lands) is produced by Rixon Richards, the Landlord's Surveyor, and executed by the First Defendant, Veronica Aris

- November 4, 2011 - Northgate finally executes the Assignment taking over the May 27, 2009 lease.

[71] The Defendants dispute the validity of the Pre-Checked Diagram prepared on August 2, 2011, which was delivered to Northgate by the landlord. The Defendants suggest that the surveys and diagrams prepared in 2011 were coincidental and unrelated to the leased premises. However, it is noteworthy that neither Richard Toyloy/Melanie Yap-Shing nor Lionel Aris sought to survey the leased premises between May 2009 and July 2011, an act which Counsel contends supports the Claimant’s assertion that the surveys conducted in 2011 were carried out at its request to obtain a clear diagram for the transfer of the lease. The Claimant contends that the Pre-Checked Diagram by Rixon Richards defines the size and boundaries of the leased premises and seeks an order compelling the Defendants to specifically perform the option to purchase based on the boundaries outlined in the diagram.

[72] The uncertainty surrounding the boundaries, it is submitted, only arose because the Executors ignored the Pre-Checked Diagram provided by Mr. Aris. Instead, they have chosen to rely on an unsigned and unverified diagram, creating confusion. At the time the option to purchase was exercised in April 2015—and when this claim was filed—these were the only two diagrams in existence. Counsel argued that the Court must consider the language used and ascertain what a reasonable person, who has all background knowledge at the time of the contract would have understood; the Court should also

consider the relevant surrounding circumstances. The description of the leased premises is relevant. Section 1.0 provides that:

> *The landlord hereby leases and the tenant takes all that parcel of land with-house-on-part of White River in the parish of Saint Ann containing by estimation One Thousand nine hundred and forty four square meters and two hundred and forty eight thousandths of a square meter be the same more or less butting and bounding northerly on the main road leading from Ocho Rios to lodge southerly and easterly on the remainder of the said land and Westerly on a reserved road [hereinafter called the "leased premises") to HOLD the leased premises UNTO the tenant for the term of TWENTY-FIVE years commencing on the Tenth day of April 2009 the tenant YIELDING and PAYING throughout the term hereby created the rent set out in clause 1.1 hereof SUBJECT to the covenants, agreements and Provisos hereinafter appearing and to the covenants and powers implied by the Registration of Titles Act unless hereby negatived or modified. "*

[73] On the issue of determining the size of the leased premises, it was submitted for the Claimant that Mrs. Aris' evidence seeks to show that the leased premises, for which the Option to Purchase was exercised, measures exactly 1944.248 square meters. She emphasises that the leased lands have been specified to the "third decimal place," which seems "quite precise" to her, and therefore, the Court should avoid intervening in the lease description of 1944.248 square meters. It was submitted however that her evidence fails to consider that:

(a) The measurement would only encompass half of the leased house which she proposes should be the leased premises, which the diagram of Charles Johnson, created at the request of this Court, clearly demonstrates. The extensions to the leased house were completed with the full knowledge and consent of the landlord, Lionel Aris and he would therefore have consented to a breach of his own lease and boundaries if the leased premises measures 1944.248 square meters.

(b) Pre-Checked Diagram of Rixon Richards to Northgate, illustrating the leased premises was delivered by the landlord, and he signed the letter allowing Northgate to modify the leased premises as per the boundaries specified in the Pre-Checked Diagram. Ms. Aris was not the landlord at the time as Mr. Aris was still alive.

(c) An Executor acts as a representative of the Testator's estate and is legally required to carry out the intentions and wishes of the Testator. The executors seem to be overlooking the Pre-Checked Diagram of the leased premises, which does not align with the Testator's intentions.

(d) The amended Defence asserts that the leased premises is no longer 1944.248 square meters, but 1944.248 square meters, "or such greater amount of land as is necessary to include the entire building on the leased premises". However, it is submitted, there is no evidence of the size and boundaries of this leased premises that should comprise the “entire building” resulting in continued uncertainty.

[74] It was proposed therefore that to determine the issue, the Court ought to consider:

(a) The language and the exact wording of Section 1.0 of the lease, which includes the words "by estimation" and “with house thereon". This it is submitted must be reconciled, as against Mrs. Aris' evidence that the leased premises, for which the option to purchase was exercised, is exactly 1944.248m 2.

(b) The intention of the parties to the lease. It is Richard Toyloy's position that the leased premises was not measured or surveyed, but that he and Mr Aris agreed that the leased premises would be “one acre more or less"; which equates to 4046.86 m², more or less and is consistent with the Pre-Checked Diagram.

(c) Mrs. Aris contends that the leased premises is exactly 1944.248 m², which it was submitted would lead to a nonsensical result, as half of the leased building would be excluded. It is contrary to commercial common sense, and business efficacy, that the parties would have agreed to such a thing.

[75] It was asserted that the following are the legal issues:

i. What is the legal construction or interpretation to be given to section of the lease?

ii. In construing section 1.0, can the Court take into account extrinsic matters such as the intention and the conduct of the parties as well as the factual background,

iii. Can the Court rectify the lease based on the intention of the parties and matters disclosed in the Toyloy letters that the size of the leased premises was one acre more or less?

iv. Should the Executors to be estopped from denying that the Pre-Checked Diagram represents the leased premises?

