[2014] JMSC Civ 146

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV03801

BETWEEN	**LEON COURTNEY ROBINSON (Executor of the Estate of Herman L. Denton, Deceased)**	**CLAIMANT**
A N D	**MICHELLE CHEN**	**1ST DEFENDANT**
AND	**THELMA AGATHA CHEN**	**2ND DEFENDANT**
AND	**ERROL ALPHANSO CHEN**	**3RD DEFENDANT**

Ms. Audré-Lois Reynolds instructed by Bailey Terrelonge Allen for the Claimant

Ms. Arlean Beckford and from August 5, 2014, Mrs. Yualandé Christopher-Walker instructed by Arlean D. M. Beckford & Co. for the Defendants

October 30 - 31, 2013; July 16, 2014; August, 5 & 26, 2014; September 9 & 26, 2014; October 3, 2014

Application for Recovery of Possession – 1st Purchasers unable to complete – Effect of Notice to Complete and making time of the essence served on 1st purchasers – Whether contract with 1st purchasers was ended before vendor entered new contract for sale of the same property with the 2nd purchasers – 2nd purchasers obtaining order for specific performance of contract against vendor – Whether case should be reopened and 2nd purchasers added as ancillary defendants so that the respective interests of the 1st and 2nd purchasers in the property could be determined in one proceedings – Whether damages should be awarded in lieu of Specific Performance

D. FRASER J

INTRODUCTION

[1] While still a law student I first heard the expression, “a conundrum wrapped in enigma”. This case is aptly so described. The events which

have unfolded between 1997 and 2014 have created a quagmire that does not admit of easy resolution. None of the parties in this drama is entirely blameless and the options for solution all have deficiencies. The court in this judgment has however sought to enable the best outcome in the circumstances. Time will tell if that goal is achieved.

BACKGROUND

[2] The claimant in this action is the son and Executor of the Estate of his deceased father, Rev. Herman L. Denton. Rev. Denton is the registered proprietor of property situate at 9 Myers Drive, Kingston, which is the subject matter of this dispute.

[3] In 1997, Rev. Denton entered into an Agreement for Sale with the defendants to purchase the property for $5M. The defendants were placed in possession of the property. However, subsequently Rev. Denton maintained that they failed to meet their obligations under the Agreement, and a Notice Making Time of the Essence was sent dated October 29, 2001 requiring them to meet their obligations within twenty-one (21) days. Thereafter it being contended that they had failed to meet those obligations, Rev. Denton considered the agreement with the defendants at an end and entered into another Agreement for Sale of the said property with Mr. Dennis Wright and Mrs. Lisa Wright dated February 6, 2002. The Wrights were already in occupation of another portion of the property when this second sale agreement was entered into.

[4] The defendants subsequently lodged a Caveat against the property, sworn to on November 5, 2002, claiming an equitable interest in the property as purchasers and forbidding the transfer of the property to any person. The defendants remained in and are still in possession of part of the property, maintaining that their agreement with Rev. Denton was never cancelled.

[5] On July 20, 2006 in an action filed against Rev. Denton, Mr. and Mrs Wright obtained from the Supreme Court, an Order for Specific Performance of the Agreement for Sale dated February 6, 2002.

[6] Rev Denton died on December 23, 2006 leaving a Will dated December 14, 2006 which named Rohan Eccles as Executor. On April 25, 2008 the claimant was appointed to represent the Estate of Herman Denton for the purpose of the proceedings brought against Rev. Denton for Specific Performance of the Agreement for Sale dated February 6, 2002.

[7] The claimant initiated this action by way of a Fixed Date Claim Form dated July 22, 2009. On January 29, 2010 Rohan Eccles renounced the Executorship and signed over the Executorship and all its rights and privileges to the claimant.

[8] The claimant subsequently filed a claim form on February 18, 2011 seeking Orders to facilitate his compliance with the Order for Specific Performance by enabling him to deliver vacant possession of the property to Mr. and Mrs Wright.

THE CLAIM AND COUNTERCLAIM

[9] The claim seeks the following orders:

a. A Declaration that the Agreement between the Defendant[s] and Herman L. Denton (Deceased) has been cancelled.

b. A Declaration that any deposit paid by the Defendant[s] has been forfeited.

c. An order that the Defendants owe rental totaling $3,180,000.00, being rental at $20,000.00 monthly for the period October 2002 to January 2011, and continuing until the final determination of this matter.

d. An order that the Defendants quit and deliver up possession of the said property to the Claimant forthwith.

e. Damages for Breach of Contract

f. Such further or other order as this Honourable Court deems just in the circumstances

[10] By way of counter claim the defendants maintain that the orders sought by the claimant should be denied and the following orders made:

a. That the Defendants have a beneficial interest in the property consequent on the several contracts executed by the parties

b. Further or alternatively, damages for breach of the said agreement

c. A declaration that the rental in the sum of $1,440,000.00 collected by Herman Lloyd Denton be applied to the purchase price as agreed by the parties

d. The claimant is not entitled to forfeit the deposit herein or any portion of the monies paid under the contract

e. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act

f. Costs

g. Such further or other relief as may be just

THE FACTS AND ISSUES IN DISPUTE

[11] There are a number of facts and issues in dispute between the parties. There are some that overlap and some which are contingent on the prior determination of others. The issues are:

a. Was there one or were there two written agreements for sale between Rev. Herman Denton and the defendants?

b. Was either one or were both of the parties in breach of the subsisting written agreement?

c. Did the Notice making time of the essence dated October 29, 2001 terminate the subsisting written agreement when the notice expired without the defendants being able to provide the balance purchase price?

d. Who is entitled to possession and should either party be awarded damages for breach of contract? Is there a basis for the deposit paid by the defendants to be forfeited to the vendor's estate?

e. How much money has been paid by the defendants towards the purchase price?

f. Do the defendants owe the claimant for rental and if so how much?

g. Was rental of $1,440,000 collected by Rev. Herman Denton from the Wrights and if so should that be applied towards the purchase price paid by the defendants?

h. Should the defendants be required to withdraw the caveat?

a) Was there one or were there two written agreements for sale between Rev. Herman Denton and the defendants?

[12] It is accepted by the parties that a written agreement was entered into between Rev. Denton and the defendants in 1997. The Agreement for Sale, (exhibit 3C) was drafted by Mr. Leon Palmer, Attorney-at-Law who at that point acted for both the vendor and the purchasers. The agreement was not dated beyond the indication of the year 1997.

[13] There are however a number of documents and also evidence from the witnesses which point to the time frame within which the document would have been executed. The defendants signed a Promissory Note dated

October 31, 1997 (exhibit 6) in which they promised to pay Rev. Denton $250,000.00. The evidence of Mr. Palmer in cross-examination was that the contract was executed in October 1997. Further the 1997 Agreement at the item dealing with POSSESSION reads as follows, *"On November 30, 1997. The Purchasers have agreed to pay a rental fee of $20,000,00 per month subject to Special Condition #9."* More will be said about special condition 9 later in the judgment when the amount of the purchase price and rental that have been paid is considered.

