[2026] JMCC Comm 09

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

**COMMERCIAL DIVISION**

**CLAIM NO. SU 2024 CD 00126**

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| **BETWEEN** | **AUTO CHANNEL LIMITED** | **CLAIMANT** |
| **AND** | **MARTIN PAUL CHIN** | **1ST DEFENDANT** |
| **AND** | **JENNIFER DOOLAM CHIN** | **2ND DEFENDANT** |
| **AND** | **NATIONAL COMMERCIAL BANK LIMITED** | **3RD DEFENDANT** |

**IN CHAMBERS**

**Mrs Caroline Hay KC & Mr Zurie Johnson instructed by HayMcDowell Attorneys-at-Law for the Claimant**

**Mr Marc Williams and Mr Duncan Roye instructed by Williams McKoy & Palmer for the 1st and 2nd Defendants**

**Mrs Sandra Minott Phillips KC & Mr Jamaiq Charles instructed by Myers Fletcher & Gordon for the 3rd Defendant**

**Heard: December 3, 2024, May 1, 2026 and May 11, 2026.**

**Civil Procedure – Civil Procedure Rules - Summary Judgment – Agreement for Sale – Notice to Complete – Vacant Possession – Rescission of Agreement – Whether Agreement Completed by Delivery of Bank Undertaking for Payment of Purchase Price and Costs – Civil Procedure Rules ("CPR") 2002, R. 15.6, 10.5, 26.3(1)(b) and (c), 64.6 and 64.6(4)(d).**

**BROWN BECKFORD J**

## INTRODUCTION AND BACKGROUND

[1] It would be remiss of me not to begin this judgment with an apology to the parties and Counsel for the delay in rendering same. The Court acknowledges that delays of this nature often inconvenience those who wait. Though burdened by the pressures of current matters, I completely accept responsibility for this and crave your mercy.

[2] The Claimant, Auto Channel Limited, has brought a claim seeking a declaration that an Agreement for Sale entered into with Martin Paul Chin and Jennifer Doolam Chin, the 1st and 2nd Defendants respectively, is discharged for breach of a fundamental condition, and also a declaration that it is entitled to cancel or repudiate the contract and that the land be retransferred to the vendors and other orders consequential on those declarations. The Claimant seeks against the 3rd Defendant, National Commercial Bank Limited, a discharge of its undertaking to pay the sum of **FIFTY-TWO MILLION THREE HUNDRED AND SIXTY-ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($52,361,875.00)** and that this sum be released to the Claimant.

[3] The particulars are that the 1st and 2nd Defendants were owners, as tenants-in-common, of property located at Lot 250 Richmond Park, St. Andrew. By way of an Agreement for Sale made on 9 May 2023, the Claimant agreed to purchase the subject commercial property for a price of **FIFTY-EIGHT MILLION DOLLARS ($58,000,000.00).** The contract provided that the purchase price and all fees and costs were to be paid on completion. Completion was fixed for within 90 days of the date of the Agreement. It was a term of the Agreement for Sale that vacant possession be given on completion. A condition of the Agreement for Sale was that the purchaser present a Letter of Undertaking from a registered financial institution to the vendors' Attorney-at-Law within 45 days of the Agreement, failing which the Attorney was not obliged to part with the registrable documents or duplicate certificate of title, unless the purchaser had paid all monies. The Letter of Undertaking was duly produced.

[4] On 23 August 2023, after the time for completion had elapsed, the purchaser served the vendors with a Notice to Complete the Agreement for Sale and making time of the essence, indicating that the property was not vacant and that the purchaser was ready, willing and able to complete the contract. The Notice to Complete extended the

completion date, completion now to be made within 21 days of the Notice, which would be by 18 September 2023. The property remaining occupied on 18 September 2023, the purchaser's Attorneys-at-Law indicated, by way of letter, that the purchaser was treating the transaction as having been rescinded or cancelled as the vendors had failed to deliver vacant possession. The purchaser demanded a refund of all monies due to it under the Agreement for Sale and a re-transfer of the property to the vendors.

[5] The Claimant, in its claim, contends that the 1st and 2nd Defendants could not deliver vacant possession as the tenants of the premises continued in occupation. The Claimant relies on letters signed by the tenants, after the Agreement for Sale had been rescinded, indicating that they continued in occupation as tenants on the premises and wished to remain in possession as tenants.

[6] Because of the dispute between the vendors and purchaser, the 3rd Defendant Bank has refused to act on the Letter of Undertaking or to return the funds to the Claimant without an order of the court. Unable to reach an amicable resolution with the 1st and 2nd Defendants, the Claimant filed its claim form seeking the following orders:

1. *In relation to the 1st and 2nd Defendants whether jointly and/or severally as follows:*

    (i) *A Declaration that the Agreement for Sale dated May 9, 2023 between the 1st and 2nd Defendants as Vendor and the Claimant as Purchaser is discharged by 1st and 2nd Defendants' breach of a fundamental condition of the contract;*

    (ii) *A Declaration that the Claimant is entitled to cancellation and/or repudiation of the Agreement for Sale dated May 9, 2023 together with damages for breach of contract;*

    (iii) *Damages and/or Special Damages;*

    (iv) *An Order that the 1st and 2nd Defendants within 180 days of the date of this Order and at their sole cost and expense facilitate retransfer from the Claimant's name into their own names as registered proprietors all of the*

*estate and interest in ALL THAT parcel of land part of RICHMOND PARK in the parish of SAINT ANDREW being the Lot Numbered Two Hundred and Fifty on the plan of Richmond Park aforesaid deposited in the Office of Titles on the 15th day of February 1946 of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in Certificate of Title registered at Volume 1419 Folio 845 of the Register Book of Titles ("the property") and that the 1st and 2nd Defendants do bear all costs fees and charges thereof by way of restitutio in integrum;*

(v) *Further or in the alternative, an Order that should the 1st and 2nd Defendants' fail to facilitate the said retransfer from the Claimant's name into their own names within the said 180 days, the Claimant is entitled to sell the property by private treaty or by public auction and the sum claimed by way of damages and all costs be repaid to the Claimant by way of restitution.*

2. *In relation to the 3rd Defendant as follows:*

(vi) *a Declaration that the Agreement for Sale dated May 9, 2023 having been brought to an end by the 1st and 2nd Defendants breach and repudiated by the Claimant, the 3rd Defendant's banker's undertaking contained in letter dated June 29, 2023 addressed to McKoy Law Attorneys-at-Law is discharged;*

(vii) *an Order that consequent upon the discharge of the banker's undertaking contained in letter dated June 29, 2023 addressed to McKoy Law Attorneys-at-Law the 3rd Defendant to releases the sum of $52,361,875.00 to the Claimant being money payable by the 3rd Defendant to the Claimant as money had and received by them to the use of the Claimant, or such other sum as this Honourable Court may determine;*

3. *Costs and Attorney's Costs;*

4. *Interest,*

5. *Interest at commercial rates or at the rate and for such period as the court in equitable jurisdiction thinks fit;*

6. *Such further and other relief as this Honourable Court deems fit.*

[7] The 1st and 2nd Defendants deny that they were in breach of contract and contend they were not obliged to deliver possession until payment was made. Having failed to make payment as stipulated in the Agreement for Sale, it was the Claimant that was in breach of contract. At best, they argue, the claim was premature.