[76] Counsel submitted, relying on **Rainy Sky SA v Kookmin Bank** [2012] 1 All ER 1137 for the principle that in the exercise of construction of a contract the court should consider the language used and ascertain what the reasonable person would have understood the parties to have meant and further, where there are two possible constructions, the Court is entitled to prefer the one which is consistent with business common sense and reject the other.

[77] What is the 'reasonable person' for this purpose according to **Rainy Sky SA** is "*a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".* Applying the authority, it was submitted that in interpreting the term of the contract, the words used should not lead to an absurdity, and excluding the leased house from the transaction applying the exact wording of '1944.248 square meters' would lead to such an absurdity. The more unreasonable the result, the more unlikely it is that this was what the parties intended, and if the seemingly unreasonable is what is intended, then the more is necessary to make that intention abundantly clear (See **Schuler AG v Wickman Machine Tool Sales Ltd** [1973] 2 All ER 39 at 45). It is submitted that what the parties to the contract interpreted the terms of the agreement to be, must be determined considering the background knowledge available to the parties in their documentary, factual and commercial context. (See **Chartbrook Ltd v Persimmon Homes Ltd** 12009] 4 All ER 677.)

[78] Counsel submitted that the contract should be interpreted in a way which is necessary to give it business efficacy and relied on the authority ***AG of Belize Telecom Ltd*** [2009] 2 All ER 1127, [2009] 1 WLR 1 1988 in support of that point.

> *'The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties ... The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.*

[79] Counsel also argued that if the semantics and syntactical analysis of words in a commercial contract leads to a conclusion that flouts business common sense it must be made to yield to business common sense (***Antaois Cia Naviera SA v Salen Rederierna AB, The Antaois*** [1984] 3 All ER 229 at 223). On an application to the instant matter Counsel argued that the exact wording '1944. 248 'would result in half of the leased house being excluded from the transaction and the intention of the deceased was to lease the land and the house.

[80] Counsel submitted that though Mr. Aris is deceased, his intentions can be derived from his action and conduct during his lifetime, as the original party to the contract, he delivered to Northgate the Pre-Checked Diagram that he procured. It is contended that the Defendants interpretation that the leased premises is to exclude half of the leased building from the Assignment to Northgate, ought to be rejected and asserted that the natural and ordinary meaning of the words used in the contract must be consistent with the intentions of the parties and the commercial purpose of the contract which in this case is to lease the land and not half of the house thereon. The 'commercial purpose' it is submitted could not be interpreted to exclude half of the house.

[81] It is submitted that it is clear that the lease agreement, is a commercial transaction and the commercial purpose of this lease was to lease land and the "house thereon". With no evidence from the Defendants as to the size of the leased premises, and the only diagram is one evidencing the leased premises at 1944.248 square meters. This, counsel maintained, would defeat the commercial purpose of the transaction, as they have opted to find every conceivable inconsistency in the documents, and throw it at the Court.

[82] Counsel submitted that the measurement 1944.248 square meters in the May 27, 2009 lease arose from a common mistake between Lionel Aris and Richard Toyloy/ Melanie Yap Shing, as the land was not measured or surveyed at the time of the contract. Counsel argued that where there is an error in a contract, the court may order rectification of a mis-description or common mistake of the parties (See ***Salisbury v Dias*** [1968] 5 WIR 297). The court is empowered to do same by its powers at equity.

[83] The rectification is treated as a construing of the contract and all that is required is clear evidence that something has gone wrong with the language and it should be clear what a reasonable person would have understood the parties to have meant (See ***Chartbrook Ltd v Persimmon Homes Ltd***). Applying the principle in ***Chartbrook Ltd v Persimmon Ltd*** reliance was placed on **W & K Holdings (NSW) Pty Ltd v Laureen Margaret Mayo** 12013] NSWSC 106 for the proposition that this approach to the interpreting commercial contracts was for the prevention of an unconscionable or unconscientious insistence on the terms of the contract by a party, which is inconsistent with what that party knows to have been the common intention of the parties at the time that the written contract was entered into.

[84] The Claimant submits that it is clear from the evidence that neither Lionel Aris nor Richard Toyloy intended for the leased premises to be precisely 1944.248 square meters The Executors' current assertion of this specific measurement is unconscionable. In actions for rectification establishing the parties' common intention requires proof on the “balance of probability”, as outlined in **Thomas Bates & Son Ltd v Wyndham’s (Lingerie) Ltd** [1981] 1 WLR 505 at 521. The Subdivision Plan and Pre-Checked Diagram, which were both prepared under Mr. Aris’s direction, demonstrate his intended boundaries. Despite this evidence, the Executors have not consulted Rixon Richards, the Surveyor responsible for these Plans in view of his role as surveyor for the landlord. It was submitted that the Executors appear solely focused on increasing the amount to be paid by the Claimant rather than to determine and give effect to the intention of Mr. Aris.