[14] Then in a letter to Mr. Palmer dated June 17, 1999 (exhibit 11) Rev. Denton stated, *"As of November 1st 1997 Ms. Chen et al is residing in the premises at a rent rate of Twenty ($20,000) thousand dollars per month – There is no written Lease."* That date of possession was however contradicted by the 1st defendant on behalf of the defendants, at paragraph 11 of her witness statement which stood as her evidence in chief. There she stated that she moved into the property on January 18, 1998 which she recalled, as her brother's birthday was the day before. Significantly though, at paragraph 20 she stated that she was paying rental from November 1997. Counsel for the claimant in her submissions relied on the admission made by the 1st defendant in cross-examination that being a real estate agent, she would be unlikely to pay rental when she did not have possession.

[15] Whether the defendants actually entered into physical possession in November 1997 or not, it seems clear they had a right to such physical possession possibly from November 1, 1997 and at latest from November 30, 1997, based on the terms of the Agreement, and were therefore in law in possession from then.

[16] Due to funding difficulties being experienced by the defendants, the 1997 Agreement had still not been completed in 2001. The defendants maintain that a new Agreement was entered into in 2001 to facilitate the defendants

obtaining a mortgage. This new Agreement they say arose in the following manner:

a. Mr. Leon Palmer sent the defendants a Notice to Complete making time of the essence dated May 2001 (Mr. Palmer in his statement said it was dated May 9, 2001). The 1st defendant met with Rev. Denton and he agreed to extend the time in exchange for a further payment of $45,000.00 on May 25, 2001, at which time he withdrew the Notice. There was a subsequent meeting in early June 2001 when Rev. Denton said he would give the defendants a further six months expiring at the end of November 2001 to come up with the mortgage.

b. At that meeting the attorneys agreed that the 1997 Agreement needed to be re-executed to avoid the 100% penalty as the transfer tax and stamp duty had not been paid from the deposit and further payments made. Mr. Palmer asked that new documents be signed.

c. After several months trying to borrow $1.6M, which the 1st defendant believed was the balance owing to finally complete, in October Victoria Mutual Building Society was approached. Victoria Mutual indicated a list of things necessary including a new Agreement as the one dated June 2001 was not good enough for them.

d. The 1st defendant further maintains that after several visits to Mr. Palmer's office she obtained a new agreement from his Secretary. Her statement indicates that a new document was not printed and signed but that she saw the Secretary removing the front page and replacing it with another page. The same signature page from the 1997 Agreement was used. The Secretary inserted the date November 30, 2001, based she said on the number of times

changes had had to be made to the document and because she did not want the 1st defendant to come back for another copy. The Secretary according to the 1st defendant said it was something she did all the time to facilitate clients. The 1st defendant was finally informed by Victoria Mutual Building Society that she had qualified for a loan of $1.1M and not the $1.6M she had applied for.

[17] The 1st defendant's claim that a second Agreement was entered into was strenuously opposed by the witnesses for the claimant. Ms. Hortense Clarke, Secretary to Mr. Palmer in cross-examination did admit to seeing an Agreement for Sale dated June 2001. However she stated that the Agreement for Sale she saw did not look like one which she would have prepared as the font used was dissimilar from the ones which they usually used. She further noted that the signature of Mr. Leon Palmer witnessing the signatures of the parties appeared to be genuine to her. She therefore surmised that the document may have been prepared outside of the firm and brought in for Mr. Palmer to sign. Mr. Palmer on the other hand disavowed any knowledge of an Agreement dated June 2001.

[18] Concerning the Agreement dated November 30, 2001, Ms. Clarke had no recollection of giving the 1st defendant a new Agreement in October 2001, nor of putting a new front page on the old Agreement. Further she indicated that the date inserted was not in her handwriting. Mr. Palmer also indicated he knew nothing of this agreement dated November 30, 2001 and the only Agreement he knew of was the 1997 Agreement.

[19] The admission of Ms. Clarke to seeing a June 2001 Agreement would tend to lend some credence to the contention by the 1st defendant that there were some discussions concerning entering into a new agreement to avoid the payment of a penalty, especially as Mr. Palmer in cross-examination also admitted that under the relevant legislation an Agreement should be submitted for duty to be assessed within 30 days.

Further he acknowledged that if it was not submitted within 30 days the agreement would have been subject to whatever penalty the Stamp Commissioner assessed. The defendants have however not sought to rely on another Agreement dated June 2001, but on a purported Agreement dated November 30, 2001,(the "2001 Agreement"), obtained on the evidence of the 1st defendant to avoid a penalty having to be paid, and to satisfy the requirements of the building society. It is that purported Agreement the court has to determine if it was valid.

[20] In respect of the purported 2001 Agreement the 1st defendant admitted in cross-examination that the typeface used on pages one and three was different from that on pages 2 and 4. Pages one two and three have some changes from the 1997 Agreement. On page 1 the word Schedule has been misspelled as "Schudule". Also the payment terms are different. Whereas in the 1997 Agreement a deposit of $400,000 was payable, then $300,000 in 30 days and $1,000,000 in 120 days, the 2001 Agreement speaks to an initial payment of $3,400,000 payable on signing.

[21] On page 2 of the 2001 Agreement, which the 1st defendant did not indicate had been changed, at the item POSSESSION, the words "On November 30, 1997." are blanked out. Also, while in the 1997 Agreement no attorneys are listed as having Carriage of Sale and as Purchasers' Attorney-at-Law, in the 2001 Agreement the Law Firms of Williams, McKoy & Palmer and Derrick Darby & Company respectively have been inserted.

[22] On page 3, Special Condition 4 has been changed. In the 1997 Agreement the Agreement was subject to the purchasers presenting an irrevocable letter of mortgage commitment from National Housing Trust and the Bank of Nova Scotia for a sum not less than $2.5M the balance of the purchase price on or before 6 months to the Vendor's Attorneys-at-Law. In the 2001 Agreement it was subject to the purchasers obtaining a

mortgage from a reputable institution for not less than $1.6M, with a commitment letter from the institution to be forwarded to the Vendor's Attorney-at-law within 60 days from the commencement of the Agreement.

[23] Apart from the fact that changes were made to pages 2 and 3 and not just page 1, counsel for the claimant also made some telling submissions in respect of the purported Agreement of 2001. Firstly that particularly as the 2001 Agreement indicated receipt of $3.4M, the defendants would have been expected to use this document to support their application in November 2002 for a Caveat to protect their alleged interest in the property. However the 1997 Agreement was used.

[24] Further the court notes that even before November 2002, as revealed by the Writ of Summons (exhibit 35) and Statement of Claim (exhibit 36) filed March 4, 2002 when action was filed by the 1st defendant against Rev. Denton seeking Specific Performance of the Agreement, no mention was made of an agreement entered to in 2001. Neither was there any such reference to a 2001 Agreement when a Summons for an Interlocutory Injunction to restrain Rev. Denton from Disposing of the property until the action was determined and Affidavit in Support were filed on May 29, 2002. All references were to an Agreement entered into November 30, 1997 which was the one the 1st defendant, the then claimant, sought to specifically enforce.