[8] The 3rd Defendant took no adverse position to either the Claimant or the 1st and 2nd Defendants and awaits the ruling of the court as to its obligations.

[9] Contending that the 1st and 2nd Defendants' defence discloses no reasonable grounds for defending the claim, the Claimant now seeks the following orders:

1. *Summary Judgment be entered against the 1st and 2nd Defendants pursuant to Rule 15.6 of the Supreme Court Civil Procedure Rules, 2002 ("CPR");*

2. *Further and/or in the alternative, that this Honourable Court strike the 1st and 2nd Defendants' statements of case pursuant to CPR Rules 10.5, 26.3(1)(b) and (c) as either an abuse of the process of the Court or that the defences of the 1st and 2nd Defendants disclose no reasonable grounds for defending the claim dated March 19, 2024 and filed by the Claimant on March 22, 2024;*

3. *Consequent on an Order made in terms of (1) and/or (2) above:*

   (viii) *A Declaration that the Agreement for Sale dated May 9, 2023 between the 1st and 2nd Defendants as Vendor and the Claimant as Purchaser is discharged by 1st and 2nd Defendants' breach of a fundamental condition of the contract;*

   (ix) *A Declaration that the Claimant is entitled to cancellation and/or repudiation of the Agreement for Sale dated May 9, 2023 together with damages for breach of contract;*

(x) *Damages and/or Special Damages;*

(xi) *An Order that the 1st and 2nd Defendants within 180 days of the date of this order and at their sole cost and expense facilitate retransfer from the Claimant's name into their own names as registered proprietors all of the estate and interest in ALL THAT parcel of land part of RICHMOND PARK in the parish of SAINT ANDREW being the Lot Numbered Two Hundred and Fifty on the plan of Richmond Park aforesaid deposited in the Office of Titles on the 15th day of February 1946 of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in Certificate of Title registered at Volume 1419 Folio 845 of the Register Book of Titles ("the property") and that the 1st and 2nd Defendants do bear all costs fees and charges thereof by way of restitutio in integrum;*

(xii) *Further or in the alternative, an Order that should the 1st and 2nd Defendants' fail to facilitate the said retransfer from the Claimant's name into their own names within the said 180 days, the Claimant is entitled to sell the property by private treaty or by public auction and the sum claimed by way of damages and all costs be repaid to the Claimant by way of restitution.*

*4. In relation to the 3rd Defendant as follows:*

(xiii) *a Declaration that the Agreement for Sale dated May 9, 2023 having been brought to an end by the 1st and 2nd Defendants' breach and repudiated by the Claimant, the 3rd Defendant's banker's undertaking contained in letter dated June 29, 2023 addressed to McKoy Law Attorneys-at-Law is discharged;*

(xiv) *an Order that consequent upon the discharge of the banker's undertaking contained in letter dated June 29, 2023 addressed to McKoy Law Attorneys-at-Law the 3rd Defendant to releases the sum of $52,361,875.00 to the*

*Claimant being money payable by the 3rd Defendant to the Claimant as money had and received by them to the use of the Claimant, or such other sum as this Honourable Court may determine;*

5. *Costs and Attorney's Costs;*

6. *Interest;*

(xv) *Interest at commercial rates or at the rate and for such period as the court in its equitable jurisdiction thinks fit;*

(xvi) *Such further and other relief as this Honourable Court deems fit.*

**CLAIMANT'S SUBMISSIONS**

[10] Mrs Caroline Hay King's Counsel, on behalf of the Claimant, contended that the Defence of the 1st and 2nd Defendants disclosed no realistic prospect of success and that there were no genuine issues warranting determination at trial, pursuant to Part 15 of the **Supreme Court of Jamaica Civil Procedure Rules, 2002 ("CPR")**. CPR Rule 15.2 states:-

*"The court may give summary judgment on the claim or on a particular issue if it considers that-*

*a) The claimant has no real prospect of succeeding on the claim or the issue; or*

*b) The defendant has no real prospect of successfully defending the claim or the issue."*

[11] The Court's powers on an application for summary judgment are set out at CPR Rule 15.6(1) which states:

*"On hearing an application for summary judgment the court may-*

*a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*

*b) Strike out or dismiss the claim in whole or in part;*

*c) Dismiss the application;*

*d) Make a conditional order; or*

*e) Make such other order as may seem fit."*

[12] In addressing what constitutes a real prospect of success, she relied on the discussion in **Swain v Hillman and anor** [2001] All ER 91, Lord Woolf MR stated at paragraph j, page 92 that:-

> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success..."*

In that same judgment, Lord Woolf MR stated:

> *Useful though the power is..., it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial."*

[13] King's Counsel for the Claimant also relied on the statement of Lord Hutton in **Three Rivers DC v. Bank of England [2001]** 2 All ER 513 for the meaning of "no real prospect of success". Lord Hutton said the following:

> *The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly.*

[14] King's Counsel also referred to the discussion by Harrison P JA of the primary test for "no real prospect of success" in **Gordon Stewart et al v Merrick Samuels SCCA No. 2/2005** at page 94 where he noted:

> *"The prime test being "no real prospect of success" requires that the learned trial judge to do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action*

*as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning."*

[15] King's Counsel contended that the test of no real prospect of success was met in that the 1st and 2nd Defendants' defence was misconceived. The 1st and 2nd Defendants' argument that the Claimant was in breach of the Agreement for Sale by failing to pay the sale price and all fees and costs associated with the Agreement for Sale was rejected. King's Counsel for the Claimant took the position that the Claimant complied with the terms of the Agreement for Sale, including the manner of payment outlined therein, having delivered the required undertaking.

[16] King's Counsel posited that clause (iii) at pages 2 and 3 of the Agreement for Sale, which states that the *"Balance purchase price in the amount of* ***FIFTY-TWO MILLION TWO HUNDRED THOUSAND DOLLARS ($52,200,000.00)*** *to be paid on completion subject to the terms and conditions noted herein."* is subject to Special Condition 6.

[17] King's Counsel submitted that in keeping with Special Condition 6, the Claimant elected to satisfy the balance purchase price by way of the Letter of Undertaking, which was delivered within the prescribed 45-day period. That undertaking was accepted and reflected in the 1st and 2nd Defendants' own closing statement of account, which showed nothing further was owing from the Claimant. On that basis, she further argued, the Claimant's obligations toward completion had been discharged, whereupon the duty fell on the 1st and 2nd Defendants to hand over the title documents and deliver the property free of occupation within the period extended by the Notice to Complete.