[85] Once the Court concludes that the lease contains an error, it has the power to issue orders that correct the mistake and uphold the intended agreement between the

parties. This principle is reinforced by **Salisbury v Dias** [1968] 5 WIR 497, where a sale agreement misdescribed property boundaries which was significantly less than contemplated. The Vendor called upon the Purchaser to accept a transfer of the reduced parcel of land, or, face recission, while the Purchaser insisted on performance of the contract, but at a reduced price for the reduced parcel of land. The Court in exercising its equitable jurisdiction to order rectification of the contract, noted that when there is a mutual mistake, it can either enforce the agreement with an adjusted purchase price or rescind the contract entirely. This approach ensures the contract reflects what both parties had originally intended.

[86] Similarly, **Yassin v Egerton** [1959] 1 WIR 493 demonstrates the Court's role in correcting agreements containing boundary errors. In that authority, the parties mistakenly included buildings on the western half of a property, and the Court ordered specific performance of the corrected contract. This case supports the Claimant's argument for rectification, as the boundary misdescription also resulted from a mutual mistake.

[87] The Claimant further argues that the lease's reference to 1944.248 square meters arose from a common error by Aris and Toyloy/Yap Shing, as the land was not formally measured or surveyed when the agreement was made. Therefore, rectifying the lease to correct this measurement is justified. It was further submitted that since Northgate now seeks to exercise its option to purchase rather than to continue leasing the property, the correction should be reflected in the sale agreement as outlined in the amended claim. The trial judge has full discretion to decide on the form and manner of rectification to achieve fairness and align with the parties' original intentions.

[88] On the issue of liability, Counsel argued that the fact that Mr. Aris rather than just to hand the Pre-Checked diagram to Northgate, chose to go through a checking process with the Director of Surveys before it did so. Section 33(1) of the **Land Surveyors Act**, it was submitted, underscores the significance of a Pre-checked diagram versus a regular Survey diagram. The Pre-checked diagram, it was contended, is more accurate than a Sub-division Plan or a regular survey plan. Counsel also submitted, that it was also

prepared in contemplation of a sale, transfer or conveyance of any title under the Registration of Titles Act, which lends some credence to the Claimant's case as to the circumstances in which the Pre-Checked Diagram was presented by Lionel Aris to the Claimant.

[89] It was submitted that in determining what is the leased premises, only the intentions of the actual parties to the lease (Lionel Aris and Richard Toyloy) are relevant, as a contract is a meeting of the minds of the parties to the contract. Therefore, the extensive cross-examinations of Burchell James, and Pastor Boynes as to what they perceive is the leased premises is irrelevant. Equally irrelevant, it was submitted, is letter dated November 16, 2016 from Nunes, Scholefield, Deleon & Co., corrected by letter dated November 24, 2016, which the Defendants derive much comfort from. Equally irrelevant, it was submitted, is this focus that the Defendants have on what is occupied by Northgate.

[90] In addition to the declaratory relief sought, the Claimant also seeks damages to recover the loss suffered as a result of the failure of the Defendants to complete the sale. The losses are summarised as follows:

- Increased construction costs – it was contended for the Claimant that its construction plans in 2019 would be Ninety-Two Million Four Hundred and Eighty-Four Thousand Dollars ($92,484,000.000), versus Sixty-Nine Million Three Hundred and Sixty-Three Thousand Dollars ($69,363,000.00) in 2014. The Landlord was aware of and consented to the Claimant's plans to improve the building, which housed the school. The construction commenced in 2012 but ceased after the death of Lionel Aris in 2013, given the issues with Mrs. Aris. Reliance is placed on the Quantity Surveyor’s report, as the appropriate party to quantify building costs, rather than Mr. James’ estimation of construction costs.

- Loss of income in school fees – Twenty-Six Million and Twenty-Two Thousand Nine Hundred and Eleven Dollars ($26,022,911.00) arising from the inability to

continue construction to accommodate more students, and thereby collect more income in the form of school fees.

- High interest rates - the delay in completion of the sale has deprived Northgate of an asset against which it can secure credit at cheaper interest rates.

- Lease payments to the date of the witness statement - $2,800,000.00 - the lease requires Northgate to pay rent until the purchase price has been paid in full (see clause 4.8 (iv) of the lease). The delay in the completion of the sale has thus prolonged the period for which the Claimant has to pay rent. Whereas, the Claimant initially proposed that maintaining the rent at the 2015 rate would cover this loss, this was never agreed by the Defendant, and, the Claimant could not have expected the impasse to continue for six years.

- Loss of investment income - the Claimant paid a deposit of $2,700,000.00 in furtherance of the option to purchase and in accordance with clause 4.8(ii) of the lease. This is money that the Claimant could have invested. Burchell James used the interest rate on credit facility from NCB (15%) to quantify this loss The deposit has not been returned, and there is no information that it was invested by the Defendants, or their attorneys

[91] On the issue of constructions costs, it was submitted that there is no negating the fact that constructions costs will be greater today than they were when the Quantity Surveyor's report was prepared. Apart from the time it will take to complete the sale, the Defendants are still to obtain sub-division approval. Therefore, with inflation and the devaluing dollar, the costs of material and labour for construction the sum sought of Twenty-Three Million One Hundred and Twenty-One Thousand Dollars ($23,121,000.00) for increased construction as at 2019, was viewed as not being unreasonable.