[25] Secondly and perhaps more significantly, it was pointed out to the 1st defendant by counsel for the claimant that the Commitment Letter from Victoria Mutual Building Society (exhibit 44) on which she relied asserting that she had met her obligations under the new 2001 Agreement, is dated November 26, 2001, four days before the 2001 Agreement which on the evidence of the 1st defendant was obtained partly to satisfy the requirements of the building society and facilitate the issuance of the

Commitment Letter. The 2001 Agreement therefore could not have been used for this stated purpose.

[26] In any event on the evidence one of the stated purposes for entering into this new 2001 Agreement as contended by the 1st defendant was so that the parties could avoid the payment of the 100% penalty due to late submission of the Agreement for the assessment of the relevant duties and taxes. This is tantamount to asking the court to uphold an Agreement made for the illegal purpose of defrauding the revenue.

[27] Having considered all the relevant evidence I find that the parties though they might have been in discussions concerning a new Agreement never entered into a November 30, 2001 Agreement, which was used to procure a Letter of Commitment for a mortgage. Even if they had entered into such an Agreement it would not have been enforced by the court, as one of the purposes for it having been made would have been to defraud the revenue. Therefore from whatever perspective the circumstances are viewed, the 1997 Agreement represents the only operative written Agreement for Sale entered into between Rev. Denton and the defendants which the court will have cognizance of.

b) Was either one or were both of the parties in breach of the subsisting written agreement?

[28] As outlined before, the payment terms in the 1997 Agreement required the defendants to pay a deposit of $400,000, then $300,000 in 30 days and $1,000,000 in 120 days. Special Condition 4 was that the Agreement was subject to the purchasers presenting an irrevocable letter of mortgage commitment from National Housing Trust and the Bank of Nova Scotia for a sum not less than $2.5M, the balance of the purchase price, on or before 6 months, to the Vendor's Attorneys-at-Law. The purchasers also agreed to pay $20,000 per month for rent subject to Special Condition 9 which stipulated that the rental proceeds should be credited to the balance

of the purchase moneys due on completion. Completion was stated as on or before the expiry of 12 months from the date of the Agreement, in exchange for the Title duly endorsed in the names of the Purchasers as registered proprietors.

[29] Based on the terms of the Agreement if all sums had been paid, including rent, as indicated in the Agreement and a mortgage of $2.5M obtained, then if completion had been after 12 months, the defendants would have had to pay a further $560,000 at the time of completion to finish payment.

[30] The 1st defendant however admitted in evidence that she had been in default all through the Agreement. According to her evidence she paid the sum of $700,000 but could not come up with the full $1M in 120 days. Further she could not qualify for a mortgage and so could not present Rev. Denton or his lawyers with a letter of undertaking within the 6 months. Counsel for the defendants submitted that while Special Condition 4 provided that the contract was subject to the purchasers procuring a commitment for a mortgage, Special Condition 5 contained contrary terms which provided that unless rescinded, (presumably pursuant to Special Conditions 2 and 3), then whether the letter of commitment was produced or not, the parties were bound by the contract. Counsel for the defendants submitted that in these circumstances where the terms were conflicting, the contract ought to be interpreted in favour of the purchasers and therefore Special Condition 5 ought to be excluded.

[31] Whether or not Special Condition 5 is included or excluded is however of no moment. Having been unable to comply with the payment terms of the Agreement according to the 1st defendant she entered into more than one informal agreements with Rev. Denton to pay the outstanding sums. These agreements included the promise by Rev. Denton that when she made payments to a certain level he would give her a vendor's mortgage. The supposed agreements and payments made pursuant to these

agreements will be addressed below when the issue of the total sum paid by the defendants to Rev. Denton and Mr. Palmer and the circumstances of those payments are addressed. However it is sufficient at this stage to indicate that the 1st defendant freely accepted that in so far as the written Agreement was concerned she was in breach all through the Agreement.

[32] What was the position of the vendor Rev. Denton? Was he also in breach? Special Condition 2 entitled the Vendor's Attorney-at-Law Mr. Palmer to stamp the Agreement with stamp duty and transfer tax from the deposit. Further by Special Condition 3 the parties agreed that if the Commissioner of Stamp Duty and Transfer Tax assessed transfer tax on a higher consideration the Agreement would be immediately cancelled and all monies paid on account of the purchase price refunded to the purchasers unless the purchasers agreed to pay the additional assessment. Neither stamp duty nor transfer tax was ever paid on the Agreement. Pursuant to section 32 (3) (a) of the Stamp Duty Act, the Agreement should have been stamped before the expiry of thirty days after execution.

[33] Counsel for the defendants submitted that having breached Special Condition 2, the Vendor could not take advantage of Special Condition 3 to rescind, as the Commissioner of Stamp Duty and Transfer Tax was never presented with the contract for the purpose of assessing the taxes.

[34] There really is no dispute that both sides were in breach of the Agreement. The dispute concerns the effect of those breaches especially in light of the conduct of the parties and of Mr. Palmer on behalf of the vendor throughout the life of the Agreement. The effect of the respective breaches will be analysed later in the judgment.

c) Did the Notice making time of the essence dated October 29, 2001 terminate the subsisting written agreement when the notice expired without the defendants being able to provide the balance purchase price?

[35] This is one of the most critical issues the court has to determine. Much turns on that determination. It is manifest and accepted by both sides that the contract itself did not stipulate that time was of the essence. Mr. Palmer in his statement spoke to acting on the instructions of Rev. Denton and issuing two Notices to Complete and Making Time of The Essence to the defendants to complete the Agreement for Sale entered in 1997. The exhibits however reveal that there were three such Notices. The first issued July 16, 1999 *(exhibit 33),* the second dated May 9, 2001 *(exhibit 8)* and the third dated October 29, 2001 *(exhibit 7).* Significantly, he states that after the Notice dated May 9, 2001 the 1st defendant's Attorneys advised that a further payment was accepted by Mr. Denton. Therefore another Notice Making Time of the Essence was sent on October 29, 2001 requiring completion within 21 days.

[36] The terms of the Notice are as follows:

> **NOTICE TO COMPLETE AND MAKING TIME THE ESSENCE**
>
> TO: MICHELLE ROSEMARIE CHEN
> THELMA AGATHA CHEN &
> ALPHANSO CHEN
> *c/o* THEIR ATTORNEYS-AT-LAW
> MESSRS. DERRICK DARBY & COMPANY
> 65 BARRY STREET
> KINGSTON
>
> We, WILLIAMS, McKOY & PALMER, of I Eureka Crescent, Kingston 5, as the Attorneys-at-Law for and on behalf of HERMAN LLOYD DENTON, formerly of 101 Woodruff Avenue, Brooklyn, New York 11226 in the United States of America now residing at 2945 White Plains Road, Bronx, New York 10467 in the United States of America HEREBY GIVE YOU NOTICE:

1. That the said **HERMAN LLOYD DENTON**, is ready and willing to complete the sale of premises known as No 9 Myers Drive, Kingston 8 in the parish of Saint Andrew and being the land registered at Volume 910 Folio 8 of the Register Book of Titles the subject of an Agreement for Sale between the vendor **HERMAN LLOYD DENTON** and yourselves.