[18] King's Counsel relied on the following statements in **The Law of Real Property, 5th Edition by Sir Robert Megarry and H.W.R. Wade** at page 614 where the legal effect of a clause in relation to vacant possession in contracts of sale was discussed:

*"The vendor must give vacant possession on completion. This rule requires the vendor to make property available at the due date of completion in a state in which the purchaser can both physically and lawfully occupy it. It also requires the vendor to evict any tenants or other occupiers, to remove his own chattels; and to bear the risk of any event, even after the contract, which makes it*

> *impossible for him to give vacant possession at the proper time. Thus, if between contract and conveyance the property is requisitioned and the vendor put out of possession, the purchaser may rescind and recover his deposit." [Emphasis added]*

[19] King's Counsel also relied on **Cumberland Consolidated Holdings Limited v Ireland** [1946] K.B. 264 on pages 270-271 Lord Greene M.R. said:

> *The phrase "vacant possession" is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of "vacant possession" and it is the duty of the vendor to eject such a person before completion."*

[20] King's Counsel then referred to **Alex Import's Limited v Keith Tennant** (Suit No. C.L. 1999/A109) to highlight the vendors' obligation to take steps to give vacant possession. In that case, Daye J found that the vendor had fallen short of the obligation to deliver vacant possession. The court took into account that the vendor had made no personal effort to remove the occupants, had not instructed their Attorneys-at-Law to issue notices, and had carried on receiving rental payments throughout. The vendor was accordingly found to be in breach and ordered to pay damages.

[21] King's Counsel also relied on **Topfell Limited v Galley Properties Limited** [1979] 1 WLR 446. The case involved a claim for specific performance where the purchasers asserted a right to vacant possession of part of the property. The vendors were unable to comply at completion due to a regulatory restriction and refused to complete unless the full purchase price was paid. Templeman J (at pages 447D–E, G) held that vacant possession requires that the purchaser be able to occupy and enjoy the property, whether directly or through others, and that the vendors were obliged to deliver it in that state. At page 450D, Templeman J further held that this obligation, entered into via the particulars of the contract, could not be contradicted by inconsistent special or general conditions.

[22] King's Counsel argued that the 1st and 2nd Defendants failed to deliver vacant possession, and it is undisputed that the property remains occupied by third parties. The 1st and 2nd Defendants' seeking to invoke the 3rd Defendant's undertaking, without ever

obtaining the Claimant's waiver or agreement, even after the Claimant's rescission had been communicated, was indicative that the 1st and 2nd Defendants' claim that the Claimant was in breach of the Agreement for Sale was a convenient position, and not one that was genuinely held.

[23] King's Counsel was also of the firm position that the failure to secure vacant possession of the property within the period of the Notice to Complete, time being made of the essence, was itself a fundamental breach entitling rescission, and that the act of registering a transfer at a time when the property was not vacant, and without the Claimant's knowledge or consent, independently constituted a repudiatory, or alternatively anticipatory, breach of contract by the vendors.

[24] It was ultimately submitted by King's Counsel that the Claimant, having served the Notice to Complete requiring the 1st and 2nd Defendants to deliver vacant possession, their failure to comply within the stipulated period brought any entitlement to specific performance to an end and entitled the Claimant to rescind without equitable intervention. King's Counsel further contended that at the point when the Notice to Complete was issued, the Claimant had fully discharged its own obligations under the Agreement for Sale, a fact demonstrated by the closing statement of account prepared by the 1st and 2nd Defendants' Attorney-at-Law, which showed no outstanding sum.

[25] As to the adequacy of the notice period, King's Counsel submitted that the 26 effective days allowed (comprising 21 days in the Notice to Complete itself, plus 5 days for deemed service under Special Condition 10) was reasonable in all the circumstances. In support of this, King's Counsel pointed to the fact that the 1st and 2nd Defendants had themselves requested a 30-day period to close at an earlier stage of negotiations, that the issue of sitting tenants had been raised and discussed before the Agreement for Sale was even executed, that the vendors had represented that notices to vacate had already been served on those tenants; and that they had expressed confidence that vacant possession could be secured within 90 days.

[26] To support this point, King's Counsel relied on dicta from Palmer Hamilton J in **Donald George Hinds & Anor v Rudolph George Stephenson & Ors** [2020] JMSC

Civ. 253 (paras. 44–46) )(**'Hinds'**), who, applying ***J.T.M Construction & Equipment Ltd v Circle B Farms Ltd*** **(unreported), Supreme Court, Jamaica, Claim No. 2007HCV05110, judgment delivered 29 June 2009** (**'JTM Construction & Equipment'**) reaffirmed that where completion is delayed, an innocent party seeking to rescind must first serve a valid notice to complete specifying a date for compliance and indicating that failure will be treated as repudiation, such notice typically being grounded in an express contractual term and requiring proper service. On the facts of **Hinds,** the Notice issued pursuant to Special Condition 10 of the Agreement for Sale in that matter was unequivocal, identified the Purchasers' non-compliance, required completion by a specified date, and stated that failure would result in repudiation; accordingly, it constituted, in substance, a valid notice to complete.

[27] Once Palmer Hamilton J determined that the notice in **Hinds** was complete, making time of the essence, she turned to the effect of the notice. She relied on paragraphs 50 and 51 of **JTM Construction & Equipment,** where it was outlined that in an instance where completion is delayed, an innocent party must serve a notice to complete making time of the essence, failing which the contract may be treated as repudiated, and the court will not assist a party who fails to complete by that date (**Stickney v Keeble** [1917] A.C. 386; **Brickles v Snell** [1916] 2 A.C. 599). The purpose of such notice is to extinguish the defaulting party's right to specific performance, thereby enabling rescission (**D.G. Barnsley in Barnsley's Conveyancing Law and Practice (3rd edn. p. 376**).

[28] King's Counsel also relied on **Voumard The Sale of Land (5th ed) (1995)** where the learned author P.N. Wikramanayake SC at paragraph [13 100], [12 080] and [12 150] looks at principles of completion, repudiation and rescission. King's Counsel drew the Court's attention to the treatment of these principles in **Voumard**, where the learned author explains that a failure to honour a fundamental contractual obligation may give rise to a breach only if the innocent party chooses to act on it; until that election is made, the conduct is not itself actionable. Once the election is made and the breach accepted, the contract comes to an end for all purposes, save the pursuit of damages, provided the innocent party has moved with reasonable expedition. The author further

notes that the innocent party's own readiness and capacity to perform goes to the assessment of damages rather than liability. King's Counsel asserted that on the facts of this case, the Claimant had moved promptly to bring the contract to an end and to restore the parties to their pre-contractual positions, and that these matters had not been challenged or contradicted by the 1st and 2nd Defendants.