[92] Counsel argued that Mr. Aris was aware of Northgate's plans to purchase the property at the time of assignment and this was buttressed by the evidence of Mr. Burchell James and further explains why the survey plan after being checked by the Director of Survey was handed to Northgate. The increased construction costs and loss of

investment on the deposit, flows directly from the Defendants' failure to complete the sale. Counsel further contended that the loss of tuition is also recoverable despite the fact that the School has been registered as a charity as it is the Claimant, Northgate Enterprises, which acts on behalf of the institution and was the Lessee/Assignee for same which is information within the knowledge of the Defendants as school is operated on the subject premises.

[93] Further, the Defendants have complained that the Quantity Surveyor's Report uses 2014 as the base year, for the construction costs, and not 2015, the year when the option was exercised. According to the submissions, the lease permits the Claimant to make additions to the building, and permission was obtained from Mr. Aris in April 2012. However, Mr. Aris died in 2013, and then in 2014, Mrs. Aris started to insist that the leased property was only 1944.248 square meters. It is for that reason it is submitted, that 2014 was chosen as the base year as Northgate could not have safely continued the construction on any section of the building thereafter.

[94] The submission further is that in any event, the cost of construction will be greater than in 2014 as the Clamant is pursuing construction costs as at 2019 (initial trial date). Therefore, the Defendant should not be complaining about a base year of 2014, as the Claimant is already a suffering a loss by not being able to update the construction costs to 2021.

[95] The Defendants have also taken issue with the time it will take the Claimant to secure 'Building Approval" and elicited evidence from Burchell James as to the time it would take to secure Building Approval for a "development". The school is not akin to a residential development. Further, it was submitted, that the Defendants ought not to benefit from their own delays in setting the Claimant on a path to secure Building Approval. Northgate cannot apply for Building Approval, because it is not the owner of the land.

[96] It was submitted therefore that the rule in **Hadley and Another v Baxendale and other** [1843-60] All ER Rep 461 is now well established and has been adopted in

numerous causes including **The Heron II, Koufos v C Czarnikow Ltd** [1967] 3 All ER 686 where at 715, the recoverable loss falls under 2 heads of damages:

- Damages should be such as may naturally and usually arise from the breach, or

- Damages should be such as in the special circumstances of the case is known to both parties as that which may be reasonably supposed to have been in the contemplation of the parties, as the result of a breach, assuming the parties to have applied their minds to the contingency of there being such a breach.

[97] It was argued that in determining whether loss of profits or increased construction costs etc, can be recovered as damages for breach of contract, the crucial question is the information available to the defaulting party when the contract was made, and, whether: (a) the loss or damage was sufficiently likely to result from the breach of contract, to make it proper to hold that the loss or damage flowed naturally from the breach, or (b) a loss of that kind, should have been within his contemplation (**The Heron II**).

[98] Counsel contended that the Executors stand in the shoe of the Landlord, Mr. Aris. Therefore, it is the knowledge of the Landlord, that is relevant. There is no denying that the Mr.Aris was aware of Northgate's plans to purchase the property at the time of Assignment (which would be the relevant contract date where Northgate is concerned). This is why the Survey Plan prepared by Rixon Richards in August 2011 was sent to be "checked" by the Director of Surveys, it was asserted, and then handed to Northgate in April 2012 when the checking process was complete - to facilitate the extensions to the building. Northgate's letter of April 24, 2012 expressly speaks to the discussion between Mr. Aris and Mr. James over a period of months. It is the evidence of Burchell James, that he specifically informed Mr Aris of Northgate's intention to purchase the property when they met in July 2011 (paragraph 15 of witness statement). It is submitted that, it ought to have been in contemplation of the Landlord, Mr. Aris , that as owners, Northgate would develop the property. That is not too remote a concept. Owners renovate, add or develop their property, to their liking.

[99] It was also submitted that the loss of tuition income is also recoverable, although the School was recently registered as a Charity in 2019 (after the action was filed). They are clearly all interconnected entities, with Northgate Enterprise Limited being the business arm, and entity that enters into business contracts (such as the lease), secures the loans and undertakes the actual construction on the property as the Lessee/Assignee, irrespective of who the letters and documents are addressed to. The Claimant should not be penalized for how they organize their affairs, especially as there can be no denying that the Defendants were fully aware of the nature of the business which Northgate was operating at the property. There is a huge sign: "Northgate High School" at the front of the premises, as depicted in the exhibited photographs. It is the only "business" operating at the premises, and therefore a loss in school income/tuition is also foreseeable. Once it is accepted that the Executors were aware that a school was being operated the premises, loss of tuition, is a "sufficiently likely" result, from a failure to expand the school.

[100] Finally, the Defendants' attorney, submitted that there is no proof that the Claimant can afford to acquire the property. In response it was submitted that there is no requirement in the lease, or clause containing the option to purchase, that the Claimant is required to prove its ability to purchase the property. The only pre-condition, is the provision of a $2,700,000.00 deposit which has long been paid. Once the deposit is paid and the option exercised in writing, the Claimant has a right to demand a sale agreement for completion in 120 days. The Defendants cannot now seek to insist on terms and preconditions which do not, it was submitted, exist in the lease or option to purchase, to avoid paying Damages for Breach of the lease and option to purchase,

Defendants Submissions

[101] The Defendants maintained that the leased property is encompassed by 1944.248 square meters and that the Claimants cannot seek to rely on the Pre-Checked plan which sets out the lot as measuring 4401.993 square meters. Counsel argued that they do not occupy that amount of land and as such the option to purchase land at that measurement has not arisen as that was not the parcel of land described in the lease agreement and therefore not what had been offered as an option, resulting in the option not being

exercised in accordance with the lease. Counsel contended that the Claimants are prevented from seeking an action in specific performance of the agreement as they had knowledge of the variances with the lease agreement, as it is principle that he who comes to equity must come with clean hands.

