IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2015HCV01524

BETWEEN	**BARRINGTON SCOTT CLARKE**	**CLAIMANT**
AND	**KIMESHA AMELIA DEBBIE-ANN NOTICE**	**DEFENDANT**

IN CHAMBERS

Miss Lisamae Gordon and Miss Rayhnah Spence instructed by Malcolm Gordon on behalf of the Claimant

Mrs. Saverna C. Chambers for the Defendant

BREACH OF CONTRACT FOR SALE OF LAND – SECTION 4 OF THE STATUTES OF FRAUD – WHETHER PREVIOUS ORAL CONTRACT FORMS PART OF THE AGREEMENT FOR SALE OF LAND – MESNE PROFITS- APPORTIONMENT OF OUTGOINGS

HEARD: February 21, 2020, 3rd March, 2020 & January 28, 2021

WOLFE-REECE, J

INTRODUCTION

[1] By an Agreement for Sale dated the 7th July, 2014 the Claimant agreed to sell and the Defendant agreed to purchase a parcel of land described as Lot 14 Congreve Park Pen now called Caribbean Estate Phase 1 (Block C) in the parish of Saint Catherine registered at Volume 1403 Folio 468 of the Register Book of Titles.

[2] The undisputed fact in the claim is that prior to the signing of the Sale Agreement, the Defendant had made an advance payment of Two Thousand Nine Hundred

and Sixty-Six United States Dollars and Forty-Five Cents ($2,966.45 USD), which at the time of the payment equated to approximately Three Hundred and Twenty-Two Thousand Five Hundred and Forty-Two Dollars ($322,542.00). A dispute arose between the parties as to how the sum should be applied, which resulted in the Claimant filing a Fixed Date Claim Form on the 9th March, 2015 for the following orders:

i. *A declaration that the sum of $358,233.91 or more is owing to the Claimant pursuant to the breach of sale agreement dated July 7, 2014 signed between the parties.*

ii. *Specific performance of a Sale Agreement between Barrington Scott Clarke and Kimesha Amelia Debbi-Ann Notice dated July 7, 2014 for the sale and purchase of property known as:*

> *"All that parcel of land part Congrieve Pen formerly part of Trenham Pen now called Caribbean Estate Phase 1 (Block C), registered at Volume 1403 Folio 468 "the property"*

iii. *A Declaration of Breach of Contract by the Defendant of the Sale Agreement dated July 7, 2014*

iv. *That the Defendant pay the balance of the sum of $358, 233.91 which is the sum which is due and owing under the sale agreement between the parties and/or the property be sold and the costs of the sale of the said property be jointly borne by the parties*

v. *That the deposit minus all costs be returned to the Purchaser.*

vi. *Damages*

vii. *Costs*

viii. *Such further or other relief as the Court may deem fit.*

[3] The Defendant refutes the Claimant's claim and instead she argues that despite having paid all monies due under the contract, the Claimant has refused to give her possession and has refused to pay the full outgoings for the premises. The Defendant is therefore counterclaiming:

i. *Immediate possession of Lot 14 Congreve Pen in the parish of St. Catherine registered at Volume 1403 Folio 468 [C14 Dominica Caribbean Estate].*

ii. *That the Vendor and or [sic] his Attorney-at-law furnish Letter of Possession, Letters to the utility companies, current Property Tax Certificate, up-to-date water receipt evidencing payment, up-to-date Strata maintenance payment receipt and keys to the premises.*

iii. *Mesne Profits*

iv. *Damages for Breach of Contract*

v. *Costs.*

CLAIMANT'S CASE

[4] The Claimant's Supplemental Affidavit filed on the 14th March, 2016 was allowed to stand as his evidence-in-chief. The Claimant contends that he advertised the property for sale in June, 2015 for the sale price of $16,000,000.00. According to the Claimant, the Defendant negotiated the cost of the property down to $15,500,000.00 to which he agreed.