[29] King's Counsel also relied on the discussion in **Halsbury's Laws of England that "Repudiation must go to the root of the contract." Halsbury's Laws of England > Contract (Volume 22 (2019)) > 8. Discharge of Contractual Promises > (4) Discharge by Termination for Breach of Contract (iii) Repudiation and "Express and implied repudiation." Halsbury's Laws of England > Contract (Volume 22 (2019)) > 8. Discharge of Contractual Promises > (4) Discharge by Termination for Breach of Contract > (iii) Repudiation.** King's Counsel argued that where a vendor fails to deliver possession under a contract for sale, and time is of the essence, such failure entitles the purchaser to rescind and claim damages. The holding over of the tenant is not per se a defect of title, and provided the purchaser has not waived his rights under the contract, the purchaser was entitled to damages. **Voumard** was credited for this proposition.

[30] It was further submitted that there is no evidence that the 1st and 2nd Defendants served the existing tenants with any notices to quit, as none have been produced, and the documents relied on merely indicate non-renewal of leases rather than termination. The evidence therefore points to no genuine intention to secure vacant possession.

[31] Turning to the position of the 3rd Defendant, King's Counsel submitted that once the Agreement for Sale was rescinded, the Bank's Letter of Undertaking ceased to have any operative force. Any purported compliance with the conditions of the undertaking was of no effect, since those steps were taken only after notice of rescission had been communicated to all parties. King's Counsel went further to argue that the funds held by the 3rd Defendant were not the bank's own moneys but were held on behalf of the Claimant, placing the 3rd Defendant in the position of either agent or trustee. In that

capacity, it could not properly act in a manner averse to the Claimant's interests, and upon a finding that the contract had been brought to an end, the 3rd Defendant would be obliged to return the funds together with any interest accumulated thereon.

**1ST AND 2ND DEFENDANTS' SUBMISSIONS**

[32] Mr Duncan Roye, on behalf of the 1st and 2nd Defendants, also pointed to Part 15 of the CPR in relation to summary judgment. Counsel added that the Court should also consider the court's striking out powers under **Rule 26.3 (1) (b)** and **(c)** of the **Civil Procedure Rules** which provide:

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the Court-*
>
> *(a) there has been a failure to comply with a rule of practice direction or with an order or direction given by the Court in the proceedings;*
>
> *(b) that the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10*

[33] Counsel also relied on **Swain v Hillman** and highlighted where Woolf J stated that:

> *"[Summary Judgment] enables the Court to dispose summarily of both claim or defenses which have no real prospect of being successful. The words 'no real prospect of succeeding and not need amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the Court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success"*

[34] Counsel for 1st and 2nd Defendants also relied on **Gordon Stewart et al v Merrick Samuels** in relation to the primary test of a real prospect of success. Stating that it requires the court to determine the ultimate success or failure of the claim and not the initial contentions of the parties.

[35] He relied on the case of **Easton Lozane v Junior Beckford [2020]** JMSC Civ 106 to remind the Court that in considering an application for summary judgment, the court ought not conduct a mini-trial. He pointed to the court's opinion at paragraph 18, where it was noted that while it was necessary to form some conditional view of the claim, the court should not conduct a mini-trial on disputed facts which, at that juncture, would not have been tested and investigated on the merits.

[36] Counsel submitted that the Claimant's case, premised on an alleged failure to deliver vacant possession, is unsustainable, as the obligation to give possession had not yet arisen under the Agreement for Sale. Counsel argued that Special Condition 6 does not govern the issue of possession but instead addresses the provision of a Letter of Undertaking and the circumstances in which the vendor's Attorney may release the registrable instrument and/or the Duplicate Certificate of Title for the said property to the purchaser.

[37] Counsel further posited that, on a proper construction of the Agreement, vacant possession is to be given only "on completion", as defined under the Agreement for Sale. Counsel emphasised that mere provision of a Letter of Undertaking did not amount to completion, as the Claimant would remain obliged to actually pay over all sums due. The Claimant's contention that completion was effected by the delivery of the Letter of Undertaking and partial payment was accordingly said to be misconceived.

[38] Counsel relied on **Barrington Scott Clarke v Kimesha Amelia Debbie-Ann Notice** [2021] JMSC Civ 12 (**'Clarke v Notice'**) 12 at Paragraphs 32 and 33 for the position that possession is to be determined by reference to the terms of the contract. The court there held that even though the title had been transferred to the purchaser's name, based on the wording of the completion clause, the contract had not been completed to give her the right to possession.

[39] On the point of what constitutes completion, Counsel pointed the Court to **Arlene Wilson v Trevand Manufacturing Company Limited** Unreported Judgment Suit No. C.L. 324 of 1996 entered on the 29th day of October, 1999 (**'Wilson v Trevand'**). At page 5 of the judgment, the court discusses what constitutes completion. The court held

the meaning in **Kilner v France-1946-2 ALL ER 83**, that the word completion in a contract had its usual meaning, that is "the complete conveyance of the estate and final settlement of business". The court also referred to **In Re Alkins Will Trust National Westminster Bank Ltd. v Atkins & Om 1974 2 ALL ER 1:**

> ***…..****Pennycuick V-C at page 5. in construing the expression at the date of completion of sale. Relied on the following quote,: -*
>
> > ***"It seems to me that those words are themselves quite unambiguous and can only denote the date at which the sale of Church Farm is completed; in accordance with the ordinary meaning of that word in the language of conveyance, namely the execution of a conveyance and payment of purchase price".***

The court ultimately determined that completion occurred when payment of the balance purchase money was made. Counsel pointed out that this case was distinguishable from the present case because in the Agreement for Sale being considered, “completion” was defined by payment of the purchase price and did not contemplate the provision of an Irrevocable Letter of Undertaking. Accordingly, the Claimant’s contention that the Letter of Undertaking alone satisfied its obligations as to completion was said to be erroneous. It was further submitted that the Claimant has, to date, failed or refused to pay the purchase price to the 1st and 2nd Defendants.

[40] Counsel then turned to the decision in **Henlin Gibson Henlin (A Firm) and Calvin Green v Lileth Turnquest** [2012] JMSC Civil No. 73 (‘**Henlin’**) to define an undertaking. This case, though in relation to an Attorney's undertaking, defined it as *"any unequivocal declaration of intention addressed to someone who reasonably places reliance on it made by Solicitor...".*

[41] With that definition in mind, Counsel argued that an undertaking constitutes no more than a conditional promise to pay and cannot be equated with payment of the purchase price. Accordingly, Counsel asserted that the Claimant has not complied with its obligations for payment under the Agreement for Sale and has acquired no entitlement to vacant possession or to rescind the agreement. It is further contended that, as completion has not occurred, due to the Claimant’s failure to pay the sums due, no right

to possession has arisen. On that basis, the claim is premature, the Defence raises a real prospect of success, and summary judgment should be refused.

## THE LAW

[42] There is no dispute as to the applicable law relating to Summary Judgment. I am grateful for the detailed submissions made by Counsel, which are adopted in full.

## DISCUSSION

[43] I am also grateful for the in-depth submissions of Counsel, which have been very helpful to the Court, such that they have been reproduced above in some detail. My failure to refer to any portion of the submissions does not mean it was not considered in the overall determination of the matter.