[102] Counsel argued that in order for the Claimant to establish estoppel by conduct it would have to be proven that the reasonable man would understand that the conduct of Mr. Aris was to be acted on, and acted on such conduct and in so doing prejudicially altered its position. Counsel argued that there is no evidence that the claimants had a survey conducted in order to confirm what was on the Pre-checked plan and further they had not relied on the pre- checked diagram to inform its activities on the land and as such it cannot be said that they relied on Mr. Aris' conduct to their detriment.

[103] Counsel argued that the contract in question uses the words *"by estimation… be the same more or less"* Counsel contended that the question is whether the parcel of land was estimated to contain the quantity stated or whether the error is so great as to make the estimate irrational. If the error is great the statement might be rejected as incredible (**See Joliffe v Baker** (1883) 11 QBD 255). Counsel relied on the authority of **Portman v Mill 38 ER 449** in which the measurement of the land was less than the estimate by about one hundred acres out of three hundred and forty-nine acres and was seen as too serious to be covered by the expression *"be the same more or less"*

[104] Counsel submitted that the differences between the estimate in the lease and the land occupied by the claimant is more than a 100% underestimation. It was argued that, in that event, it is impossible to reconcile it and more so difficult to reconcile the estimate with the area of the land being claimed by the Claimant. Counsel further argued that when the estimate is less than half of what is on the ground it moves from being an estimate to being an error. Counsel contended that there is no basis on which the Claimants make this claim as the portion claimed has never been occupied by the persons from whom they received their assignment.

[105] Counsel argued that given the underestimation, it would be inequitable to compel the Defendants to transfer the land being claimed without being compensated, as authority has established that a vendor may seek compensation for an excess **(See Portman v Mill**). On that note, Counsel submitted that damages should be confined to the Claimants expenses.

[106] It was Counsels argument that the Claimants have not proven the loss for the damages which they seek. Counsel argued that the damages sought for the bookshop are too remote as the bookshop does not operate from the property. Counsel further argued that there is no evidence that the Claimants had received building approval for the expansion they had made and subject to **Section 22** of the **Town and Country Planning Act**, development should not be carried out without the grant of planning permission.

[107] Counsel averred making observations of inadequacies in the letter outlining the increased construction cost. Counsel highlighted that it was addressed to a third party, Philadelphia Life Center and not the Clamant, it was unsigned, it used 2014 as the year of comparison, it included no price breakdown and made no reference to approved building plans or where they would be constructed.

[108] Counsel argued that damages for the loss of income should not be granted on the basis that the projections which were shown by the Claimants have been unreliable since 2014 as the Claimant projected a profit of Five Hundred and Thirty Seven Thousand Dollars ($537,000.00) and made a loss of Two Million Nine Hundred and Sixty Five Thousand Dollars ($2,965,000.00) and in 2015 projected a profit of Five Million One Hundred and Fifteen Thousand Six Hundred Dollars ($5,115,600.00) and made a profit of One Million Four Hundred and Sixty One Thousand Seven Hundred and Eighty Two Dollars ($1,461,782.00).

[109] Counsel argued that these projections were based on an increased number of students without proof being shown for same. Counsel also noted that the lease provided for an agreement to be concluded within 120 days after the exercise of the option and no evidence was lead in relation to a timeline in which obtain splinter titles or subdivision

approval should have been obtained. Neither had it been shown how the Claimants would finance the construction of the additional classrooms and a timeline for their competition Furthermore, Counsel argued, the Grant of Probate in the estate of Mr. Aris was not obtained until March 31, 2022.

[110] In reliance on the authority of **Cockwell and Another v Romford Sanitary Steam Laundry Ltd** [1939] 4 All E.E 310 at page 371, Counsel argued that nothing shall operate to determine the lease and the liability thereunder until the purchase price payable under the option is paid, as such the Claimants were required to continue paying rent. Counsel argued that the Defendants did not err in their acceptance of the deposit and as such there should be no remedy available to the Claimants. He added however that argued that there is no evidence to substantiate the Claimants claim of the loss of 15% on their deposit.

Discussion

[111] This claim arises from a dispute between Northgate Enterprises Limited (the "Claimant") and the Executors of the Estate of Lionel Aris (the "Defendants"), who act as the landlord's representatives. The Claimant became the Assignee of a 25-year lease, taking over the remaining 23 years of the lease originally agreed upon between the landlord and previous tenants for premises located at White River, Saint Ann. The core of the dispute revolves around the boundaries and size of the leased premises, which surfaced only after the death of the Claimant’s landlord, Mr. Aris, on March 30, 2013. The Claimant asserts that, even without a surveyor, Mr. Aris would have been aware if any survey pegs were misplaced, further eliminating any doubt about the accuracy of property boundaries during his lifetime.