2. That the said vendor now requires you to complete this sale by payment of the balance of purchase money inclusive of your one half costs.

3. That the said vendor **HEREBY MAKES TIME OF THE ESSENCE** of the agreement and requires you to complete the sale as last above-mentioned within twenty-one (21) days of the date of this Notice.

4. If you fail to comply with this Notice within the said twenty-one (21) days, the vendor will rescind the contract, may forfeit the deposit, and may re-sell the premises and claim from you the deficiency in price (if any) on such re-sale and all expenses attending the re-sale and any attempted re-sale and all costs, loss, damage and expenses incurred by him by reason of your delay or default in performing the said agreement.

DATED THE DAY OF ,2001

WILLIAMS MCKOY & PALMER

PER: .....
LEON R. PALMER
ATTORNEY-AT-LAW FOR THE VENDOR

[37] The claimant maintained that this third and final Notice to Complete and Making Time of the Essence operated to terminate the agreement between Rev. Denton and the defendants when they failed to provide the outstanding payments or to provide a letter of commitment to cover the full balance, prior to the expiration of the notice period. Counsel for the claimant relied on a number of authorities. In ***Stickney v Keeble*** [1915] AC 386, the plaintiff, a farmer contracted with the defendants to purchase

agricultural land with a completion date set for approximately 4 months after the date of contract. He paid a deposit on the purchase price. On the date set for completion, the defendants did not yet have legal title for the land which was purchased by the defendants for resale. Approximately 7 months after the date of contract the plaintiff who had repeatedly pressed for completion, gave notice to the defendants to complete within a fortnight or return his deposit. The trial judge held that the time for the notice was sufficient and the deposit should be returned. The court of appeal reversed the trial judge. On further appeal reversing the court of appeal, the House of Lords held that the defendants had unreasonably delayed in completion and in the circumstances the time limited by the notice was sufficient. The headnote is instructive. It reads:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the Court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto.

[38] Counsel also relied on a passage from the judgment of Lord Atkinson who, referring to the judgment of James LJ in ***Noble v Edwards*** (1877) 5 Ch. D. 378 at 393, stated page at 403:

> [I]f a vendor of land, on the contract being repudiated by the purchaser on the day named for completion, sued for damages for breach of contract, he would have been obliged to aver and prove that he was on that day ready and willing to convey, which involves that he had a good title on that day. If he could not do this he could not sue, because he could not do that which is a condition precedent to the performance of the contract by the purchaser.

[39] Counsel also cited ***Chintamanie Ajit v Joseph Mootoo Sammy*** (1967) AC 255 in which the Judicial Committee of the Privy Council applied

Stickney v Keeble. The Board held that a vendor giving 6 days notice to complete otherwise he would cancel the sale, was reasonable in circumstances where on July 31, 1958 the purchaser agreed to buy the land for $17,000 and paid $1000 deposit with $10,000 to be provided by mortgage. On February 3, 1959 when the notice was given the purchaser had no money and no prospects and hence his application for specific performance failed. See also ***MacBryde v. Weekes*** (1856) 22 Beav 533 on the point that what constitutes a reasonable notice period is dependent on all the circumstances.

[40] Finally in respect of the effect of the Notice, counsel cited ***Aberfoyle Plantations Ltd v Khaw Bian Cheng*** [1960] A.C. 115 in which the Judicial Committee of the Privy Council outlined the following general principles captured in the headnote:

a. Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date.

b. Where a conditional contract of sale fixes no date for the completion of the sale, then the condition must be fulfilled within a reasonable time.

c. Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be adhered to, and the time allowed is not to be extended by reference to equitable principles.

[41] Counsel therefore maintained that the Notice was valid and had given the defendants a reasonable time to complete given the history of the dealings between the parties. While acknowledging that in the instant case the vendor was also in breach by not have had the Agreement stamped and the Title ready for transfer, counsel for the claimant submitted that the

major breach was that of the defendants as they had failed to obtain the necessary funding to complete the agreement and that once the defendants provided the funds the agreement would have been stamped.

[42] From that standpoint, in seeking to defend the actions of Rev. Denton in reselling the property to the Wrights, counsel cited **Halsbury's Laws of England Fourth Edition** Vol. 42 paragraph 127 where it is stated that:

> When a notice to complete has expired, the party not in default may elect either to affirm or rescind the contract. On affirmation, damages will be available to compensate for loss caused by the delay and may be claimed even after completion. On rescission by the vendor, he may forfeit the deposit and resell the property claiming as damages his expenses on the resale.

[43] It is noted however that the authority referenced by **Halsbury's** for the statement that in the circumstances outlined the vendor may resell and claim damages, is the English Law Society's General Conditions of Sale (1980 Edn) which is not applicable in Jamaica.

[44] Counsel submitted that as a result of the breach of the purchaser the Vendor had a right to repudiate the Agreement for Sale and had lawfully entered into another Agreement for Sale of the property to Dennis and Lisa Wright. Counsel relied on ***Mersey Steel and Iron Co v Naylor Benson & Co*** (1884) 9 App Cas 434, in which at 443 Lord Blackburn said:

> The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage v. Cole), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."

[45] Relying on **McGregor on Damages** 16th Ed paragraph 989 counsel maintained that the defendants were guilty of a repudiating or discharging

breach of the contract and there were several remedies open to the vendor. In those circumstances the defendants would not be entitled to damages. On the contrary the claimant as the vendor's successor in title would be entitled to forfeit the deposit. See **Halsbury's Laws of England**, **Fourth Edition** Vol. 42 paragraph 127 previously cited, ***Collins v Stimson*** (1883) 1 QBD 142, at 143 per Pollock B and ***Workers Savings and Loan Bank v. Dojap*** [1993] 1 AC 573.

[46] Counsel for the defendants resisted the submission of counsel for the claimant contending that the Notice was not effective as the vendor Rev. Denton was not in a position to complete the contract at the point at which the Notice was issued. The defendants point to the fact that the vendor had not fulfilled his obligations under the Transfer Tax Act and the agreement was never stamped. The necessary assessments under that Act counsel submitted could not have been completed within the 21 days given by the Notice, even if the document had been lodged at the time the Notice was issued which it had not. The vendor therefore counsel argued was not in a position to complete the transaction in accordance with the terms of the contract which required that completion should have occurred "… in exchange for the Title duly endorsed in the names of the Purchasers as registered proprietors".

[47] Counsel also submitted that as the property was subject to the tenancy of the Wrights that was another factor which prevented the Notice being valid. There was nothing in the Agreement of Sale stipulating that the defendants were taking the property subject to a tenancy and thus they would have been entitled to vacant possession which the vendor would not have been able to provide at the end of the 21 day Notice period.