[44] King's Counsel submitted on behalf of the Claimant that the determination of completion rests on the manner of payment of the purchase price. Counsel contended that payment could be made in cash or by a Letter of Undertaking. This, she further contended, was the correct interpretation of the provision in the Agreement for Sale in relation to completion. The letters from the tenants prove that at the time of completion, the tenants were still in possession. The property not being vacant on completion, the vendors were in breach of the Agreement for Sale entitling the Claimant to rescind it.

[45] The 1st and 2nd Defendants' position was that they had not yet received the funds required to complete the sale, and thus no issue of possession had arisen. They relied on the 'Time of the Essence' clause for the payment of the purchase price. Completion was therefore contingent on the payment of the sale price within the 90 days. They contended that the Letter of Undertaking did not trigger completion and that the Claimant was still under an obligation to make actual payment. The Letter of Undertaking prompts only the parting with of the registrable instrument of transfer or title.

[46] The issue arising from these competing arguments is what was the purchaser's obligation under the contract. This is predicated on the meaning and effect of the Letter of Undertaking. The 1st and 2nd Defendants relied on the case of **Clarke v Notice** in

support of the position that completion required the payment of the purchase price even though title had been transferred to the purchaser.

[47] In **Clarke v Notice,** the issue arose as to whether the purchaser was entitled to possession of the premises. The vendor claimed a balance on the sale price remained to be paid, while the purchaser argued that an advance payment (which was not disputed) should be credited against the purchase price and that she had paid all monies due under the contract. She claimed that despite her being the registered proprietor of the premises, the vendor was in breach of the Agreement for Sale by refusing to provide her with the keys, the letter of possession, and letters to the utility companies. The court determined that the prepayment did not form a part of the purchase price and therefore the purchaser was in breach of the Agreement for Sale, having refused to pay the balance stipulated in the statement of accounts. In determining whether the purchaser was entitled to possession, the court considered the terms of the Agreement for Sale, which provided for completion on payment of all the monies payable and for possession to be vacant on completion. The court found that, as the purchaser was in breach of the Agreement for Sale, having failed to pay the full costs necessary to complete the sale, she was not entitled to possession.

[48] In **Clarke v Notice**, there was no issue that the balance due was to be settled by way of a letter of undertaking. A mortgage was obtained, and the proceeds were paid over. The statement of account related to the payment of the purchase price and costs. The dispute arose as to how the prepayment should be treated, which the court ultimately found did form part of the sale agreement. There was no undertaking to pay the balance that was due on the account. The case therefore does not support the arguments made on behalf of the 1st and 2nd Defendants that the purchase price could not be settled by the Letter of Undertaking.

[49] The 1st and 2nd Defendants also relied on **Wilson v Trevand** in support of their position as to what constitutes completion, that is to say, payment of the purchase price. The 1st and 2nd Defendants' Counsel did not give any credence to the portion of the judgment which indicated that neither the purchase money *nor evidence of an irrevocable*

*undertaking from a reputable financial institution for the payment of the balance purchase price* had been submitted to the vendors' Attorneys within the prescribed time for completion. Counsel's position that **Wilson v Trevand** is distinguishable from the case at bar in that the case at bar does not contemplate the provision of an irrevocable letter of undertaking, speaking only to the payment of the purchase price, is misconceived, as pointed out by Counsel for the Claimant. The difference lies in the time in which payment is made or the undertaking supplied, being after the time fixed for completion in **Wilson v Trevand** and within the time fixed for completion in the instant case.

[50] Counsel for the 1st and 2nd Defendants, in defining the purchaser's obligation to make an actual payment of money, focused on the completion clause, which states:

*COMPLETION: On or before Ninety (90) days from the date of this Agreement for Sale and upon payment of the sale price and all fees and cost, and interest if any, of which time shall be of the essence.*

This clause, however, must be read together with the payment clause and Special Condition 6, which are as follows:

*HOW PAYABLE: (1)(i)Deposit of FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS ($5,800,000.00) on the signing hereof.*

*(ii) Stamp duty, fees and costs attributable to the purchaser to be paid to the Vendor's Attorney-at-Law on completion*

*(ii) Balance purchase price in the amount of Fifty-Two Million Two Hundred Thousand Dollars ($52,200,000.00) to be paid on completion subject to the terms and conditions noted herein*

Special condition 6 provides that:

*6. Time is of the essence of this agreement as it relates to the obligations of the Purchaser and on the failure of the Purchaser to pay the purchase price and/or any other sums payable or to fulfil any of the obligations herein within the time stipulated, the Vendors shall be entitled to terminate this Agreement by serving Seven (7) days notice in writing on the Purchaser's Attorneys-at-Law. At the point of termination, the Purchaser will forfeit 10% of the purchase price.*

*This is a cash transaction and the Purchaser shall provide the Vendors Attorney-at-Law with a Letter of Undertaking from a registered financial institution approved by the*

*Vendors Attorney at law for the balance of the purchase monies and cost within forty-five (45) days from the date of this Agreement for Sale. The parties further agree that the Attorney-at-Law shall not be obliged to part with the registrable document and/or duplicate certificate of Title for the said property, until the Purchaser has presented a letter of undertaking acceptable to the Attorney-at-law or have paid all monies payable by the Purchaser hereunder to complete this sale.*

[51] In **Wilson v Trevand,** the exact terms of the agreement are not given; instead, it contains a summary of the terms of the agreement by the court. It is noted that the undertaking was an alternative to the payment of the balance purchase money. A mortgage was obtained for the payment of the balance of the purchase money. The proceeds were not, however, paid until after the time fixed for completion. The court made the point that as neither the balance purchase money being paid *nor an irrevocable letter of undertaking* being given during the time fixed for completion, actual completion was deemed to be the date of payment. The terms of this Agreement for Sale make it clear the Letter of Undertaking would satisfy the purchaser's payment obligations. This case again does not support the 1st and 2nd Defendants' arguments.

[52] The final case relied on by the 1st and 2nd Defendants was **Henlin** where the nature of an undertaking was discussed. The 1st and 2nd Defendants' interpretation is that an undertaking is nothing more than a promise or pledge to pay and could not be substituted for payment itself.

[53] In **Henlin,** the 1st claimant was the vendor's Attorneys-at-Law for the sale, while the defendant was the purchaser's Attorney-at-Law. The defendant gave her professional undertaking to pay the balance purchase price upon completion of the sale. The defendant was called on to honour her undertaking. The defendant did not respond to this correspondence. Some days later, the defendant was served two Provisional Attachment of Debt Orders relating to court proceedings between the vendor and purchaser, directing her to retain the sums in her custody to which the vendor was entitled. The defendant subsequently wrote to the 1st claimant indicating her willingness to honour her undertaking, subject to the terms of the Provisional Attachment of Debt Orders and enclosing the balance purchase money less an amount to satisfy the Provisional Attachment of Debt Orders. This was not accepted by the 1st claimant and the funds were

returned with a demand for the full balance, noting the sale was still incomplete. When the defendant failed to pay over the balance purchase price in keeping with her undertaking, the supervisory jurisdiction of the Supreme Court over Attorneys-at-Law was invoked for breach of professional undertaking.