[112] The Claimant company contends that from the outset of the lease it, through its servant and/or agent, informed Mr. Aris of the intention to purchase the leased premises and to expand the existing building, which was used as a school during the week and a church on weekends. Accurate determination of the size and boundaries was essential for these plans and for accepting the assignment of the lease. The Defendants cannot

dispute these matters, especially as Mrs. Aris admitted having “no personal knowledge” of her late husband’s business, and Valnie Gordon, another executor, is similarly without any personal knowledge of the deceased’s affairs.

[113] The Claimant argues that Mrs. Aris' evidence of the leased premises, for which the Option to Purchase was exercised, measures exactly 1944.248 square meters. However, she argues that her evidence fails to consider that the measurement would only encompass half of the leased house, which was completed with the full knowledge and consent of the landlord, Mr. Aris. The pre-checked diagram of Rixon Richards to Northgate, illustrating the leased premises, was delivered by the landlord, and he signed the letter allowing Northgate to modify the leased premises as per the boundaries specified in the Pre-Checked Diagram. Mrs. Aris was not the landlord at the time, as Mr. Aris was still alive.

[114] The amended Defence asserts that the leased premises is no longer 1944.248 square meters , but 1944.248 square meters, *"or such greater amount of land as is necessary to include the entire building on the leased premises"*.[1] However, there is no evidence of the size and boundaries of this leased premises that should comprise the "entire building," resulting in continued uncertainty.

Issues

[115] On an assessment of the Claim, I have found that the issues to be addressed in are as follows:

1. Whether the legal interpretation to be given to the lease should take into account extrinsic matters such as the intention and conduct of the parties as well as the factual background.

[1] Paragraph 11 of Defence to Amended Particulars of claim filed June 14, 2019

2. Whether the Pre- Checked Diagram provided by Mr. Aris should stand as the description of the Property in the sale agreement

3. Whether the Claimants are entitled to Damages for the breach of option to purchase

[116] Given the length and complexity of the submissions made by both Counsel, I have found it useful, for the sake of clarity and ease of reading, to include a summary of their respective arguments throughout my discussion.

Issue 1: Whether the legal interpretation to be given to the lease should take into account extrinsic matters such as the intention and conduct of the parties as well as the factual background.

[117] Counsel, Ms. Minto, submits that in the exercise of construction of a contract, the court should consider the language used and ascertain what the reasonable person would have understood the parties to have meant. In interpreting the term of the contract, the words used should not lead to an absurdity, and excluding the leased house from the transaction applying the exact wording of 1944.248 square meters would lead to such an absurdity. If the seemingly unreasonable result is what the parties intended, then the more is necessary to make that intention abundantly clear.

[118] Counsel argued that the contract should be interpreted in a way that is necessary to give it business efficacy, (See **AG of Belize Telecom Ltd**). They argued that if the semantics and syntactical analysis of words in a commercial contract leads to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[119] The measurement 1944.248 square feet in the lease, the Claimant submitted, arose from a common mistake between Lionel Aris and Richard Toyloy/ Melanie Yap Shing, as the land was not measured or surveyed at the time of the contract. The court may order rectification of a mis-description or common mistake of the parties, and the

court is empowered to do so by its powers at equity. (See **Chartbrook Ltd v Persimmon Ltd**). The Claimant submits that it is clear from the evidence that neither Lionel Aris nor Richard Toyloy intended for the leased premises to be precisely 1944.248 square meters, and the Executors' current assertion of this specific measurement is it was submitted, is unconscionable.

[120] In interpreting the true intentions of the parties, I found the principle of interpreting the lease through the filter of its business efficacy provides a guiding interpretation, as seen in **Rainy Sky SA v Kookmin Bank**. The court must interpret the contract in a way that reflects practical commercial intentions rather than literal terms, which in this case would lead to absurd results. A strict application of the 1944.248 square meters would exclude essential parts of the property the Claimant has occupied and improved with the landlord's knowledge, and which from the actions of the parties was clearly within their contemplation and intention when contracted. Even after the assignment of the lease, the actions of the Claimant and its landlord, Mr. Aris, support a contention that Mr. Aris was well aware of the boundaries of his property and is consistent with the commercial purpose of the agreement.

[121] Additionally, **Chartbrook Ltd v Persimmon Homes Ltd** supports considering extrinsic evidence where necessary to clarify the intention. In addition, Northgate through their agents had discussed their intentions for the property with Mr. Aris who had the Pre-Checked Diagram prepared by Rixon Richards, checked by the Director of Surveys before it was given directly to the Claimant, shows that he was aware of the boundaries and intended that what was contained in the Pre-Checked diagram, is what was the subject of the lease. Therefore, based on the foregoing, on a balance of probabilities I find in favour of the Claimant on this issue.

Issue 2: Whether the Pre-Checked Diagram provided by Mr. Aris should stand as the description of the Property in the sale agreement

[122] The Claimant seeks an order for specific performance, asserting that the Pre-Checked Diagram provided by Mr. Aris should serve as the property description in the

sale agreement. The Defendants argue that enforcing specific performance based on this plan would be unjust, given their contention that the original leased area was much smaller. I find on a balance of probabilities that that the Pre-Checked Diagram represents a clear boundary and size agreed upon, initially between Mr. Aris by the original lessees and later by the Assignee of the lease, Northgate. This aligns with the equitable remedy of specific performance, as it enables fulfilment of the agreement in line with the original parties' apparent intentions. The case **Salisbury v Dias** reinforces the court's authority to rectify contract descriptions where a mutual error results in boundary misdescription. Hence, the court grants specific performance, with the Pre-Checked Diagram to be appended to the Agreement for Sale to ensure the leased premises are accurately defined.