[5] The Claimant's evidence is that the Defendant was very eager to purchase the property and offered to make an advance payment of USD $2,966.45, which equated to JMD $322, 542.00, to secure the sale of the property. The Claimant argued that the parties agreed that the sum would be offset against the purchase price of $15,500,000.00 thereby reducing the purchase price to $15,177,458.00.

[6] The Defendant, through her attorney-at-law, denied being indebted to the Claimant for the sum of $353,143.61 and claims instead that the sum of USD $2,966.45 should be applied to the sale proceeds of $15,177,458.00. Through the evidence of Counsel Mrs. Avris Whittingham for the Defendant it was denied that any other price was agreed upon other than what was stated in the agreement of sale. Therefore, it remained their contention that the advance payment of USD $2,966.00 or JMD $322,542.00 should be credited against the purchase price of $15,177,458.00.

[7] Counsel for the Defendant insisted that her client was not indebted in the amount claimed by the Claimant. Instead, the Defendant's attorneys-at-law argued that the Defendant owed only $27,691.00, which Miss Gordon claims was sent to her on the advice from Counsel for the Defendant that this sum represented the full and final settlement of the matter.

DEFENDANT'S CASE

[8] Dr. Notice agrees with the Claimant that the original sale price was $16,000,000.00 and that this sum was reduced to $15,500,000.00. She further noted that, at the time of the negotiation Mr. Clarke expressed directly to her that he was in urgent need of funds to repair and save properties which he owned in the United States of America, he therefore agreed that if an advance payment was made he would further reduce the sale price.

[9] Dr. Notice claims to have acted upon the Claimant's promise by paying a bank draft in the sum of USD $2,966.45 directly to the Claimant. A copy of the cheque was tendered into evidence which shows that the Claimant received same on the 13th June, 2014. At paragraph 5 of the Defendant's Supplemental Affidavit she expressed as follows:

> *"My understanding of the Agreement for Sale was that the $15,177,458.00 was the new sale price and the US bank draft was a down payment on this price so I signed the Agreement for Sale which I had discussed with my Attorney-at-Law."*

[10] According to the Defendant the Agreement for Sale was signed in July, 2014 and shortly after the Agreement for Sale was signed she received a Statement of Accounts from her attorney-at-law showing the sums she paid and what remained outstanding. A copy of the said statement was exhibited, therein, it was stated that as at July 24, 2014, the Defendant paid a total of $1,926,276.89 to include a deposit of $933, 491.06, a further payment of $666,476.33 and an amount of $326,309.50 (which is the said amount of USD $2,966.45 using an exchange rate of JMD $110), which was paid directly to the Vendor.

[11] Dr. Notice's evidence is that she obtained a loan from Jamaica National Building Society in the sum of $13,659,712.20, which to the best of her knowledge was paid to Mr. Clarke's attorney-at-law. She asserts that it was only in November, 2014 after all the monies had been paid to Mr. Clarke's attorney-at-law, to include the mortgage payment, that she was sent the first statement of account claiming an outstanding sum.

[12] The Defendant denied owing the Claimant the said sum he is claiming or any other sum. According to the Defendant she fulfilled her obligations under the agreement for sale by paying the total purchase price and costs of $15,574,288.31.

[13] According to the Defendant, both the transfer of the property to her and the mortgage from JNBS was registered on the October 21, 2014. She argued that though she is the registered proprietor of the property she is not enjoying the benefits because the Claimant refuses to provide her with the keys, letter of possession and letters to the utility companies despite requests for same by her attorney-at-law.

There are three issues to be addressed

i. **Whether the Court should accept the sale price as $15,500,000.00 as per the oral agreement between the parties or $15,177,458.00 as was outlined in the agreement of sale dated the 7th July, 2014?**

ii. **Whether the payment of USD $2,966.45 should be applied under the agreement for sale dated the 7th July, 2014 to the sale price of $15,177,458.00?**

iii. **Whether the Defendant is entitled to possession of the premises, therefore liable to pay the outgoings for the premises and collect mesne profits from the Claimant for the premises?**

Issue i.

