[2012] JMSC Civ 98

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

**CLAIM NO. 2008HCV04348**

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|---|---|---|
| **BETWEEN** | **EUGENIE CHIN LYN** | **1ST CLAIMANT/RESPONDENT** |
| **A N D** | **SYLVIA CHIN** | **2ND CLAIMANT/RESPONDENT** |
| **AND** | **KEVIN DEHANEY** | **3RD CLAIMANT/RESPONDENT** |
| **AND** | **LUDLOW REYNOLDS** | **DEFENDANT/APPLICANT** |

Ms. Jacquline Wilcott and Mr. Michael Howell instructed by Knight Junor & Samuels for the Claimants/Respondents

Mr. Ronald Paris instructed by Paris & Company for the Defendant/Applicant

March 22, May 30, 2011 and July 18, 2012

**Summary Judgment – Rule 15.2 CPR – Principles to be applied on an application for summary judgment – Whether or not reasonable prospect that court of trial could find evidence of sufficient memoranda in writing and acts of part performance to establish a binding and enforceable lease and sale agreement in respect of which the court would order specific performance**

## FRASER J

### THE GENESIS OF THE CLAIM

[1] The defendant/applicant (hereinafter L.R.) is the owner of 24 Dudley Kassin Drive, Montego Bay St. James (hereinafter 24 DKD), the property at the centre of this claim and dispute.

[2] In early May 2008 the first claimant/respondent (hereinafter E.C.L.) and L.R. entered negotiations for the sale of 24 DKD. They agreed on a sale price of $30,000,000.00.

[3] Between the 11th May 2008 and the 8th June 2008 E.C.L. paid to L.R. the sum of US$100,000.00. There is a dispute on the affidavit evidence as to the purpose of this sum. The claimants say that sum is the agreed deposit for the purchase of 24 DKD. L.R. disagrees. He maintains that what was agreed was that $10,000,000 would be paid as a deposit as a binder for a future date sale. The US$100,000.00 at an exchange rate of J$70:1US$ amounted to only $7,000,000.00, which fell short of the agreed "binder" sum.

[4] It is however common ground that during the discussions the parties had contemplated a lease with an option to purchase. During the 2nd or 3rd week of July 2008 L.R. also allowed E.C.L. to store some goods on the premises at 24 DKD.

[5] A draft lease containing a standard form option to purchase was prepared by Mrs. Paris, counsel for L.R. and given to E.C.L. for her perusal. E.C.L. subsequently indicated that she wished the names of her sister and son, the 2nd and 3rd claimants respectively, added to the lease. This was done and on the 13th August 2008 L.R. obtained from Mrs. Paris duplicate originals of the engrossed lease which contained the same option to purchase clause that had been reflected in the draft lease. That same day he executed them before a Justice of the Peace. The following day, the 14th August, L.R. gave the duplicate originals of the engrossed lease to E.C.L. for execution by her.

[6] At a meeting at the Pelican Restaurant on 17th August 2008 the keys for 24 DKD was handed over by L.R. to E.C.L and one original lease executed by E.C.L. was handed over to L.R. Though there is dispute as to whether or not the other original was handed to L.R. to take to Canada

with him for the 2nd and 3rd claimants to sign, or that duplicate original lease was retained by E.C.L. for that purpose and sent to Canada by her, it is agreed by both sides that the duplicate original was to be so executed by the 2nd and 3rd claimants.

[7] Also at that meeting on the 17th August 2008 L.R. wrote a letter of even date addressed to E.C.L. That letter was signed by both L.R. and E.C.L. The contents of that letter, which will be important in the final disposition of this matter, will be outlined later in the judgment during the consideration of the evidence.

[8] On the 1st September 2008 E.C.L paid the sum of US$4000 into L.R's bank account. On 5th September 2008 L.R. the duplicate original of the engrossed lease was received from the 2nd claimant by L.R. in Canada. The lease was unsigned by both the 2nd and 3rd claimants and contained a number of annotations, amendments and jottings to which L.R. had not agreed.

[9] On the 6th September 2008 L.R. wrote to Mrs. Paris, his Attorney at Law, indicating that the engrossed lease he had received from the 2nd claimant "had been written on" after it had been signed by himself and E.C.L. and notarized by justices of the peace. This he understood was illegal and made the lease null and void. Under those circumstances he requested that Mrs. Paris write E.C.L. a letter to vacate the premises and hand over the keys to him or Mrs. Paris' office. He also stipulated that the letter should indicate that he would be returning "her Deposit money $100,000.00 and her one months rental…"

[10] On 11th September 2008 Mrs. Paris wrote to Ms. Wilson, then counsel for the claimants asking her to advise her client not to enter into occupation of 24 DKD as the entire bargain was now off. Ms. Wilson responded on September 12, 2008 indicating that her client had been in possession and that, "There is no turning back for her at this point."

[11] On 13th September 2008 L.R. returned to Jamaica and about 4 a.m. on the 14th September took back possession of 24 DKD by removing padlocks which E.C.L. had placed on the premises and replacing them with his own.

**THE INJUNCTIONS AND THEIR DISCHARGE**

[12] On the application of E.C.L an *ex parte* injunction containing a number of orders was granted by Cole-Smith J. on the following day, the 15th September which authorised E.C.L. to occupy the premises and restrained L.R. and his servants or agents from interfering with her occupation.