[48] Further counsel pointed to the course of conduct between the parties whereby the two previous Notices issued were effectively withdrawn after payments were made. Counsel for the defendant acknowledged that the

letter of commitment was a few days late, but it was accepted by the vendor's counsel and no further word was heard from the vendor. Counsel submitted that as the purchasers had delayed in completing the contract, it was acknowledged that it was open to Rev. Denton to collect interest on the unpaid balance of the purchase price. However counsel relied on the principle laid down by Romilly, M.R. in ***Parkin v Thorold*** **(1852) 16 Beav 59, 66 (Equity and Equities)** that if a party to a contract for the sale of land fails to complete on the day fixed for completion, at law he is in breach of his contract and will be liable for damages. Yet in equity, it will usually suffice if he is ready to complete within a reasonable period thereafter, and thus the other party will not be able to avoid performance.

[49] It was also highlighted that the Instrument of Transfer for execution was never provided to the defendants. The court was further in effect being asked to take judicial notice of conveyancing practice whereby the Instrument of Transfer is usually delivered subsequent to, or contemporaneous with the delivery of the letter of commitment. It was therefore submitted by counsel for the defendants that the defendants did all they could when they supplied the letter of commitment and satisfied their obligations under the contract and it was the failure and/or refusal of the vendor to forward the Instrument of Transfer for execution which led to the expiration of the letter of commitment on February 26, 2002. Counsel submitted it was quite telling that Rev. Denton sent the letter dated October 14 2002 (exhibit 13) to his Attorney informing that he had "not received any rent or other money from her, for many years, I want her out", when it was their failure which caused the offer from Victoria Mutual Building Society to be withdrawn.

[50] Counsel further sought to highlight that the vendor's act of placing the defendants into possession prior to completion resulted in the defendants acquiring rights. The cases cited by counsel do not support the defendant's position as they are based on United Kingdom law and

practice. In ***Abbey National Building Society v Cann and Another*** [1991] 1 AC 56, the issue for determination was whether under ss 23(1) and 70(1)(g) of the English Land Registration Act 1925 Act the appellants had an equitable overriding interest by virtue of the timing of their occupation that would prevent the mortgage company from seizing the property in respect payments had fallen into arrears. It was held that the relevant date for determining whether an interest in registered land was protected by actual occupation and had priority over the holder of a legal estate by virtue of s 70(1)(g) was the date when the legal estate was transferred or created and not the date when it was registered. That Act however does not apply to Jamaica and there is no local equivalent. The case of ***Lloyds Bank PLC v Rossett and another*** [1991] 1 A.C. 107 which applied the Abbey ***National Building Society*** case is similarly based on the English land Registration Act of 1925 and therefore cannot assist the defendants. However the court is aware of the powerful position of a purchaser in possession and further of a purchaser who is first in time, relative to a subsequent purchaser is well established in law.

[51] The facts are clear that both parties were in breach of the contract and that the defendants had over a long time been incrementally seeking to complete the contract. A point strongly urged by counsel for the claimant is that looking at the relative seriousness of the breaches on either side, it was clear that the failure of the defendants to realise the full purchase price was the main and operating reason for the non-completion of the contract. It was stressed that even if the vendor would have been minded to accept the late submission of the letter of commitment, the letter was not even for the full balance purchase price that the defendants indicated they owed; in a context where the vendor alleged the outstanding amount was even more than the defendants said it was. It was submitted on the other hand that the vendor's breaches could be relatively easily addressed.

[52] The full circumstances of the case have to be considered. The original date for completion of the contract had long gone by the time of the third Notice to Complete. It is common ground that by then more than half of the sale price had been paid, even though there is a dispute as to the actual amount that has been paid, which the court will subsequently resolve. The vendor had a responsibility to have the agreement stamped within 30 days of receipt of the deposit. Certainly given the amount of money the defendants had already paid, the vendor had no basis to say there was insufficient money at that point for the agreement to have been stamped.

[53] By the practice of the parties they had varied the original terms of the contract. Twice Notices to Complete had been withdrawn after payments were made. I find the defendants were not unreasonable to expect that practice to have been followed upon the presentation of the letter of commitment. As the passage from **Halsbury's Laws of England Fourth Edition** Vol. 42 paragraph 127 shows, a Notice to Complete, (certainly one worded in the manner of the Notice used in this case), does not automatically terminate the contract. It gave the vendor a right to rescind the contract (assuming the Notice was valid) — a right he had on two previous occasions declined to exercise, affirming the contract on each occasion, by accepting further sums towards the outstanding balance.

[54] On the question of the validity of the third Notice, it is, as contended by the defendants, that the vendor was not in a position to complete in 21 days after that Notice. The Agreement was not stamped, and still is not. The property was also subject to a tenancy which it was not expressed in the contract the agreement should be subject to. On the face of the agreement the defendants would have been entitled to vacant possession, which could not reasonably have been procured in 21 days. The breach of the vendor was also significant and sufficient to make that Notice, and by implication the previous two Notices invalid; even though it is accepted

that it was the defendant's inability to raise the balance purchase price in a timely fashion that caused the agreement to have remained incomplete after four years.

[55] Even if I am wrong that the Notice was invalid, the vendor did not by letter or actions by himself or his counsel, act in a manner communicated to the defendants that would have advised them that the vendor was rescinding the contract. It is not denied that after the letter of commitment was delivered neither the vendor's attorney nor the vendor himself advised the defendants or Mr Darby who at that point acted for them, that the vendor considered the contract at an end. There was silence. In the absence of a contrary indication the defendants were entitled to consider the agreement still alive. No accounting was sent to the defendants indicating the sums paid over to that point and offering to return or returning any of that money. That course of conduct, that inactivity was affirmative of the agreement. There was no effective rescission at that point. The vendor was not at liberty to privately decide to end the contract and keep the defendants' money. The contract lived.

(d) Who is entitled to possession and should either party be awarded damages for breach of contract? Is there a basis for the deposit paid by the defendants to be forfeited to the vendor's estate?

[56] I have determined that the Notice to Complete dated October 29, 2001 was invalid and that the contract the defendants had with Rev. Denton continued to subsist after the expiration of that purported Notice. The defendants therefore continued to be the first purchasers in possession. From the unchallenged evidence of the defendants, Ms. Michelle Chen the 1st defendant discovered by chance that the vendor had entered into an agreement with the Wrights to sell the property to them, having seen the agreement for sale on the desk of Mr. Palmer. This agreement was dated February 6, 2002, twenty days before the letter of commitment issued to

the defendants by Victoria Mutual Building Society expired. The defendants sprang into action and engaged the services of Michael Hussey, Attorney-at-law. On March 4, 2002 Mr. Hussey filed on behalf of the 1st defendant then as claimant, a Writ of Summons against the vendor Rev. Denton, seeking specific performance of the Agreement for Sale dated on or about November 30, 1997; alternatively damages for breach of contract and an injunction restraining Rev. Denton from disposing of the property until the action was heard. As earlier noted in the background on November 5, 2002 the defendants lodged a caveat as purchasers against the property. In that caveat they claimed an equitable interest and forbidding registration of any person as transferee and appointing Mr Hussey's office as the place at which Notices and proceedings should be served.