[54] Interestingly, the resulting action was not against the purchaser for breach of the Agreement for Sale, but against the defendant Attorney-at-Law for breach of her irrevocable professional undertaking given to the vendor's Attorneys-at-Law. Paragraph 3 of the judgment, as follows, gives the only indication of the terms of the agreement relative to completion. It states:

> 3. *This undertaking must have been deemed necessary given the terms in the agreement for sale relative to completion which stated:-*
>
> *Completion: On or before the date set out in Item 9 of the Schedule on payment of all moneys payable by the purchaser hereunder in exchange for the Duplicate Certificate of Title for the said property registered in the name of the purchaser and/or nominee along with up-to-date Certificate of payment of Property taxes, National Water Commission receipt, Letter of Possessions and letters to the Jamaica Public Service Co. Ltd. and the National Water Commission.*

[55] The court accepted that in some instances an undertaking is to be regarded as a contract (and in the case of an Attorney, was more than a mere contract but in the nature of a bond or deed, having more far-reaching consequences). The Letter of Undertaking is therefore more than a mere promise or pledge to pay, but was a binding obligation so to do.

[56] There is no dispute that a Letter of Undertaking was presented by the 3rd Defendant in the time stipulated. More importantly, there is no indication that the vendor's Attorney-at-Law did not find the undertaking to be acceptable. The Claimant contends, logically and indisputably, that the Letter of Undertaking was accepted in all its terms by the purchaser's Attorney-at-Law issuing a Statement of Account to close indicating a nil balance due from the purchaser. The Letter of Undertaking is reproduced below:

> *Dear Madam:*

***Purchase of Property Located at Lot 250 Richmond Park, St. Andrew By Auto Channel Limited***

*On the instructions of our client, Lynvalle Hamilton, we undertake to pay to you the sum of* ***Fifty Two Million Three Hundred and Sixty One Thousand Eight Hundred and Seventy Five Dollars ($52,361,875.00)*** *following:*

*Confirmation of receipt of the undermentioned documents by him at 14 Holborn Road, Kingston 10, St. Andrew, from you:*

1. *Duplicate Certificate of Title registered at Volume 1419 Folio 845 in the name of* ***Auto Channel Limited*** *free from all other encumbrances save and except the restrictive covenants endorsed thereon;*

2. *Letters of possession;*

3. *Evidence that property taxes are paid up to the date of possession; and*

4. *Evidence that water rates are paid up to the date of possession.*

***This undertaking expires on September 20, 2023.***

*Kindly provide us with the relevant bank account information to facilitate payment via RTGS.*

*In acknowledgement of receipt of this letter and confirmation of your agreement to the terms and conditions noted therein, kindly sign, stamp and return the attached copy of this letter.*

[57] There is no indication that the vendors' Attorney-at-Law failed to acknowledge receipt of the letter or failed to confirm agreement. Indeed, the attempt to call on the Letter of Undertaking leads to the inescapable inference that this was done. The correct interpretation of the payment terms then must be that the balance of the purchase price and costs were to be paid in accordance with the terms of the 3rd Defendant's Letter of Undertaking.

[58] It is not indicated in the Defence of 1st and 2nd Defendants that they provided or indicated their intention to provide to Mr Lynvalle Hamilton, within the extended time for completion, the Duplicate Certificate of Title in the name of the purchaser, letters of possession, evidence that the property taxes were paid up to date of possession or evidence that water rates were paid up to the date of possession. Under the terms of the Letter of Undertaking, which it must be considered to have been accepted by the vendors

through their Attorney-at-Law, these steps were necessary to trigger the payment of the balance purchase price and costs. This is the chicken and egg situation referred to in **Henlin** at **para 70**.

[59] The purchasers seem not to appreciate that there were two parties to the Agreement for Sale, both of whom were bound by its terms. While time was made of the essence only in relation to the purchaser's obligations for payment, it is undisputable that the 1st and 2nd Defendants failed to carry out their obligations to deliver vacant possession within the 90 days stipulated for completion. This led the purchaser to issue the Notice to Complete, as it was bound to do if it wished to be rid of the contract. See **Hinds,** relied on by the Claimant. The Notice to Complete placed the obligation on the vendors to take certain action, action which was required by the terms of the Letter of Undertaking, within the stipulated time.

[60] There can be no dispute that the vendors failed to comply with the Notice to Complete. The 1st and 2nd Defendants, as vendors, were obliged to take steps to make the property available to the purchaser on the date fixed for completion. I completely accept the law and reasoning from the texts and cases set out in the Claimant's submissions in relation to vacant possession and notice to complete.

[61] There is no evidence that the vendors took the required actions to make the premises vacant for the purchaser's possession. The Leases of the tenants expired by January 2023 at the latest. The Agreement for Sale was entered into in May 2023. Completion was fixed for 90 days, which would be August 2023, and was extended by the Notice to Complete to September 2023. The vendors were aware that vacant possession was required from at least April of 2023. Indeed, the time for completion was fixed for 90 days precisely to achieve that end.

[62] The only issue remains whether the Notice to Complete was valid. In the case of **Leon Robinson v Michelle Chen** [2020] JMCA Civ 42 (**'Robinson v Chen'**) Morrison P confirmed that the law was correctly stated by McDonald-Bishop J (as she then was) in **JTM Construction Equipment** and Sinclair-Haynes JA (Ag) (as she then was) in

**Jennifer Messado and another v Keith Recas and another** [2015] JMCA App 10. He stated at paragraphs 44 to 46 and 51:

> *[44] In **JTM Construction & Equipment**, McDonald-Bishop J summarised the three common law requirements of a valid notice to complete as follows:*
>
> *"(1) The server must himself be ready and willing to complete at the time of service: **Quadrangle Development and Construction Co. Ltd v Jenner** [1974] 1 All ER 729 at 731.*
>
> *(2) The notice can only be served after unreasonable delay.*
>
> *(3) The notice must allow a reasonable time for completion."*
>
> *[45] McDonald-Bishop J also said that, once time has been made of the essence of a contract for the sale of land by the service of a valid notice to complete -*
>
> *"Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission."*
>
> *[46] And, in **Jennifer Messado**, after a review of some of the leading authorities, Sinclair-Haynes JA (Ag) (as she then was) concluded that:*
>
> *"The principle gleaned from those cases is that a party serving a notice making time of the essence cannot himself be in default. The party urging the completion of the contract by issuing a notice making time of the essence must himself be ready, willing and able to complete."*
>
> *.....*
>
> *[51] There is no question that the law is as stated by McDonald-Bishop J and Sinclair-Haynes JA (Ag) in **JTM Construction & Equipment** and **Jennifer Messado** respectively. Although time is not usually of the essence of an agreement for the sale of land, the party not in default may make it so in a case of unreasonable delay on the part of the other party by serving a notice to complete which makes time of the essence of the contract and fixes a reasonable time for completion. However, for the notice to be valid, the party serving the notice must him or herself be ready and willing to complete the agreement. In other words, he or she cannot be in default*