[13] On the 1st June 2009 at the *inter partes* hearing Cole-Smith J. discharged the injunction, holding that although there were serious and complicated issues to be tried, damages would be an adequate remedy if the claimants were successful in the action.

[14] On the 17th July 2009 the Court of Appeal dismissed the claimants appeal against the discharge of the injunction. The import of the written reasons for the Court of Appeal's decision ***Eugenie Chin-Lyn et al v Ludlow Reynolds*** 2011 JMCA Civ 24 will be addressed later in this judgment.

**THE CLAIM AND COUNTER CLAIM**

[15] The injunction that was sought and ultimately discharged was further to a claim filed by the claimants on the 15th September 2008. In summary the claimants sought:

(a) A Declaration that there was a valid lease;

(b) A Declaration that they had a beneficial interest in and right to the property arising from L.R's agreement to sell 24 DKD and an Order directing L.R to complete the agreement to sell 24 DKD;

(c) A Declaration that they were entitled to remain in possession pursuant to the lease and agreement for sale;

(d) Injunctions to restrain L.R. from interfering with the claimants peaceful enjoyment of 24 DKD and from in any way disposing or attempting to dispose of his interest in 24 DKD until the trial of the matter; and

(e) Damages, Interest and Costs.

[16] By Amended Claim Form filed October 7, 2008 the claimants sought, in summary:

(a) A Declaration that the claimants and L.R. entered into a binding and enforceable agreement for sale in respect of 24 DKD;

(b) An Order directing L.R. to complete and specifically perform the agreement for sale agreed between the parties in the following terms:

(i) Sale price $30,000,000.00;

(ii) Deposit US$100,000.00 (already paid);

(iii) Balance purchase price should be converted to US$ at a rate of J$70:US$1 amounting to US$328,571.42;

(iv) L.R. would grant the claimants a vendor's mortgage at 10% annually for 6 years open at a monthly mortgage payment of US$4,000.00;

(v) The balance purchase price at the end of the mortgage period would be payable in one lump sum in exchange for a registrable transfer.

(c) A Declaration that the claimants have a beneficial interest in and right to 24 DKD arising from L.R.'s agreement to sell 24 DKD to the claimants and/or the acts performed by the claimants pursuant to this agreement;

(d) A Declaration that the claimants are entitled to remain in possession of the premises pursuant to the agreement for sale between the parties;

(e) Further or in the alternative a Declaration that the claimants are entitled to an Order for Promissory, Proprietary or Equitable Estoppel as against L.R. to justify an Order that L.R. specifically perform the agreement outlined at (b) above;

(f) Injunctions to restrain L.R. from interfering with the claimants peaceful enjoyment of 24 DKD and from in any way disposing or attempting to dispose of his interest in 24 DKD until the trial of the matter; and

(g) Damages, Interest and Costs.

[17] On 17th September 2009 with the consent of the claimants L.R. filed a Defence and Counter Claim. On his counter claim L.R. pleaded in summary that:

(a) He had suffered loss by virtue of being unable to i) enter into negotiations any other prospective purchaser and ii) attend on his premises to arrange for the sale of stock stored thereon valued approximately $3,000,000.00;

(b) E.C.L. had converted to her own use and benefit without his permission or consent all the furniture, fittings and equipment left by him at 24 DKD to the value of $1,382,900.00; and

(c) He claimed recovery of possession of 24 DKD from the claimants who were trespassers thereon.

**THE APPLICATION FOR SUMMARY JUDGMENT**

[18] Emboldened by the ruling of the Court of Appeal L.R. brought this application filed 10th February 2010 for summary judgment on the counter claim.

[19] The orders sought by L.R. on this application are as follows:

(a) That summary judgment on his counter claim be entered in favour of the defendant against the claimants pursuant to Rule 15.2(a) of the Civil Procedure Rules 2002 as amended in respect of property situate at 24 Dudley Kassin Drive Montego Bay in the Parish of St. James owned by the defendant as the registered proprietor and occupied by the claimants whose right to remain therein has been determined by the defendant.

(b) Mesne profits at the rate of $4,000.00 in United States currency per month from the 14th September 2008 and continuing until possession is delivered up to the defendant.

[20] L.R relied on five grounds. Four chronicled and relied on aspects of the history of the matter up to the hearing in the Court of Appeal. The fifth was the fact, that subsequent to the decision of the Court of Appeal, demands were made of the claimants in writing for possession to be delivered to L.R. by the 31st July 2009 and then by the 21st August 2009 and on both occasions the claimants refused. Further that on two occasions L.R. caused the premises at 24 DKD to be padlocked only to have E.C.L. cause the padlocks to be removed and in the terms of the application, “continue in unlawful possession of the Defendant’s premises.”

**THE APPLICABLE TEST CONCERNING THE GRANT OF AN ORDER FOR SUMMARY JUDGMENT**

[21] The Civil Procedure Rules 2002 as amended (CPR) at rule 15.2 provides as follows:

> The court may give summary judgment on a 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.