[123] On the issue of liability, Counsel argued that the fact that Mr. Aris chose to go through a checking process with the Director of Surveys before it did so, underscores the significance of a Pre-checked diagram versus a regular Survey diagram, which is more accurate than a Sub-division Plan and was prepared in contemplation of a sale, transfer, or conveyance of any title under the Registration of Titles Act. In determining what comprises the leased premises, only the intentions of the actual parties to the lease (Lionel Aris and Richard Toyloy) are relevant, as a contract is a meeting of the minds of the parties to the contract.

[124] The Defendants have resisted the boundaries provided by the Pre-Checked Diagram, despite a lack of alternative survey evidence that aligns with their position. The Defendants maintained that the leased property is encompassed by 1944.248 square meters and that the Claimant cannot seek to rely on the Pre-checked plan which sets out the lot as measuring 4401.993 square meters. Counsel argued that they do not occupy that amount of land and as such, the option to purchase land at that measurement has not arisen as that was not the parcel of land described in the lease agreement and therefore not what had been offered as an option. Counsel contended that the Claimants then cannot seek specific performance of the agreement as they had knowledge of the variances with the lease agreement.

[125] Counsel argued that in order for the Claimant to establish estoppel by conduct it would have to be proven that the reasonable man would understand that the conduct of Mr. Aris was to be acted on, and in so doing prejudicially altered its position. There is no evidence that the claimants had a survey conducted to confirm what was on the pre-checked plan and further they had not relied on the pre-checked diagram to inform its activities on the land. Counsel relied on the authority of **Portman v Mill**, which showed that the measurement of the land was less than the estimate by about one hundred acres out of three hundred and forty-nine acres and was seen as too serious to be covered by the expression “be the same more or less”.

[126] Given the Claimant’s established occupation of the property and improvements, permitted without objection by Mr. Aris, estoppel applies here, to be inferred from the conduct of the parties. Mr. Aris clearly permitted or acquiesced in the actions of the Claimant and where he had objections to them going beyond where he viewed the boundary to exist would expressly say so or prohibit activity there. The Defendants, acting as representatives of the Estate of Mr. Aris, are estopped from now disputing the agreed boundaries under the Pre-Checked Diagram, as the Claimant relied on these representations to its detriment. This is supported by **Yassin v Egerton**, where estoppel prevented boundary disputes from frustrating established expectations. I therefore find that on a balance of probabilities, the position of the Claimant on this issue is also preferred.

[127] The findings in regard to the first 2 issues stated herein, largely address orders 1 – 6 sought in the Claim. I will proceed to discuss the issues that relate to the remaining remedy sought of damages.

Issue 3: Whether the Claimants are entitled to damages for breach of option to purchase

[128] The Claimant initially sought damages for multiple losses, including increased construction costs, lost income from establishing the school, and opportunity costs related to the delay in completing the sale and opportunity cost of the interest they paid over.

However, the only damages awarded in this decision that I found established on a balance of probabilities are for the opportunity cost of the deposit sum paid.

[129] The Claimant argues that the costs of construction, loss of investment, and tuition are recoverable due to the Defendants' failure to complete the sale and the fact that the school is operated on the premises. The court also considers the fact that the Defendants were aware of the business operation at the property and that the loss of tuition is a "sufficiently likely" result from a failure to expand the school.

[130] Counsel argued that the Claimant has not proven the loss for the damages they seek, as the damages sought for the bookshop are too remote, there is no evidence that the Claimant had received building approval for the expansion, and the letter outlining the increased construction cost was addressed to a third party, Philadelphia Life Center, and did not include any price breakdown or reference to approved building plans or where they would be constructed.

[131] If the Claimant chooses to build the premises as planned, the cost will be higher than in 2014. It is true that if it had completed the construction and used the building to establish or expand the existing school premises, it could have earned additional revenue. Notwithstanding, despite the Claimant's submissions to the contrary, the loss is too remote to justify an award of damages. Many factors could intervene to cause a change of one's mind or simply make it untenable to proceed with said construction or expansion, such as acts of God, economic downturn, or simply a lack of consumer demand for that service in that area of the country due to dynamic demographic changes, to name only a few.

[132] While it is unfortunate that if the Claimant continues to do construction (which it may eventually decide not to do), it will be more expensive, and if it proceeds to establish or expand the school (which it still may not do) it could have derived more income from so doing, and perhaps having done so, they would have gotten additional income from students, these are all variables which the parties could not have reasonably anticipated. The Executors, who were not parties to the agreement, nor had any personal knowledge

of much of what occurred after the assignment of the lease to Northgate, could not reasonably be expected to interpret the parties' intentions from the original lease agreement.