[57] Unfortunately Mr. Hussey died tragically before the applications filed in court were heard. The 1st defendant indicated in her witness statement that she sought to retrieve her file from Mr. Hussey's office but was advised that she would have to await the settlement of his estate. In January 2010 she received the file and discovered on reading it that her applications had been adjourned sine die.

[58] Based on their action brought against Rev. Denton on July 20, 2006 the Wrights obtained an order for specific performance of their Agreement for Sale dated February 6, 2002. From the attested copy order which is exhibit 4, the order was in the nature of a default judgment as the defendant Rev. Denton was not present or represented and the present defendants were not a part of that action. After the completion of the evidence and receipt of closing submissions in this matter the court having considered the evidence and submissions invited counsel to make further submissions on the following question:

"Given the evidence concerning the competing interests of the Defendants and those of Mr. Dennis Wright and Mrs. Lisa Wright in the property, the subject matter of this litigation, should Mr. and Mrs. Wright be added as parties pursuant to part 19 of the Civil Procedure Rules so that the Court can resolve all the matters in dispute in the proceedings?"

[59] In opposition to the addition of the Wrights, counsel for the claimant reiterated submissions made in her closing arguments. Counsel cited **Halsbury's Laws of England Fourth Edition** Vol. 26 paragraph 550 where it is stated:

> Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against the world of its existence, date and legal consequences.

[60] The original submission indicated that the order for Specific Performance operated as a bar to the defendants' claim for Specific Performance of an Agreement for Sale in regard to the said property. Further that the defendants were also bound by the legal consequences arising from that order and must vacate the premises. Counsel however had additional ammunition in her arsenal. Counsel brought it to the attention of the court that an application had been filed on June 10, 2010 by the defendants seeking to intervene in Claim No. 2004HCV002341 in which the Wrights obtained their order for Specific Performance. That application sought the following orders:

a. To be permitted to intervene, and added as a Defendant

b. That the default judgment granted by Mrs. Justice M. McIntosh on July 20, 2006 be set aside.

c. That there be a stay of execution of the orders made.

d. That the applicant be permitted to file and serve a response to that claim.

[61] That application came up for hearing in the Supreme Court on January 11, 2014. The minute of order reveals it was refused on a procedural point for non-compliance with Civil Procedure Rule 13.4, as no draft defence was exhibited. It should be noted however that an examination of the file reveals that the application was supported by a detailed affidavit setting out the history of the matter which outlined the same facts as have been canvassed in this claim. Counsel for the claimant also submitted that the learned judge opined that in any event the defence had no reasonable prospect of success. It is to be noted however that the official Minute of Order does not record any such observation. Counsel submitted that as that Order has not been appealed the initial order for Specific Performance remained undisturbed and it would therefore be futile to add the Wrights as there could be no impact on the enforceability of the order made in favour of the Wrights. Further it was submitted that it would only cause unnecessary delay and expense as the matter would have to be reopened.

[62] For the submissions on the issue of joinder the defendants had new counsel Mrs. Yualandé Christopher-Walker. This change was necessitated as Ms. Arlean Beckford, their counsel throughout the trial, due to professional difficulties, was subsequently unable to continue in the matter. Ms. Christopher-Walker sought to support the addition of the Wrights. Counsel pointed out that **CPR** rule 19.2(3) (a) & (b) states as follows:-

> The Court may add a new party to proceedings without an application, if-
> a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the

> new party so that the court can resolve that issue. (Emphasis added by counsel).

[63] These specific powers are supplemented by the overriding objective. In ***Prophecy Group L.C. v Seabreeze Company Limited*** (Supreme Court of Belize unreported judgment delivered April 6, 2006), A. O. Conteh CJ had this to say at paragraph 41:

> I am however of the view that this is a matter of discretion and the provisions in 19.3 expressly confer this discretion on the Court. It is discretion whose proper exercise must be informed by the overriding objective of the Civil Procedure Rules and bear in mind the factors mentioned in either paragraph (a) or (b) of 19.2 (3), that is, when the Court of its own motion decides to add a new party to the proceedings without any application. (Emphasis added by counsel).

[64] The defendants' submission supporting joinder of the Wrights to this claim was based on rule 19.2 (3) (b), the contention being that there is an issue involving the Wrights which is connected to the matters in dispute in this claim and it is desirable to add the Wrights to resolve that issue. The common issue of law between the Wrights and the defendants being which of them has an equitable right to the fee simple interest in the property the subject of this claim. The common issues of fact being that both claimed to have purchased the same property from the same vendor Rev. Denton. Counsel submitted that as the purchasers-second-in-time, the question of whether the Wrights were bona fide purchasers for value without notice remained a live issue, which could not be resolved in a timely and cost effective manner without adding them to this claim. Counsel submitted that the summary manner in which the Wrights obtained the order for Specific Performance meant their claim was not determined on its merits, and their rights vis-vis the Chens' were yet to be determined.

[65] Counsel also submitted that the claimant in this matter the deceased vendor's executor was but a "passive bystander" as the issues are essentially between the Wrights and the defendants. With no direct knowledge of the facts, the claimant could only rely on documents which give only part of the facts required to resolve the issues in this claim. Much of the evidence relied on by the Wrights and the defendants was parol evidence, the credibility of which would need to be tested under cross examination at trial. Joinder was therefore necessary to achieve this.

[66] Counsel cited in support the Court of Appeal decision of ***Barrington Dixon v Angela Runte*** SCCA 105/08 (July 17, 2009) in which Harrison J.A. upheld the decision of Brooks J (as he then was), joining a party who had an equitable interest in the disputed land. Similar to the case herein the 1st respondent had accepted deposits from both the appellant and the 2nd respondent. The 2nd respondent who wished to be joined could demonstrate his equitable interest in the property and argued that the appellant was not a bona fide purchaser for value without notice, since the 2nd respondent had lodged a caveat prior to the appellant's payment of his deposit, giving notice of his interest to the world. It was accepted that in those circumstances to try the issues together would avoid multiple claims.

[67] Counsel maintained that the submission that the Wrights' claim has been determined and was at an end was without merit as the order for Specific Performance remained unenforceable without an accompanying order for possession against the defendants which was sought by this claim. The issue in this claim remained one of entitlement to the interest in the property and ought not to be resolved without the Wrights being added as a party to this claim.