[22] The CPR does not state which party has the burden of proof on an application for summary judgment. However in the case of ***ED and F Man Liquid Products Ltd v Patel*** [2003] All ER (D) 75 (Apr) where the similar section of the English Civil Procedure Rules was commented on, it was stated, albeit in what may be considered *obiter dictum*, that the burden rests on the applicant.

[23] The standard to be attained for the successful discharge of that burden has been considered in a number of cases. Discussions of this standard usually begin with the authoritative statement of Lord Woolf MR in ***Swain v Hillman*** [2001] 1 All ER 91. At page 92 in explaining the proper approach to adjudication on summary judgment applications, he said the power to grant summary judgment:

> [E]nables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do 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 fanciful prospect of success.

[24] In ***International Finance Corp v Utexafrica Sprl.*** [2001] All ER (D) 101 (May) in the Queen's Bench Division (Commercial Court) the test for setting aside a default judgment, which is the same as that for the grant of summary judgment, was considered by Moore-Bick J. At paragraph 8 he stated, *"…to say that a case has a realistic prospect of success carries the suggestion that it is something better than merely arguable."* He continued later in paragraph 8 to opine that *"…the expression 'realistic prospect of success'…means a case which carries a degree of conviction".* Similar language was used concerning the meaning of *'reasonable prospect of success'* in ***Bee v Jenson*** [2007] RTR 9.

[25] The courts have however also been careful to note that the power to grant summary judgment must be exercised within careful limits. In ***Swain v Hillman*** the Master of the Rolls in outlining those limits said at page 95:

> 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 the trial… it … does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[26] For this reason, cases involving complex issues of law and disputed facts are likely to be inappropriate for summary judgment (***Three Rivers District Council v Bank of England (No 3)*** [2003] 2 AC 1). There are however occasions where, without embarking on a mini-trial, the court may have to consider evidence of some volume before it can be determined whether or not there is a real prospect of success (***Miles v ITV Networks Ltd*** [2003] EWHC 3134(Ch), (Transcript)). In considering whether or not a case has a reasonable prospect of success the court should also consider whether the case may be supplemented or supported by evidence at trial (***Royal Brompton Hospital NHS Trust v Hammond and others*** [2001] EWCA Civ 550).

[27] The principles outlined in the previous paragraph were approved and applied by Kangaloo JA in ***Western United Credit Union Co-operative Society Ltd v Corrine Ammon*** (TT Civ App 103/2006) when he considered the English case of ***Toprise Fashion Ltd v Nik Nak Clothing*** [2009] EWHC 1333 which relied on ***Federal Republic of Nigeria v Santolina Investment Corp*** [2007] 437 CH. In the ***Federal Republic of Nigeria*** case it was stated that:

> (iii) In reaching its conclusion the court must not conduct a mini trial…
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents…
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence which can reasonably be expected to be available at trial…

**THE STATUTE OF FRAUDS**

[28] The claimants to succeed in their claim must satisfy section 4 of the Statute of Frauds 1677 which is still applicable to Jamaica. Section 4 provides that:

> ***No action shall be brought…upon any contract for the sale of lands*** tenements or hereditaments or any interest in or concerning them or upon any agreement that is not performed within the space of one year from the making thereof ***unless the agreement*** upon which such action shall be brought or ***some memorandum or note thereof shall be in writing and signed by the party to be charged therewith*** or some person thereunto by him lawfully authorized. (my emphases)

**THE MAIN ISSUE TO BE DETERMINED BY THE COURT**

[29] Based on the law governing the granting of orders for summary judgment and considering the Statute of Frauds the main issue the court has to resolve in this case may be stated thus:

**Is there evidence, including the possibility of parol evidence, on which a court at trial could find that there was a binding enforceable agreement between L.R. and E.C.L. for the lease and/or sale of 24 DKD either (i) in writing or (ii) evidenced by sufficient memoranda in writing and sufficient acts of part performance? If so this would not be a case amenable to summary judgment. If not the applicant/defendant would be entitled to the order sought.**

**THE SUBMISSIONS OF COUNSEL FOR THE DEFENDANT/APPLICANT (L.R.)**

[30] Counsel for L.R. submitted that the claimants have not presented evidence to establish an arguable case with a real prospect of success against L.R. that there exists a valid enforceable agreement for the sale of the premises to them. He pointed out that it was noteworthy that the original Claim Form, before it was amended, did not include a claim for specific performance of any agreement for sale. Counsel pointed out that in paragraph 3 of E.C.L's first affidavit she describes the claimants as "lessees". However not much significance should be accorded to that, as in paragraphs 6 and 7 E.C.L. refers to there being a sale and lease agreement.

[31] Counsel for L.R. highlighted that all the negotiations and discussions at all material times pertaining to a sale of L.R's premises involved only E.C.L. and L.R. to the exclusion of the 2nd and 3rd Claimants, unless E.C.L. was also acting at all material times as their undisclosed agent.

[32] Counsel for L.R. submitted that an examination of the terms of the letter of August 17, 2008 is critical for the disposition of this matter. That letter is set out below.