[63] In his summary at paragraph 53, he concisely states the correct approach to the question being:

> *[53] On the basis of these authorities, three questions arise in this case. First, had the occasion for service of notice to complete on the Chens arisen at the date of service of the October 2001 notice by the deceased? Second, was the deceased ready and able to complete the agreement when he served the third notice? And third, the notice not having been complied with, was the deceased required to do anything in its immediate aftermath to make it clear to the Chens that he was rescinding the 1997 agreement?*

[64] In relation to the first question whether there was unreasonable delay the entire circumstances of this transaction must be examined. The vendors initially desired a completion date of 30 days, it being a cash transaction. The vendors, of course, knew that the premises was tenanted when they made the decision to sell. The notices terminating the leases may have been as a result of this decision. They were made aware that the purchaser desired vacant possession. The completion date was extended to 90 days on that premise. It being a cash sale and having received a Letter of Undertaking from the Bank, they would also be aware that the purchaser, a commercial entity, had tied up significant sums. In all these circumstances, the delay by the vendors to take the necessary steps, which would include commencing an action for recovery of possession, was unreasonable.

[65] The second question is whether the purchaser was ready willing and able to complete the transaction. The Letter of Undertaking from the 3rd Defendant Bank indicates that it was.

[66] The third question, not in issue in this case, is also answered affirmatively for the purchaser which took the necessary steps through communication from its Attorney-at-Law to notify the vendors through their Attorney-at-Law of its intention to rescind the Agreement for Sale.

[67] There is a further question to be considered, that is, whether the time given for completion was reasonable in the sense that what remained to be done could be done within the time given. The Claimant contends that the period was reasonable and no issue has been taken in relation to this. There is no evidence that vacant possession could not be given within the time stipulated. A letter was issued to Mr Charles McLaughlin dated 8 November 2022 that his lease, which expired on November 30, would not be renewed.

The year of expiry is not stated. A letter was also issued to Mr Peter Mathews dated the 2 December 2022 that his lease, which expires on January 31, would not be renewed. Again, the year the lease expired was not stated. The defence of the 1st and 2nd Defendants indicated that they were confident the tenants would vacate the property within the time fixed for completion in the Agreement for Sale made on 9 May 2023, so it is a reasonable inference that the leases expired in 2022 and 2023, respectively. The tenants therefore had had ample time in which to make arrangements to vacate the premises.

[68] Further, there is no assertion in the affidavit of Martin Chin that the purchasers would experience any difficulty in abiding by the time stipulated in the Notice to Complete. There was also no explanation given for why the evidence of paid-up property taxes and water rates, also required by the Letter of Undertaking, were not issued, which could have been done in short order.

## CONCLUSION ON LIABILITY

[69] Having accepted the Letter of Undertaking, the sale was completed, and the purchaser became entitled to vacant possession. The Notice to Complete, making time of the essence, required the vendors to do so by 18 September 2023. There is no denial that the tenants remained in occupation. Having taken no steps to make the property available for possession up to the time for completion as extended, the vendors were in breach of the Agreement for Sale, and the purchaser was entitled to rescind the contract.

## ASSESSMENT OF DAMAGES

[70] It is a well-established principle that the measure of damages for breach of contract is that the party not in breach is to be compensated for the full value of his loss of bargain and be put in the same position, so far as money can do it, as if the contract had been performed. Damages generally flow from the date of breach. Morrison P points this out in **Robinson v Chen** at paragraph 91 where he states:

> *[91] The date of breach is important because of the well-known rule that, generally speaking, that is the date from which damages for breach of contract are usually assessed. As Lord Wilberforce put it in* ***Johnson and another v Agnew****:*
>
> > *"… the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances."*

Generally, therefore, the innocent party would be entitled to recover as special damages the deposit paid with interest and any expenses in connection with the sale, as well as general damages for loss of bargain.

[71] The submissions did not focus on the question of damages, save for the return of the hypothecated funds to the Claimant. There was a general denial in the defence of the particulars of loss, damage, costs, and particulars of special damage, putting the Claimant to strict proof. The particulars of loss, damage and cost in relation to the Agreement for Sale are unchallengeable. Proof in the way of receipts has been provided for these claims.

[72] In respect of Special damages, the Claimant has indicated that it sought to acquire the commercial property as it intended to change its business locations, if possible, consolidate its storage needs and for its general operations. The Claimant further indicated that it always intended to acquire property for the purposes of operating its business and or storing imported vehicles and or parts, and supplies. It was the Claimant's further intention to cease paying monthly rents to its landlord for car lot use and wharfage costs for storage. It is not indicated that these intentions were communicated to the 1st and 2nd Defendants. The defence of the 1st and 2nd Defendants also does not suggest that they were made aware. They stated that they cannot speak to the Claimant's state of mind in coming to their decisions to purchase the property and put Claimant to strict proof of these facts. The communication between Counsel as to the need for vacant possession do not intimate the purchaser's intentions. There is also no evidence from which it could be objectively said that the intended uses must have been

in the contemplation of both parties at the time they entered into the Agreement for Sale. There is no indication the Claimant's business and the extent of its operations would be known to the 1st and 2nd Defendants.

[73] In **Keith Tennant v Alex Imports Limited** Supreme Court Civil Appeal No 43/2006 [2012] JMCA Civ 15 (**'Tennant v Alex Imports Limited'**) the Court of Appeal considered a similar situation. Phillips JA said this of the relevant law and principles:

> *[35] In arriving at the amount payable as damages, the court must ascertain the damages arising naturally in the normal course of things, from such breach of the contract, itself, or, such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Additionally, the court must examine whether the purchaser, if not in breach, would be entitled to any peculiar loss occasioned by the breach, if at the time of entering into the contract the purchaser had made it known to the vendor that he wanted the land for a specific purpose over and above the mere acquisition of the property. For if the party who is in breach is wholly unaware of the special circumstances, he can then only have had in his contemplation injury which could have arisen generally and not affected by those special circumstances (**Hadley v Baxendale**). This approach was adopted by this court in **Tewari v The Attorney General**, when Paul Harrison JA (as he then was) in delivering the judgment of the court, upheld the decision of the court below, disallowing damages for economic trees, on the basis that there was no evidence indicating that it was within the contemplation of the parties, at the time of entering into the contract, "that the plaintiff would reap economic trees and would undertake land development".*

She further made it clear that the innocent party would be entitled to the costs in connection with the agreement and to compensation damages for the loss of their bargain. I am also mindful of the Claimant's duty to mitigate its losses (paragraph 38 **Tennant v Alex Imports Limited**). However, the claim for special damages relating to storage and wharfage cannot be entertained as there is no evidence that the purchaser's intended use of the property was communicated to the 1st and 2nd Defendants.

[74] The Claimant has not shown that it has suffered any additional loss from the cancellation of the sale. To this end, nominal damages would suffice to recognise the 1st and 2nd Defendants' breach.