[68] Counsel further submitted that the court had the power to reopen a case when it was necessary to do so to ensure that justice was done. The

principle extends even to the level of an appeal enabling the court to reopen a case and rehear an appeal. Counsel cited ***Taylor v Lawrence*** [2003] QB 528 in which the English Court of Appeal decided that it did have the jurisdiction to re-hear an appeal even after its order had been perfected, provided that it was clearly established that a substantial injustice had probably occurred and that there was no alternative remedy. In ***RBTT Trust Limited v. Cedric Flowers*** (Civil Appeal No. 29 of 2008) which was delivered on 23 March 2012 the Belize Court of Appeal accepted the principles outlined in Taylor as applicable to Belize. In the ***RBTT Trust Limited*** case the court referred to the judgment of Carey JA in ***Belize Electricity Limited v Public Utilities Commission*** (Civil Appeal No. 8 of 2009) which was delivered on 8 October 2010 case in which Carey JA recognised the court's implicit jurisdiction to re-open an appeal in order to *"do what is necessary to correct wrong decisions and ensure public confidence in the administration of justice,".*

[69] There is much force in the submissions of Mrs. Christopher-Walker. It was with considerable reluctance that I ruled on September 9, 2014 that I would not make an order joining the Wrights to this claim. The history of the matter is of some relevance to my ruling. It should be stated that the defendants have been singularly unfortunate in their dealings with various counsel throughout this matter. It was unwise for them not to have had separate counsel protecting their interests when they entered into the Agreement for Sale with the vendor Rev. Denton. Mr. Palmer was the vendor's attorney-at-law and was throughout responding to his instructions. The arrangement for payments to be made directly to the vendor apart from the $150,000 paid to Mr. Palmer is the source of some of the difficulty in determining what sums have been paid and may well have caused the non-stamping of the Agreement. Though the defendants engaged Mr. Darby to represent their interests late in the currency of the Agreement, that does not ultimately appear to have assisted them greatly.

[70] The defendants moved with some alacrity to retain Mr. Hussey to seek to obtain Specific Performance of the Agreement, but he died in tragic circumstances and their claim fell into abeyance. In the intervening period the Wrights themselves obtained an order for Specific Performance and the claimant took out this action to recover possession from the defendants. It was only when the court sought further submissions on the issue of whether or not the Wrights should be joined to this claim that the court became aware that the defendants had taken out an application to intervene in the Wrights' claim and to have the order for Specific Performance set aside.

[71] It is puzzling why counsel for the defendants who appeared for them at trial never sought to consolidate that application in this claim which was filed in June 2010, long before this trial proceeded in October 2013. Nor did counsel even make the court aware of its existence. That application to intervene was heard and failed on a procedural point. No further application was made nor was the refusal of the application on the procedural point appealed. The court is unable to say whether or not the professional difficulties of the former counsel for the defendants played any part in the matter not being further pursued. The upshot however is that at present the order for Specific Performance in favour of the Wrights still stands, even though there has never been any determination of the issues on the merits.

[72] It seems obvious that the earlier joinder of parties is sought the better. In the ***Barrington Dixon*** case the joinder was done prior to the hearing of the matter. In this situation all the evidence and submissions were already received before the issue of joinder was raised by the court. There is as indicated by the cases of ***Taylor*** and ***RBTT Trusts Limited*** power to reopen a case on appeal. It seems logical that the same principles would apply to a court of first instance especially when there is no question of any final order having yet been made. However in this peculiar situation a

number of factors ultimately caused the court to decline to exercise the discretion to reopen.

[73] Firstly the order for Specific Performance in favour of the Wrights has existed from 2006. Though the defendants were clearly hampered by the tragic passing of their counsel Mr. Hussey and the inability to access their file they could have sought other counsel earlier to seek to advance their interests. The defendants' contention is that it was in or about August 2009 that they first became aware of the order obtained by the Wrights when they were served with this claim. It was however not until almost one year later in June 2010 that the application was filed to seek to intervene in the Wrights claim. Essentially they sat on their rights from the passing of Mr. Hussey until 2010 when the action to intervene was filed, continuing to live in the premises without paying rent from at least January 2003 on their evidence. As noted earlier, inexplicably the application to intervene in the Wrights claim and to have the order for Specific Performance set aside was not sought to be consolidated with this action. Though it seems clear that the merits have never been determined the fact is that there exists an Order for Specific Performance in favour of the Wrights and in respect of which there has already been an unsuccessful application to set it aside; though as evidenced by the Minute of Order, that application was not determined on its merits but fell at a procedural hurdle.

[74] It is arguable therefore that this court would still have the jurisdiction to consolidate the matters on the basis that the application to intervene had not been decided on the merits, nor had the initial application for the Specific Performance been so decided. However in making such an order the court would not have had the benefit of hearing from counsel for the Wrights who were represented at the hearing of the application to intervene in their claim, concerning whether or not the two matters should be so consolidated and the Wrights case also effectively reopened.

[75] There are also other factors to be considered. The issue of joinder has come very “late in the day” after the conclusion of the evidence and submissions in this claim. If the order was made to join the Wrights, essentially the matter would have to be completely retried. The claimant in this matter lives overseas and would have to return for such a re-hearing. The Wrights would have to be served and given an opportunity to file their ancillary defence. There would be significant costs and further delay involved in a matter concerning an Agreement which has been in existence since 1997.

[76] Further one of the live issues in any such rehearing would be whether in the circumstances of the various orders, this court would actually at this point still have the jurisdiction to set aside the order for specific performance, if the evidence then elicited seemed to justify that course. Still further is the reality that the court is unaware if even now, the defendants would be in a financial position to complete the Agreement. Apart from the outstanding balance purchase price, they also still owe rent for at least over ten years on their own admission.

[77] Therefore, all things considered it appears that damages in lieu of specific performance would be appropriate, given that the order for specific performance granted to the Wrights which still stands, has operated to frustrate the Agreement between Rev. Denton and the defendants. The defendants have always had in the alternative, a claim for damages for breach of contract in their counterclaim. This decision is uncomfortable as the defendants were clearly the purchasers first in time who were put in and are still in possession. Given all the circumstances in this case the question whether or not the Wrights were bona fide purchasers for value without notice is patently live. However for all the reasons outlined, damages rather than specific performance is what is now available to the defendants.

[78] It is the vendor who I have found wrongfully caused the Agreement to end by contracting with a second set of purchasers without ending the first contract. Those second purchasers subsequently managed to obtain an order of Specific Performance thus frustrating the initial Agreement with the defendants. It therefore follows that there is no basis on which the deposit paid by the defendants to the vendor Rev. Denton should be forfeited.

(e) How much money has been paid by the defendants towards the purchase price?

[79] The defendants maintain that they paid the sum of $3.4M towards the purchase price and that was the figure included in the purported agreement of 2001 as having already been paid by the defendants. However as was pointed out by counsel for the claimant the payments listed at paragraph 21 of the 1st defendant's witness statement amount to $3,049,954.50. Further counsel for the claimant pointed out that two of the payments listed in that paragraph were cheques made payable to the 1st defendant and not to Rev. Denton. These are exhibits 24 and 28, CIBC cheques in the sum of $200,000 dated December 19, 1999 and in the sum of $300,000 dated June 1, 2000. The 1st defendant explained that these sums were used to purchase United States dollars to send to Mr. Denton. On the cheque for $300,000 there is indeed an endorsement of "US$ 5,700 @ 42.60." At an exchange rate of 42.6 it appears $242,820 of that $300,000 was used to purchase United States dollars. That would offer at least some support for the defendants' contention that the proceeds of the cheque were converted to United States dollars to send to Mr. Denton. There is however no similar endorsement related to United States dollars on the cheque dated December 19, 1999. Counsel for the claimant bolstered her earlier submission by noting that several exhibits were admitted in relation to moneys sent to Rev. Denton via wire transfer and these were not listed among them. Counsel for the claimant submitted that

the amount proven by the documentary evidence submitted by the defendants was only J$2,549,954.50.