*"24 Dudley Kasim Dr*
*Montego Bay*
*17.08.08*

*Mrs Eugenie Chin*
*24 Dudley Kasim Dr*
*Montego Bay*

*Dear Mrs Chin*

*This letter serves to certify that both names now present on the lease between Mrs Eugenie Chin and myself Ludlow Reynolds makes the lease agreed complete, a further two names who mentioned on lease to be signed will make the lease totally (sic) complete. The sum of $4000.00 every 4th of the (sic) to the duration the lease along with the GCT.*

*Re the monies paid to me by Mrs Chin $100,000.00 US dollars is to be applied at a later date when it comes about as a deposit on the purchase of the above mentioned property it is now held as a deposit for a future date.*

*At the present I will be occupying a small ply board building on the premises to keep the rest of my stock from the main building with the consent of Mrs Chin*

*Yours truly*

*L. H Reynolds E Chin*
*x"*

[33] Counsel for L.R. in commenting on the above letter noted that it was drafted and executed after E.C.L. and L.R. had both signed the engrossed lease. However the option to purchase provision in that lease did not contain any terms in proof of an agreement between E.C.L. and L.R.

[34] The submission continued that the clear intention of L.R. in drafting the letter was that:

(a) he was acknowledging the existence of the agreement between himself and E.C.L as set out in the engrossed lease partially executed by them both i.e. it was complete as between E.C.L. and himself;

(b) however the engrossed lease would only take effect after it was fully executed by being signed by the 2nd and 3rd claimants to wit "*a further two names who mentioned on lease to be signed will make the lease totaly (sic) complete"; and*

(c) that the sum of US$100,000.00 now held by him was *"to be applied at a later date when it comes about as a deposit on the purchase of the above mentioned property it is now held as a deposit for a future date"*

[35] Counsel further pointed out that in paragraph 38 of E.C.L's second affidavit E.C.L. stated, *"It was understood and agreed between the parties that the lease would only be concluded and binding after it had been executed by all the parties."* Therefore it was submitted that it is arguable that unless E.C.L. was acting as the agent of the 2nd and 3rd claimants they ought not to have been joined in these proceedings and L.R. would not be able to obtain damages against them.

[36] Counsel maintained therefore that in those circumstances E.C.L. was given possession on August 17, 2008 as an intended lessee and the payment by E.C.L. of US $4,000.00 without the G.C.T. would not be a sufficient act of part performance to make the partially executed lease binding.

[37] Counsel also submitted that there was no foundation for the assertion by E.C.L. that she was also put into possession as a purchaser. Concerning the monies paid amounting to US$100,000.00 counsel pointed out that

only the first receipt dated May 11, 2008 for the sum of US$ 35,000.00 refers to that payment as a deposit. It was also specifically noted by counsel that that receipt did not state the balance payable. Counsel also submitted that the usual accepted deposit is 10% of the purchase price (***Workers Trust & Merchant Bank v Dojap Investments Limited*** 1993 A.C. 573) and that neither the US$35,000.00 (J$2,450,000.00 at an exchange rate of J$70 – 1$US) nor the full sum of US$100,000.00 (J$7,000,000.00 at the said exchange rate) amounted to 10% of the agreed sale price of J$30,000,000.00. Further it did not amount to the J$10,000,000.00 that was the sum L.R. maintains E.C.L. said she could pay as a deposit. Therefore however the figures were manipulated, there was no basis on which it could be found that they represent an agreed deposit.

[38] Counsel for L.R. also submitted that the other document relied on by the claimants exhibited at Annexure B of E.C.L's second affidavit does not amount to, nor add to, that which could be considered sufficient memoranda in writing to satisfy section 4 of the Statute of Frauds.

[39] That document reads as follows:

*Sale price $25,000,000.00 JAD.*

*D/P________ 5 000 000.00 JAD*
*$ 20 000 000.00 JAD*

*Proped at $70.00 JAD to $ 1.00 USD*

*= $ 285 714.29 USD Mortgage*

*Payable at 10% Annually for 5 years open*

*Monthly payment of $2380.95 USD*

[40] Relying extensively on the article ***Practical and Legal Questions Relating to the Drafting of Agreements for the Sale of Land*** by S Arturo Stewart and Herbert W Grant dated (6th July 1995) counsel

submitted that pursuant to section 4 of the Statute of Frauds, an oral contract for the sale of land cannot be enforced unless it is evidenced in writing and partly performed. In relation to the note or memorandum it was required to contain:

(a) The names or adequate identification of the parties

(b) A description of the subject matter

(c) The nature of the consideration; and

(d) The signature of the party to be charged

[41] Counsel continued in submitting from the Stewart and Grant paper that the circumstances of each case need to be examined to discover if any individual term has been deemed material by the parties and if so it must be included in the memorandum. He submitted that in this case the deposit payable and the time and method of payment were essential conditions in the negotiations between the parties. He further submitted that only the person whom it is sought to hold liable on the agreement or his agent need sign the memorandum.

[42] The submission continued with counsel advancing that a number of documents may be joined to create one contract where there is:

(a) The existence of a document signed by the Defendant;

(b) A sufficient reference express or implied in that document to a second document; and

(c) A sufficiently complete memorandum formed by the two or more documents when read together (***Timmins v Moreland Street Property Ltd*** [1958] Ch 110 endorsed by the Judicial Committee of the Privy Council decision from Barbados ***Elias v George Sahely & Co.*** [1982] 3 All E R 801.)