[14] The starting point in addressing any dispute regarding the sale of land is Section 4 of the **Statue of Frauds** 1677 which provides, inter alia, that all contracts for the sale of land must be in writing or must be evidenced by sufficient evidence in the form of a memorandum or note and must be signed by the person to be charged or his authorized agent. It is also expected that the agreement should contain a description of the parties, a description of the property, the price and any other term agreed on by the parties (see Commonwealth Caribbean Contract Law by Gilbert Kodilinye and Maria Kodilinye page 30 and ***Tiverton Estates Ltd. v. Wearwell Limited*** [1974] 2 WLR 176).

[15] The Agreement for Sale provides that the purchase price is Fifteen Million One Hundred and Seventy Seven Thousand Four Hundred and Fifty-Eight Dollars ($15,177,458.00). The Claimant has asked this Court to conclude that despite the clear wording of the contract, the actual sale price was $15,500,000.00 and not the figure stated in the signed document. The Defendant on the other hand, is asking the court to accept the figure of $15,177,458.00 as the correct sale price.

[16] There is a rebuttable presumption that where a contract has been reduced to writing, the Court ought not to look to parol evidence to qualify, add to, alter or contradict the terms of the agreement unless it can be shown that the written agreement does not form the entire contract. This principle is known in law as the parol evidence rule and was explained in the Halsbury Laws of England 5th Edition Volume 22 para 21 as follows:

> *"Where the intention of the parties has in fact been reduced to writing, under the so-called 'parol evidence rule' it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show that intention, or to contradict, vary or add to the terms of the document, including implied terms. This rule is not confined to oral (parol) evidence, but also excludes earlier extrinsic written matter, such as earlier drafts, preliminary agreements and prior correspondence"*

[17] There are exceptions to the parol evidence rule, however, I find that the facts of the case do not fall within any of the exceptions. Rather, I find that the court should apply the approach taken by the Court of Appeal in the case of ***Park Traders (Jamaica) Ltd. v. Bevad Ltd., Transocean Shipping Ltd (unreported)*** Supreme Court Civil Appeal no. 1 /98 delivered on 20th December, 2000**.** On pages 11-12 of the judgment Cooke JA. (Ag) (as he then was) addressed a similar issue in circumstances where the 1st Respondent sought to avoid a written agreement for sale which was executed on the 18th January, 1990 by arguing that the parties were bound by a prior oral agreement which the parties made on or about the 14th July, 1989 and which is evidenced by sufficient written memorandum. Counsel for the 1st Respondent had written to the Vendor's attorney making time of the essence of the oral agreement. Following the execution of the Sale Agreement in January, 1990 the purchaser sought to rescind the agreement by arguing that the parties were bound by the terms of the earlier oral agreement. In delivering the judgement of the Board, Cooke JA (Ag) reasoned as follows:

> *"The appellant has submitted that there was no oral contract. The learned trial judge found that there was such a contract, without coming to a decision in this debate it is my view that even if there was an oral contract the executed agreement for sale would have entirely displaced any oral agreement. In Salmond & Williams on Law & Contract 2nd Edition the authors made a distinction between a written contract and one that is proved by evidence in writing. They then proceed to state what I regard as a correct statement of law. It is at page 138:*
>
> > *"The distinction which we have indicated is not inconsistent with the fact that an unwritten contract is often superseded by and merged in a subsequent written contract to the same effect. It frequently happens that parties, after entering into a binding unwritten contract, thereafter for the sake of greater security and certainty transform it into a contract in writing. That is to say, they enter into a second and subsequent contract to the like effect constituted by an operative instrument, with the intent that the prior unwritten contract shall be wholly cancelled and which has been superseded in favour of the written contract which has been substituted for it. The subsequent writing in such a case is not merely an evidential document for use in proof of a prior and subsisting unwritten contract; it is itself an operative contractual instrument constituting the authentic and final expression of the new and substituted contract thereby entered into Leduc v Ward (1888), 20 Q.B. 475, 479-480."*