[133] The Claimant organisation contends that it validly exercised its option to purchase the leased property and have submitted timely notification of their intention to exercise the option and payment of the required deposit. The Defendants, as Executors, argue that the exercise is invalid, due mainly to the issue of the precise size and boundaries of the leased premises; the subject of the exercise of the option to purchase. They assert that the size that the Claimant is entitled to exercise the option for is only approximately 1944.248 square meters according to the lease, and if they are to acquire the over 4000 square meters that actually within the boundaries of the leased premises, that is not what was agreed, and they ought properly to pay more.

[134] When presented with information that appeared to show a parcel of land that was smaller, this issue naturally created uncertainty in how the Defendants would give effect to the exercise of the option. It would have been imprudent on the part of the Executors, in the face of this incongruity between what is on the ground and what is in the agreement, to have proceeded to give effect to the option to purchase as is. It is argued for the Claimant that the Executors' desire to maximize the purchase price is a negative thing, and should result in an adverse assessment of their motives. If from their perspective, the value of the property exceeds what the parties seeking to exercise the option are willing to pay, the Executors must take reasonable steps to determine what is appropriate and should ensure that they are acting in the best interests of Mr. Aris' estate.

[135] Counsel for the Defendants submitted that the differences between the estimate in the lease and the land occupied by the Claimant is significant, making it impossible to reconcile it and more so difficult to reconcile the estimate with the area of the land being claimed by the Claimant. Counsel contended that given the underestimation, it would be inequitable to compel the Defendants to transfer the land being claimed without being compensated, as authority has established that a vendor may seek compensation for an excess (See **Portman v Mill**).

[136] The rule in **Hadley and Another v Baxendale and other** (1854) 9 Exch 341 is now well established, a recoverable loss falls under two heads of damages: (a) damages that may naturally and usually arise from the breach, or (b) damages that may be reasonably supposed to have been in the contemplation of both parties as a result of a breach, assuming the parties have applied their minds to the contingency of there being such a breach. What was submitted is that the defendants stand in the shoes of the Lionel Aris, and therefore it is his knowledge that is relevant. Following the principle of remoteness of loss established in **Hadley v Baxendale**, only losses directly flowing from the breach and reasonably foreseeable at the contract formation date are recoverable. Here, the deposit sum was intended to facilitate the purchase under the option, making its loss of use during the prolonged sale process a direct consequence of the Defendants' delay.

[137] It is true that on a balance of probabilities, I accept that to read the term to be restricted to the smaller size and boundary description results in an absurdity - that is, that a portion of the house is excluded, nothing in the parties' actions shows with clarity what the intention was in terms of the boundaries and size of the property. Certainly, if such an unlikely result was intended by the parties, in line with [case] there ought properly to be proof that this absurd outcome was intended. Regardless of its absurdity, it was entirely reasonable for the Executors to be hesitant to allow the Claimant to exercise the option without them either paying more for the larger parcel, accepting the smaller portion at the agreed-upon price, or at least having a determination made by the Court or through some agreed third party as to how, if at all, the option should be invoked. Damages will be awarded for the opportunity cost of the deposit sum at commercial interest rates from the time it would have been paid to the Defendants, to the present. While the declarations will be used to rectify the contract and avoid the absurdity, the Executors actions were not unreasonable and were entirely consistent with their fiduciary duties to the deceased landlord's Estate.

Orders

i. A Declaration that the Claimant has validly exercised an Option to Purchase a portion of all that parcel of land part of White River in the parish of St. Ann being the Lot Numbered One on the Plan of White River and being the lands compromised in the certificate of title registered Volume 1202 Folio 859 of the Register Book of Titles as prescribed by the lease agreement between the Claimant and Lionel Aris, deceased.

ii. An Order directing the Defendants to specifically perform the aforesaid Option to Purchase by taking the necessary steps to complete the agreement for sale between the parties in the manner set out below, and/or in the manner required to have a certificate of title issued in the Claimant's name.

iii. An Order directing the Defendants to submit to the Claimant within seven (7) days of the date hereof, an Agreement for Sale in triplicate for the Claimant’s execution, in respect of parcel of land part of White River in the parish of St. Ann being the Lot Numbered One on the Plan of White River and being the lands compromised in the certificate of title registered Volume 1202 Folio 859 of the Register Book of Titles which was leased to the Claimant, and for which the Claimant has exercised an Option to Purchase.

iv. An Order that the Registrar of the Supreme Court be empowered to execute any and all documents necessary to complete the sale and transfer of the relevant portion of the said land, in the event that the Defendants fail or neglect to do so.

v. A Declaration that the Pre-Checked Plan Numbered 354506 which was prepared by Rixon E. Richards Commissioned Land Surveyor at the instance of LIONEL ARIS, and based on a survey which was conducted in the presence of LIONEL ARIS, represents the portion of land which was leased by LIONEL ARIS to the Claimant, and for which the Claimant has exercised an Option to Purchase.

vi. A Declaration that the Pre-Checked Plan Numbered 354506 which was prepared by Rixon E. Richards Commissioned Land shall be appended to the Agreement for Sale at Order (3) herein and shall be used in the description of the property as set out, in the said agreement.

vii. Damages for breach of the said Option to Purchase for the interest that could have been earned on the deposit sum at a rate of 15% per annum on the $2.7M paid, from the date of payment to the date of judgment.

viii. Costs awarded to the Claimant to be taxed if not agreed.