(d) Parol evidence may be given to identify the connecting documents (***Austin Mckenzie v Ada Barrett*** SCCA 44/92 (May 2, 1994).

[43] Counsel submitted that based on the above, the document at Annexure B did not satisfy the requirements of section 4 of the Statute of Frauds. Further as acknowledged by both E.C.L. and L.R., *(see paragraph 17 of the second affidavit of E.C.L and paragraph 9 of the affidavit of L.R. in response to the second affidavit of E.C.L.),* the parties did not agree nor act on it and hence that could not be the basis of holding that an agreement for sale existed.

[44] Counsel maintained therefore that all that was orally agreed was a purchase price of $30,000,000.00 but subject to agreement as to:

(a) the deposit payable; and

(b) how and when the balance of the purchase money was to be paid.

There was no agreement on those 2 essential conditions and hence there was no concluded contract for the sale of the property. Counsel therefore advanced the view that L.R. could return the deposit and any payment made towards the agreed price subject to any claims for damages L.R. may have against E.C.L.

[45] Counsel submitted that the claimants were in the circumstances not entitled to an order for specific performance. He maintained that generally a claimant will not succeed in obtaining an order of specific performance unless he is able to show the existence of a contract that is valid and enforceable at law at the time when the order is sought. It is sufficient to prevent the making of an order for specific performance that the defendant is able to establish any fact or matter that is inconsistent with the existence of a valid and enforceable contract at law. So it may be shown that there has been no valid offer or acceptance such as where the terms of the offer and acceptance are not sufficiently certain or that there is an

unsatisfied condition precedent. Again it may be that the Claimant is stopped from asserting the existence of a valid and enforceable contract or that there may have been an essential breach leading to an effectual rescission by the injured party. On these or other grounds it may be shown that there is no valid and enforceable contract at law and in any such case there is no room for specific performance nor for any other form of auxiliary relief (***Spry on Equitable Remedies 3rd ed.*** at pages 130-131).

[46] Counsel then addressed the position advanced by the claimants that they were put in possession as purchasers and lessees at the same time. He cited ***J.T. Farrand on Contract and Conveyance*** 3rd edition at page 172 where it is outlined that, *"Occasionally a purchaser may be allowed into possession of the property before completion. His particular position and the terms of his possession will depend primarily upon what has been agreed with the vendor (see e.g.* ***Cantor Art Services Ltd v Kenneth Bieber Photography Ltd*** *[1969] 1 WLR 1226 CA)."*. Counsel submitted that there was no evidence to suggest the existence of any agreement that the sum of US$4,000.00 per month was to operate as both a rental and a mortgage payment at one and the same time. Counsel therefore maintained that L.R. had the right to eject E.C.L. given that there was an insufficient memorandum in writing and hence no enforceable lease (***Delaney v TP Smith 179*** [1946] K.B. 393).

[47] Counsel also submitted that E.C.L. entered into possession on an intended lease which never came into effect as the conditions precedent of the 2nd and 3rd claimants signing the lease never occurred and major annotations amendments and jottings were made to the intended lease without the consent of L.R. Counsel cited ***Cheshire's, Modern Real Property*** 10th ed. at page 342 where the principle is stated that no agreement for a lease is enforceable by action unless a final and complete agreement has been reached and there is a sufficient memorandum or act

of part performance. Counsel therefore further submitted that re-entry by L.R. on September 14, 2008 was therefore justified, as forfeiture by a lessor is allowed where an express condition of a lease has not been fulfilled. (***Hill & Redman, Law of Landlord and Tenant*** 16th ed. page 460, paragraph 383).

[48] Accordingly counsel submitted that L.R. was entitled to summary judgment and he was willing to return the sum of US$100,000.00 plus the further sums paid, subject to his right to damages caused by the injunctions obtained by the claimants and E.C.L.'s continuing refusal to deliver possession of 24 DKD back to him.

**THE SUBMISSIONS ON BEHALF OF THE CLAIMANTS/RESPONDENTS**

[49] The claimants acknowledge that there is no one written agreement that evidences their claim to the existence of a binding agreement between the parties for the sale and purchase of 24 DKD. They however contend that there exists sufficient memoranda in writing and acts of part performance that are consistent with the oral agreement that the claimants aver existed between the parties.

[50] The evidence of sufficient memoranda in writing relied on by the claimants consists of the document at Annexure B, the letter of August 17, 2008 two documents written by L.R. and the four payments totaling US$ 100,000.00 made by E.C.L. to L.R and referred to earlier in this judgment. It was specifically submitted by counsel for the claimants that it should be noted that those payments were made before any discussion of a lease.

[51] Concerning part performance, counsel for the claimants submitted that there can still be an action for specific performance where there is a sufficient act of part performance. Counsel cited ***Steadman v Steadman*** [1976] AC 536 at 539 where Lord Reid stated that:

> [I]f one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that this agreement is unenforceable…that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud.

[52] Counsel for the claimants also submitted that to qualify as acts of part performance those acts must be unequivocal and referable to the existence of a contract. Counsel relied on the payment of monies which the claimants allege were paid as a deposit. While counsel acknowledged that the payment of money is by itself an equivocal act, (***Madderson v Alderson*** [1883] 8 BAC 461 at 469), it was submitted that acts of part performance have to be considered in their surrounding circumstances. Therefore applying the principles in ***Steadman v Steadman*** the payment of money on a balance of probabilities pointed to the existence of an oral agreement of sale between the parties as alleged.