[18] The dicta of Cooke JA bears significant weight in the instant case. The essence of the aforementioned passage is that unlike a memorandum or note, a written contract is not evidence of the existence of an oral contract. Rather, the written contract constitutes the new and conclusive expression of the parties' intention which may or may not reflect the terms of the prior oral agreement. I wish to add that the point expressed by the authors of Salmond & Williams on Law & Contract as cited by Cooke JA above, is even more relevant where the parties are not contracting as laypersons with no knowledge of the law. In the instant case, the parties were contracting upon the considered advice of their respective Learned Counsel, which leads to a stronger inference that the contract reflects the final and conclusive expression of the parties' intention.

[19] At paragraph 4 of his Supplemental Affidavit filed on the 14th March, 2016, Mr Clarke stated as follows:

> *"We signed the Agreement for Sale which was sent to both of us for our signature. This Agreement reflect a sale price of $15,177,458.00 which was attached an labelled and exhibited "BC-2". This sale price reflected a reduction in the sale price which was set at Fifteen Million Five Hundred Thousand Dollars ($15,500,000.00) to reflect the amount which had been provided to me initially of USD $2,966.45. In order to provide a security for the said Purchaser I agreed to sign a Loan Agreement for the sums which had been previously received."*

[20] By all accounts, both counsel were advised of the initial payment of USD $2,966.45 and the original sale price of $15,500,000.00. Yet after thoroughly dissecting the Sale Agreement, I find that no mention was made of the initial payment or the reduction in the sale price that the Claimant speaks of, nor did the agreement lead us to the existence of any collateral agreement that speaks to this reduction in the sale price. I am constrained to conclude that the terms as expressed in the sale agreement dated the 7th July, 2014 are the final and binding expression of the parties' intention. In particular, I am of the view that the sale price of $15,177,458.00 supersedes any previously agreed price which may have been orally agreed.

Issue ii.

[21] It is important to note that both parties to this claim have asked the Court to conclude that the agreement for sale is a binding contract and that the parties are bound by the terms thereof. On the other hand, they both ask the court to look to extrinsic evidence to advance their respective claims. The Claimant is asking this Court to vary the term of the agreement for the sale price to be $15,500,000.00 instead of $15,177,450.00 and the Defendant is asking the court to add a term to the agreement that the sale price of $15,177,450.00 should be reduced by the amount of USD $2,966.45. I now turn to addressing the latter issue of whether the sum of USD $2,966.45 should applied to the sale price of $15,177,450.00.

[22] The agreement for sale specifies not only the sale price but also how all funds payable under the Agreement for Sale should be paid. The relevant sections of the contract provides as follows:

PURCHASE PRICE:	*Fifteen Million One Hundred and Seventy-Seven Thousand Four Hundred and Fifty Eight Dollars ($15,177,458.00)*
HOW PAYABLE:	*A Deposit of One Million Five Hundred and Seventeen Thousand Seven Hundred and Forty Five Dollars ($1,517,745.00) shall be payable by the Purchasers to the Vendor's Attorney-at-Law as stakeholder on the execution of this Agreement as well as the one-half costs of the Agreement for Sale.*
TITLE AND COST OF TRANSFER	*Registered under the Registration of Titles Act. The Stamp Duty and Registration fees shall be borne equally by the parties. Each party shall bear his own Attorney's costs on Transfer.*

SPECIAL CONDITION

6. The Vendor shall not be obliged to lodge the Transfer and Duplicate Certificate of Title for registration in the Office of Titles until the Purchaser have paid to the Vendor's Attorney-at-law all monies

> *payable by the Purchasers to complete the sale and have delivered to the Vendor's Attorneys-at-law an undertaking reasonably acceptable to the Vendor's Attorney-at-law for the payment of same.*
>
> *13. This Agreement is conditional upon the Purchasers producing to the Vendors Attorney-at-Law, a legal undertaking 45 days from the date hereof a sum not less than Thirteen Million Six Hundred and Fifty Nine Thousand Seven Hundred and Thirteen Dollars ($13,659,713.20) towards the purchase price.*

[23] Each section stated clearly that the relevant funds were to be paid by the Purchaser to the Vendor's attorney-at-law. However, the Defendant's evidence is that she paid the sum of USD $2,966.45 directly to the Claimant on the 13th June, 2014.