[75] There is also no dispute that this transaction was of a commercial nature, lending itself to interest at commercial rates.

## COSTS

[76] The Applicant being successful, there is no reason why costs should not follow the event as between the Claimant and the 1st and 2nd Defendants in keeping with **CPR Rule 64.6.** The 3rd Defendant also seeks its costs. The Claimant argues these should be borne by the 1st and 2nd Defendants, while they, in turn, urge that these costs should be the Claimant's as the 3rd Defendant Bank need not have been joined in the Claim.

[77] **CPR Rule 64.6(4)(d)** mandates the court to have regard to whether it was reasonable for a party to raise a particular issue. The Bank was called on by the vendors' Attorney-at-Law to honour the Letter of Undertaking. The purchaser's Attorneys-at-Law advised that the Agreement for Sale had been rescinded and demanded a return of the hypothecated sums. The Bank considered that it was exposed to litigation risk and refused to act on either demand without an order of the court or the consent of both parties. This position was communicated to both parties.

[78] It was reasonable in these circumstances for the Claimant to join the bank as a party. Furthermore, the 1st and 2nd Defendants' position was not well-founded in law, which, had they accepted, would have prevented the ensuing claim. For these reasons, the 1st and 2nd Defendants should bear the 3rd Defendant's costs.

## ORDERS

1. Summary judgement is entered in favour of the Claimant against the 1st and 2nd Defendants pursuant to **Rule 15.6** of the **Supreme Court Civil Procedure Rules, 2002 ("CPR")**. Consequently, it is Declared that:

    (i) The Agreement for sale dated May 9, 2023 between the 1st and 2nd Defendants as Vendor and the Claimant as purchaser is discharged by 1st and 2nd Defendants' breach of fundamental condition of the contract.

    (ii) That the Claimant is entitled to cancel and/or repudiate the Agreement for Sale dated May 9, 2023 and to damages for breach of contract.

(iii) all beneficial rights, entitlements and incidents of ownership to include the payment of all outgoings such as property taxes and water relating to the property, including entitlement to rents, profits and occupational payments arising from the property from September 18, 2023 until the date of retransfer, are hereby preserved to and vested in the 1st and 2nd Defendants PROVIDED THAT for the period of 180 days from the date of this Order or up to the date of payment by the 1st and 2nd Defendants to the Claimant of all outstanding sums whichever is the sooner, the Claimant shall be entitled to collect rent from the occupants of the property more fully described in Order 5(i) below.

2. Special damages to the amount of **SIX MILLION THREE HUNDRED FIFTY-THREE THOUSAND ONE HUNDRED AND FIFTY DOLLARS ($6,353,150.00).**

3. General damages in the amount of **ONE MILLION DOLLARS ($1,000,000.00).**

4. Interest on the sum of **SEVEN MILLION THREE HUNDRED FIFTY-THREE THOUSAND ONE HUNDRED AND FIFTY DOLLARS ($7,353,150.00)** from September 18 2023 until the date of payment.

5. It is Ordered that:

(i) The 3rd Defendant is to deliver up to the Claimant's Attorneys-at-Law the Duplicate Certificate of Title for ALL THAT parcel of land part of RICHMOND PARK in the parish of SAINT ANDREW being the Lot Numbered Two Hundred and Fifty comprised in Certificate of Title registered at Volume 1419 Folio 845 of the Register Book of Titles ('the property') within ten (10) days of its receipt of the perfected Final Judgment/Orders in this action;

(ii) The damages with the interest thereon and 3rd Defendant costs advanced by the Claimant to the 3rd Defendant in the sum of **EIGHT HUNDRED AND FIFTY THOUSAND DOLLARS ($850,000.00)** calculated as follows:

(a) Interest on the sum of **FIFTY-TWO MILLION THREE HUNDRED AND SIXTY-ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($52,361,875.00)** from September 18, 2023 to the date of payment by the 3rd Defendant of sums due to be paid to the Claimant under Order 6(ii); and

(b) Interest on the sum of **SEVEN MILLION THREE HUNDRED FIFTY-THREE THOUSAND ONE HUNDRED AND FIFTY DOLLARS ($7,353,150.00)** from September 18, 2023 to the date of payment;

to be paid by the 1st and 2nd Defendants to the Claimant.

(iii) Provided the 1st and 2nd Defendants satisfy the payment obligations contained in this Order within 180 days of the date hereof, no further interest shall accrue upon the sums awarded herein between the date of the payment of all sums due from the 3rd Defendant per Order 6(ii) this Order and 180 days once all sums due as damages and costs are paid within the said 180 days. In the event of default, interest shall resume at the applicable rate from the date of default until payment.

(iv) The Claimant shall within fourteen (14) days of receipt from the 1st and 2nd Defendants' Attorneys-at-Law execute the relevant Instrument of Transfer necessary to facilitate the transfer of the property to the 1st and 2nd Defendants and/or their nominee and the Attorneys-at-Law for the Claimant shall hold the same in their possession along with the duplicate Certificate of Title to the property until the Claimant's Attorneys-at-Law receive from the 1st and 2nd Defendants' Attorneys-at-Law its professional undertaking to pay the damages, interest awarded herein to the date of payment and/or in accordance with the terms of this Order from the net proceeds of a pending or current sale or from some other lawful source.

(v) Should the 1st and 2nd Defendants fail to pay the sums described at Order 5(ii) above within the said 180 days, the Claimant is entitled to sell the property by private treaty or by public auction and to recover by way of restitution and from the net sale proceeds the sum claimed as damages, interest and all costs.

6. In relation to 3rd Defendant it is declared as follows:

i. That the Agreement for sale dated May 9, 2023 having been brought to an end by the 1st and 2nd Defendants' breach and repudiated by the Claimant, the 3rd Defendant's banker's undertaking contained in letter dated June 20, 2023 addressed to McKoy Law Attorneys-at-Law is discharged;

ii. it is ordered that consequent upon the discharge of the banker's undertaking contained in letter dated June 20 2023, addressed to

McKoy Law, Attorneys-at-Law, the 3rd Defendant upon receipt of the perfected Final Judgement/Orders in this action shall release the sum of **FIFTY-TWO MILLION THREE HUNDRED AND SIXTY-ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($52,361,875.00)** together with interest accrued thereon to the Claimant's Attorneys-at-Law on record in this matter.

7. Interest upon the sum of **FIFTY-TWO MILLION THREE HUNDRED AND SIXTY-ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($52,361,875.00)** from September 18, 2023 to the date the sums are paid by the 3rd Defendant to the Claimant, is to be paid by the 1st and 2nd Defendants to the Claimant. A deduction is to be made of any interest paid by the 3rd Defendant.

8. Simple Interest is to be paid at the commercial rate of 10% on damages and costs in accordance with the terms of Order 5(ii).

9. Costs and Attorneys' costs of the Claim of the Claimant to be paid by the 1st and 2nd Defendants are to be taxed if not agreed.

10. Claimant's Attorneys-at-Law to prepare file and serve Formal Order.

_____

**JUDGE**