[53] Counsel further relied on the fact that the claimants *(effectively E.C.L.)* were put in possession shortly after payment, which the claimants aver was in keeping with the agreement for sale of 24 DKD, and hence possession was prima facie referable to the agreement and the claimants were not in possession as trespassers.

[54] Counsel therefore submitted that the acts of part performance towards the purchase were:

(a) L.R. placing E.C.L. in possession

(b) The fact that L.R. conceded that he had the consent of E.C.L to occupy a part of the premises temporarily; and

(c) L.R. writing to JPS and NWC for them to connect E.C.L. in relation to 24 DKD.

[55] Counsel maintained that on the principle enunciated in ***Walsh v Lonsdale*** (1882) Ch D 9 an agreement for a lease is as good as a lease wherever specific performance is available. Therefore, based on the acts of part performance, confirmation of a lease an option for future purchase, deposit from E.C.L. to L.R. towards the purchase of 24 DKD and the confirmation of exclusive possession given to E.C.L. by L.R. evidenced by the memorandum in writing, the letter dated August 17, 2008 written by L.R., the court should have no difficulty coming to the view that an enforceable lease is in place between the parties.

[56] Counsel for the claimants further submitted that a party who has permitted another to perform acts on the faith of an agreement to her detriment is not allowed to insist that the agreement is bad and that he is entitled to treat acts partly performed as if they were nonexistent (***Morphett v Jones*** [1814-23] 1 Swanst 172). Counsel for the claimants adverted to repairs and alterations that E.C.L. made on the premises. There is a dispute on the affidavit evidence, including photographic evidence, concerning what alterations or improvements E.C.L. had made to the premises at the time L.R. instructed his counsel to write to E.C.L. requiring her to vacate the premises and up to when L.R. sought to retake possession on the 14th September 2008. The resolution of that dispute, which concerns the extent of any painting and whether counters and shelves were dismantled at the behest of E.C.L is however not essential to the determination of the application.

[57] Counsel relied on ***Rossiter and others v Miller*** [1878] 3 AC 1124 for the principle that where all the terms of an agreement have been arrived at through correspondence, the mere fact that the parties have stipulated that afterwards a formal agreement embodying the terms of the agreement would be prepared would not prevent the agreement being ordered to be specifically performed if the formal agreement was not prepared and executed. Counsel for the claimants admitted that all the

terms of the agreement claimed are not in writing, (an important concession given the fact that all the terms were outlined clearly in writing in ***Rossiter***), but submitted that parol evidence would supply any defects having regard to the fact that there were agreements made between the parties without reference to legal counsel.

[58] Counsel for the claimants in conclusion submitted that this was not a matter suitable for summary judgment as Cole-Smith J had found that there were several serious and complicated issues to be tried. Further L.R. was asking the court to find that the claimants were in unlawful possession and that he was entitled to mesne profits. It was pointed out that L.R. had not accounted for the US$100,000.00 deposit nor the sums of US$4000.00 paid monthly into L.R's account from June 2008 until September 2010 when he closed the account and hence it was submitted L.R. had acted in bad faith and was therefore not entitled to equitable relief.

[59] Counsel for the claimants finally submitted that the claimants had a real not a fanciful prospect of succeeding on the claim as there was evidence of an agreement between the parties — oral and written.

## THE ANALYSIS

### COULD A COURT AT TRIAL (BEARING IN MIND THE POSSIBILITY OF PAROL EVIDENCE) FIND THERE WERE SUFFICIENT MEMORANDA IN WRITING AND SUFFICIENT ACTS OF PART PERFORMANCE?

[60] The law on summary judgment and that on the application of the Statute of Frauds have been sufficiently traversed earlier in this judgment. The relevant issue surrounds the application of that law to the undisputed facts in this case.

[61] The documents relied on by the claimants as sufficient memoranda in writing are the document at Annexure B, the letter of August 17, 2008,

(both prepared by L.R.; the letter being signed by him and E.C.L. as well), and the receipts given to E.C.L. by L.R. for the four payments totaling US$100,000.00.

[62] The document at Annexure B is written in the hand of L.R. and refers to a sale price, deposit, balance, mortgage amount and mortgage terms. The only difficulty however is that the parties did not finally settle on those terms. In her second affidavit dated 7th October 2008, E.C.L. at paragraph 17 referring to Annexure B, indicated that they had agreed on the terms outlined but then noted that, *"…the agreement was subsequently varied…".* L.R. speaking of the same document in his affidavit dated 17th October 2008 filed in response to the second affidavit of E.C.L., said at paragraphs 8 – 9 that, *"I wrote that document exhibited as Annexure B …at the very early stages of the negotiations between Eugenie Chin Lyn and myself. We had agreed the price of $30,000,000.00 and had discussed her paying me $5,000,000.00 "under the table" so that we would proceed as if the purchase price was $25,000,000.00 and not $30,000,000.00. 9. However we abandoned that process…we never agreed to proceed on the basis of that document at all indeed neither of us signed it nor was it dated nor did it refer to the specific property."* Both sides having on affidavit evidence said that document does not reflect the terms of any final agreement between them, there is no basis on which a court could hold that it forms a sufficient memorandum of, or part of sufficient memoranda of an agreement.