[80] The 1st defendant indicated in her evidence that other payments were made than just those evidenced by the documents put before this court and that she had taken her receipts to an accountant. There is another factor which the court has taken into account. Ms. Hortense Clarke admitted in cross-examination to seeing an agreement dated June 2001. There is no evidence of what figures if any were included in that agreement. However in the purported agreement dated November 30, 2001 which the court has found was not entered into by the parties, it is recorded that the defendants had paid the sum of $3.4M. Though for reasons already outlined in detail earlier in the judgment that Agreement of November 30, 2001 has been held to be invalid, in all the circumstances I find it supports the defendants' contention and I accept that they paid $3.4M to Rev. Denton, though the evidence of receipts does not establish that entire sum.

(f) Do the defendants owe the claimant for rental and if so how much?

[81] It is common ground that given the terms of the Agreement for sale which stipulated that rent should be paid to the vendor and would go towards the purchase price rent was due to be paid by the defendants to Rev. Denton until completion of the agreement. It is also common ground that the defendants would be liable to pay rental until any such sale was completed or they vacated the premises. See the cases of ***Saunders v. Musgrave*** 108 E.R. 545 and ***Howard v Shaw*** 151 E.R. 973.

[82] Counsel for the claimant submitted that the evidence of payments provided demonstrates that the defendants were careful people who, would have also kept proof of payments of rental, if any were in fact made. It is therefore submitted that the obligations to pay rental to date had not been met. The claim therefore sought rental from the date of occupation of

the defendants. The 1st defendant however maintained that rental was paid up to January 2003 as the vendor kept pressuring her for money though she had told him in April 2002 when she confronted him about the fact that he was trying to sell the property to the Wrights that she wasn't going to be paying any more rent. Condition 9 stipulated in the Agreement is important to consider in determining the issue of payment of rental. Though completion was contemplated within a year, condition 9 stipulated that rent at the rate of $20,000 per month should be credited towards the balance of purchase price due at completion.

[83] Given the sum the court has found the defendants paid towards the purchase price it is entirely consistent with the defendants assertion that they paid rent up to January 2003 and I so find. The sums paid towards the purchase price however also counted towards the payment of rent. They served a dual purpose. I do not find that any separate sums were paid for rent. If the agreement had been concluded the defendants would have received the benefit of the sums paid going towards both the rental and the purchase price. However, given the outcome of events, in effect the sums that have been paid by the defendants can only now go to set off rent due from the date of their occupation until the date they vacate the premises.

(g) Was rental of $1,440,000 collected by Rev. Herman Denton from the Wrights and if so should that be applied towards the purchase price paid by the defendants?

[84] As part of their counterclaim the defendants seek from the estate of Rev. Denton the sum of $1,440,000. They claim that there was a letter to the effect that the rent from the section of the premises occupied by the Wrights should be paid to them and go towards the costs of purchase. The 1st defendant indicated that after she got back her file in 2010 from Mr. Hussey's estate she noticed that some documents and receipts were

missing. She however maintained that there was also a verbal agreement to that effect.

[85] In the absence of any documentation the only persons who can speak to the existence of any such agreement would be the defendants and the Wrights as Mr. Denton is now deceased. The Wrights are however not a part of this claim. With respect it seems any such agreement would be a strange bargain indeed! Not only would the vendor have agreed to allow the rent due from the defendants' to go towards the purchase price, but also the rent paid by the Wrights as well. The defendants would get a triple benefit. Their rent and the rent of the Wrights would go towards the purchase price and they would not have to pay any separate rent for their occupation pending completion of the transaction. I am not persuaded that any such agreement existed. It does not make economic sense and does not fit the picture of Rev. Denton that the defendants have sought to paint; that of a man eager to wring as much money out of them and others as possible.

(h) Should the defendants be required to withdraw the caveat?

[86] With respect to the nature of a caveat, counsel for the claimant relied on the Canadian case of ***CPR v. District Registrar of Dauphin Land Titles Office*** 4 DLR (2d) 519. At page 521 Tritschler J. described a caveat as follows:

> A caveat is merely notice of a claim which may or may not be a valid one. The validity of the claim must be determined after and not before the filing of the caveat. The purpose of the caveat is to warn the registered owner, and, what is more important, all persons who might deal on faith of the Certificate of Title, that the caveator claims an interest which is not disclosed on the title… it is trite law that caveators are to be used for the protection of alleged as well as of proved interests and that a caveat is merely a warning which creates no rights but protects existing rights, if any.

[87] Given the findings of the court the defendants will have to be required to withdraw the caveat removing the impediment to the transfer of the property to the Wrights. However it only seems just that they will be entitled to receive any damages due to them, prior to the removal of the caveat.

The Stamp Duty Act

[88] Before parting with this matter I should point out that the court is aware that section 36 of the Stamp Duty Act has not been complied with. Ordinarily the court would have required the defendants who seek to rely on the Agreement for Sale to have it stamped, prior to any award being made in their favour. However a long time has passed. A significant penalty would now apply. The agreement has been deemed to be cancelled and therefore in any event any sum paid would be recoverable. In those circumstances the court exercised its discretion not to require the stamping at this time.

DISPOSITION

In light of the foregoing the court makes the following order:

ORDER

[89] **On the claim:**

a. It is declared that the Agreement between the defendants and Herman L. Denton (deceased) has been frustrated and cancelled by the order for Specific Performance granted to Dennis Wright and Lisa Rose Wright in Claim No. 2004HCV02341 on July 20, 2006.

b. The claimant is not entitled to forfeit the deposit paid by the defendants.

c. The defendants owe rental to the claimant representative of the estate of Herman Denton from November 1997 at the rate at $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000 paid to Herman L. Denton.

d. The defendants shall quit and deliver up possession of the said property to the claimant within 14 days of the payment of any sum due and owing to them, in the event that a sum of money is owed by the estate of Herman Denton to the defendants after the sum owed for rental is set off against the damages due to the defendants from the estate of Herman Denton. This order is subject to the eventual award made for damages and will be varied if necessary.

e. The defendants shall withdraw the caveat lodged against the property within 7 days of delivering up possession to the claimant.

f. Costs to the claimant to be agreed or taxed

[90] **On the Counterclaim:**

a. The defendants are awarded damages for breach of the 1997 Agreement for Sale they entered into with Herman L. Denton.

b. The claim for a declaration that the rental in the sum of $1,440,000.00 collected from the Wrights by Herman Lloyd Denton be applied to the purchase price as agreed by the parties is refused.

c. The claimant is not entitled to forfeit the deposit herein or any portion of the monies paid under the contract.

d. Costs to the defendants to be agreed or taxed.

[91] The court will hear further submissions on October 10, 2014 on the quantum of damages to be awarded, and on any interest to be awarded on sums due.