[24] The contract stated that the deposit of $1,517,745.00 was to be made payable/paid to the Vendor's attorney-at-law as stakeholder. Special Condition 6 provided that all monies required to complete the sale should be paid to the Vendor's Attorney-at-Law. This speaks to the sale price, the purchaser's half cost of the stamp duty and half the cost of the registration fees and half the cost for the preparation of the Sale Agreement.

[25] The contract was so drafted that the parties agreed that the balance of the purchase price, being the sum of $13,659,713.20 was to be paid by a financial institution from whom the Purchaser was obtaining a mortgage. Again, it was a requirement of the contract that this sum be paid to the Vendor's attorney-at-law. Based on the Statement of Accounts, this condition was satisfied when Jamaica National Building Society paid a cheque to the Vendor's attorney-at-law in the said amount.

[26] I therefore conclude that the parties did not intend for the payment of USD $2,966.45 to form part of the Sale Agreement dated July 7, 2014. In fact, both the Claimant and the Defendant gave evidence that a separate agreement which they referred to as a "Loan Agreement" was prepared to govern the payment and possible refund of the said sum. Neither counsel thought to incorporate a term in

the Agreement for Sale which spoke either to how the sum in dispute should be applied or, at the very least, make reference to the existence of the loan agreement. It therefore leads me to conclude that the parties did not intend for the payment which was made directly to the Vendor's account to form part of the agreement for sale. I do not believe that I should now go outside of the four walls of the contract to order that this payment be applied to the Agreement for Sale when the parties took deliberate steps to ensure that the sum in dispute was governed by a wholly separate contract.

[27] It is my conclusion that the Defendant was in breach of the Agreement for Sale dated July 7, 2014 when she refused to pay the balance of $353,143.61 as stipulated in the Statement of Accounts dated the 11th November, 2014. On the other hand, I find that the Claimant and his attorney-at-law acted unreasonably by refusing to apply the advance payment of $2,966.45 to offset the sale price and their inflexible conduct has led to unnecessary judicial proceedings.

[28] Despite the unreasonable nature of the Claimant's conduct, it cannot be said that he was in breach of Agreement for Sale dated July 7, 2014 as the parties contracted in such a manner that the rights and obligations of the parties concerning the payment of $2,966.45USD was governed by the loan agreement which simply means that the Defendant would be required to honour her obligations under the sale agreement by paying the outstanding sum and suing the Claimant under the loan agreement to recoup the payment of USD $2,966.45.

Issue iii.

[29] The Defendant claims that she was refused possession of the premises even after requests were made by her Attorneys-at-law for the keys, letter of possession and letters to the utility companies. She is therefore asking this court to order that the Claimant furnish her with the aforementioned letters and keys to the premises in addition to receipts evidencing up-to-date payment of property taxes, water receipt

and strata maintenance payment. She is also claiming mesne profits and damages for breach of contract.

[30] The case of **Theophilus McLeod v Joseph Richards** [2015] JMCA Civ. 44, which was relied on by Learned Counsel, Ms. Chambers is instructive on the point of awarding mesne profits arising from a breach of contract for sale of land. In the said case, Morrison JA relied on the Halsbury's Laws of England 4th edition, volume 27(1) in defining mesne profits as *"an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land.*

[31] In the case of ***Theophilus McLeod v Joseph Richards, supra*****,** the Court of Appeal found that the issue of whether Mr. Richards was liable to Mr. McLeod for mesne profits would only arise if there was evidence that Mr. Richards had been in unlawful possession of the property during the period in dispute. The Court of Appeal found that given that it was not proved that the Respondent either trespassed on the land or had kept the Appellant out of possession, the Learned Judge was right in holding that the Appellant could not succeed in his claim for mesne profits.