[63] The four payments amounting to US$100,000.00 were made between May 11 and June 8, 2008. The first payment of US$35,000.00 was the only one for which the relevant receipt referred to it as a deposit. Counsel for the claimants placed emphasis on the fact that these payments were made, in her words, "before any lease was discussed". In any event on the clear facts, these payments would have been made before any lease was signed.

[64] The payments of course have to be looked at in their overall context particularly that which it is acknowledged was agreed between the parties. It is common ground there was an oral agreement for sale with a purchase price of $30,000,000.00. The facts also reveal that the letter of August 17, 2008 was signed by both parties at the time i) E.C.L. returned the engrossed lease that she had executed to L.R. and ii) the keys were handed over by L.R. to E.C.L. That letter of August 17, 2008 therefore is critical to the disposition of this matter as it reflected the state of agreement of the parties at the point possession of 24 DKD was granted to E.C.L. by L.R.

[65] It is clear that both parties in signing that letter were signing to a document that referred to the lease that had been signed and just returned to L.R. by E.C.L. and which was the basis on which possession was being handed over. E.C.L. in her second affidavit indicated that she was never satisfied with the lease but signed it as L.R, had indicated it was a situation of "take it or leave it" (See paragraphs 36 and 41). Critically however at paragraph 38 she depones that *"…it was understood and agreed between the parties that the lease would only be concluded and binding after it had been executed by all the parties"*. The lease was not signed by all the parties and therefore never came into force. That is why counsel for the claimants sought to rely on the principle in ***Rossiter*** which states that where all the terms of an agreement have been arrived at through correspondence, the mere fact that the parties have stipulated that afterwards a formal agreement embodying the terms of the agreement would be prepared would not prevent the agreement being ordered to be specifically performed if the formal agreement was not prepared and executed. Counsel submitted that parol evidence would be admissible to supply the defects in this case especially since the agreements were made between the parties without reference to legal counsel.

[66] The submission of counsel for the claimants in reliance on ***Rossiter*** is however misconceived in at least two respects. Firstly the affidavit evidence makes it clear that on both sides there was recourse to legal counsel in the drafting of the lease. The lease was drafted for L.R. by his counsel Mrs. Dawn Paris *(see affidavit of Dawn Paris paragraphs 4 and, 5)* and counsel Ms. Audrey Wilson offered E.C.L. advice on the terms of the lease *(see affidavit of Dawn Paris paragraphs 6 to 8 and exhibit DP1 to that affidavit)*. Secondly the terms of the supposed agreement were anything but clear. Given that the lease was signed by E.C.L., albeit on her evidence with some misgivings, that lease that she agrees would come into effect and be binding once executed by all parties, should reflect the major terms of the agreement that it is alleged existed. The agreement which was to be formalised but was not, due to the failure of her co-claimants to sign and the unauthorised annotations and alterations made on it after L.R. and E.C.L. had signed and had their signatures witnessed by justices of the peace.

[67] An examination of the lease signed by E.C.L. and L.R. *(exhibit LR 3 to the First Affidavit of Defendant in support of His Application for Summary Judgment on his counterclaim)* shows that it speaks to a lease of three years duration expiring on the 3rd September 2011 with a monthly rental of US$4000.00 plus G.C.T. There is no reference anywhere in the lease of E.C.L. being placed in possession as both a lessee and a purchaser, nor of the rental sum also being a mortgage payment. Further the critical option to purchase which E.C.L. had insisted should be placed in the lease and which counsel for L.R. indicated was already in the lease *(see affidavit of Dawn Paris at paragraphs 4 to 5)*, is very non-specific and does not even reflect the sale price which both L.R. and E.C.L. acknowledge was $30,000,000.00. It reads at paragraph 3(1):

> If the tenant is desirous of purchasing the demised premises and of such his desire delivers (sic) to the lessor or leaves for him or sends by registered post to him at his last known place of abode

> in Jamaica not less than two months notice in writing expiring not less than the expiration of the term hereby granted then the lessor shall upon the expiration of the notice and on the payment of sum to be determined by the parties sell the demised premises to the tenant or as he directs.

[68] There is therefore no credible basis from the lease or from the letter of August 17, 2008 for a finding that the parties had concluded an agreement in respect of the deposit which was payable and on how and when the balance of the purchase money was to be paid — two vital conditions for there to be a binding agreement. The letter of August 17, 2008 indicated the sum of US$100,000.00 was to be held by L.R, *"to be applied at a later date when it comes about as a deposit on the purchase of the…property…it is now held as a deposit for a future date."* As demonstrated in the submissions of counsel for L.R. neither the sum of US$35,000.00, (the first sum paid by E.C.L. to L.R. that was stated to be a deposit on the receipt acknowledging its payment), nor the full sum of US$100,000.00 would fall within the usual percentages associated with deposits paid. Further that sum was less than what L.R. indicates was the sum ($10,000,000.00) he agreed to accept as a deposit. Whatever the disagreements as to whether or not there was an agreed sum for the deposit, the effect of the letter signed by both L.R. and E.C.L. is that there was no indication of there being a present subsisting agreement for sale in respect of which the US$100,000.00 or any part thereof was the deposit.