[32] We now turn to the issue of whether it can be said that the Claimant trespassed on the land or whether it can be said that he kept the Defendant out of possession of the subject property in circumstances where she was entitled to possession of same. This must be determined by examining the terms of the contract to uphold what the parties bargained. The completion and possession clauses provides as follows:

COMPLETION	*On or before One Hundred and Twenty (120) days from the date hereof of signing on payment of all moneys payable by the Purchasers hereunder in exchange for the duplicate Certificate of Title for the Property duly endorsed with Transfer to the Purchaser and/or Nominee(s)*
POSSESSION	*Vacant on completion*

[33] As I indicated earlier, I find that the Defendant was in breach of the Agreement for Sale in that she failed to pay the full costs necessary to complete the sale. Therefore, even though the title has been transferred to her name, based on the wording of the Completion Clause, the contract was not completed thereby giving her no right to possession.

[34] Having found that the Defendant is not entitled to possession of the property as she claims, in keeping with the reasoning of Morrison JA in ***Theophilus McLeod v Joseph Richards, supra*****,** I find that the Defendant's claim for mesne profit cannot succeed as she was not entitled to possession of the premises.

[35] The Claimant seems to be of the erroneous view that he is not under an obligation to pay the relevant outgoings on the property. According to Mr. Clarke he "*cleared up everything upon selling that property."* Section 4 of the Property Tax Act provides that the property tax shall be payable by the person in possession of the premises. I am mindful that Dr. Notice is now the registered proprietor of the premises, however, it has been established that she has been kept out of possession of the premises by Mr. Clarke who retains the keys for the premises and has old furniture stored at the premises. He is therefore under an obligation to pay the property tax in keeping with section 4 of the Property Tax Act.

[36] Additionally, the agreement for sale in and of itself makes provision for the payment of outgoings. The relevant clause provides as follows:

TAXES, RATES, RENTS AND INSURANCE OUTGOINGS	*To be apportioned as of the date of possession/completion whichever is earlier.*

[37] Based on the aforementioned provision, the Vendor has a contractual obligation to pay all outgoings to include utilities and maintenance fees up until Dr. Notice is given possession of the premises or the contract has concluded by the payment of outstanding sums due and payable under the agreement.

Disposal

(1) Judgment in favour of the Claimant in the sum of $353,143.61 plus interest at 6% per annum from the date of this judgment to the date of payment of the sum.

(2) The sum of USD 2966.45 formed a separate loan agreement made by the Defendant to the Claimant.

(3) Upon the payment of all monies due and payable by the Defendant under the Agreement for Sale dated July 7, 2014, the Claimant's Attorney-at-Law within fourteen (14) days of receipt of same is to prepare and deliver to the Defendant's Attorney-at-Law a letter of possession, letters to the utility companies, current Property Tax Certificate, up-to-date water receipt evidencing payment, up-to-date Strata maintenance payment and keys to the premises.

(4) Upon the payment of all monies due and payable by the Defendant under the Agreement for Sale dated July 7, 2014 and within fourteen (14) days of receipt of same the Claimant;

(a) is to settle all costs incurred by the Strata Corporation to the date of possession and

(b) The Claimant and/ or his Attorney at Law is to write a letter copying the Defendant's Attorney-at Law to the Strata Corporation requesting that the caveat lodged by them against the Registered Title at Volume 1403 Folio 468 of the Register Book of Titles be removed forthwith.

(5) Defendant's claim for Mesne Profits is refused.

(6) Each party to bear their own costs.

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Hon. S. Wolfe-Reece
Puisne Judge