[69] The acts of L.R. relied on by the claimants as acts of part performance — specifically L.R. placing E.C.L. in possession, the payment by E.C.L. and the acceptance by L.R of the US$100,000.00 plus the request by L.R. through letters to the relevant authorities for electricity and water services to be connected to 24 DKD in the name of E.C.L. have to be viewed in the light of both the letter of August 17, 2008 and the lease executed by L.R. and E.C.L., which never came into force. When so viewed those acts are by no means unequivocal.

[70] E.C.L. was clearly placed into possession as an intended lessee in respect of a lease that had an option to purchase. The coming into force of that lease was conditional on it being executed by the other two intended lessees. The import and effect of the payments amounting to US$100,000.00 have already been determined as being a future deposit to be applied at anytime an agreement was arrived at in respect of the exercise of the option to purchase. There was therefore no current agreement for sale to which those payments could be referable as an act of part performance. The direction to utility companies to do reconnections in the name of E.C.L. is equivocal, it being common practice of which the court can take judicial notice that such directions are sometimes given in circumstances of a lease and at other times in pursuance of a sale. In the context of the letter of August 17, 2008 and the lease to which that letter refers it cannot be said that those letters to utility companies amounted to contributory acts of part performance.

[71] In the premises I therefore see no basis for departing from the findings of Dukharan J.A. writing on behalf of the Court of Appeal in providing reasons for the Court having dismissed the appeal against the discharge of the injunctions by Cole-Smith J. The learned judge of appeal identified the main issue as being, *"whether or not the appellants have a real prospect of success for a permanent injunction at the trial of this claim."* In arriving at his conclusion he said:

> [14] Is there evidence to support the fact that the parties concluded a binding agreement for sale which is evidenced in writing and capable of being specifically performed? It is quite clear from the facts that in May 2008 E.C.L. and the respondent commenced negotiations for the sale of the property for a price of $30,000,000.00. There is evidence of payments totaling US$100,000.00 towards the intended purchase of the property but no evidence in writing of any agreement between the parties of the terms and conditions of the sale. It is admitted in the affidavit of E.C.L. at paragraph [6] [c], that she was unable to complete the sale in a short period but that she and the respondent would enter

into a lease agreement, whereby she would enter into possession of the premises as a lessee and purchaser for a period of six years, but subsequently amended to three years. It is also gleaned from the affidavit at paragraph [7] that she advised the respondent that the 2nd and 3rd appellants would be parties to the sale and lease agreement and requested that the agreements include the other appellants. There is evidence, and admitted in paragraph [9] of E.C.L.'s affidavit that the respondent caused a lease agreement to be prepared which was executed by E.C.L. and the respondent and forwarded to the 2nd and 3rd appellants in Canada for their execution. A copy of this lease agreement (exhibited) reveals that neither the 2nd nor 3rd appellant has signed it.

[15] The respondent stated in his affidavit that having gone to Canada, he collected the lease on 5 September 2008 from the 2nd appellant where he observed a number of annotations, amendments and jottings on the document which he had not known about nor agreed to.

[16] It is clear that the facts do not support the contention that the parties concluded a binding agreement as there is nothing evidenced in writing to suggest that the appellants are purchasers in possession of the property. There is nothing to suggest that the appellants are also lessees in possession pursuant to a valid and binding lease agreement entered into by the parties. The engrossed lease (as exhibited) shows no indication that the 2nd and 3rd appellants are signatories. The lease agreement was signed by E.C.L. but subject to it also being signed by the other two appellants.

[17] In view of the foregoing we found the learned judge was correct when she refused to grant the injunction sought. As stated, we dismissed the appeal and refused the injunctions with costs to the respondent to be taxed if not agreed.

## DISPOSITION

[72] The court's finding is that L.R. has established that there is no basis on which it can be maintained that a binding, enforceable agreement for a sale or lease of 24 DKD from L.R. to the claimants exists. Included in the court's finding is that there is no parol evidence anticipated, were a trial to be held, that would put that finding in jeopardy considering the extent of

the affidavit evidence and the clarity of the positions of the parties established on that evidence. The claimants therefore have no reasonable prospect of success at trial and accordingly L.R. is entitled to summary judgment. Consequently the claimants are ordered to deliver possession of 24 DKD to L.R. on or before the 31st day of August 2012 and L.R. is awarded mesne profits of US$4000.00 per month from the 14th September 2008 and continuing until possession of 24 DKD is delivered to L.R.

[73] The matter should proceed to assessment of damages in respect of the loss suffered by L.R.:

(a) due to his inability to:

(i) negotiate with any other purchaser; and

(ii) enter onto 24 DKD to dispose of any stock owned by him and stored thereon,

during the time from the 14th September 2008 until possession of 24 DKD is delivered to L.R.; and

(b) in respect of any furniture, fittings and equipment left by L.R. on the premises which were converted to the use of E.C.L. during the time from the 14th September 2008 until possession of 24 DKD is delivered to L.R.

[74] Costs to L.R. the applicant/defendant to be agreed or taxed.