



[2023] JMSC Civ. 238

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV05558

BETWEEN	NEVILLE EVANS	CLAIMANT/ RESPONDENT
AND	LEO HOGG	DEFENDANT/APPLICATION

Mr Michael Erskine and Mrs Kimberly Myrie Eссор, instructed by Michael B.P. Erskine & Co. for the Claimant.

Mr Oraine Nelson for the Defendant.

Civil Procedure Rules – Rule 10.3(1) and 10.3 (9)- permission to file defence out of time- 11 years elapsed between filing an acknowledgement of service and a defence- reason for the delay- whether there exists an arguable case- Sale of Land-breach of contract-fraud – Specific Performance.

Heard on February 15, 2023, March 24, 2023, April 14, 2023, and September 28, 2023.

IN CHAMBERS (BY ZOOM)

Cor: M. JACKSON J (Ag.)

Oral Reasons

The Introduction

[1] Before me are two applications. The first is a Notice of Application for Court Orders filed on April 1, 2019, by the claimant, Mr Neville Evans, seeking, among other things, an order for specific performance in the claim brought by him against the defendant, Mr Leo Hogg, that he takes all the necessary steps to complete the sale agreement for a parcel of land entered between them in 1991.

The second is a Notice of Application for Court Orders filed on March 21, 2023, by the defendant seeking permission to extend the time to file his defence in the claim filed against him on October 10, 2012, almost eleven (11) years later.

- [2] Each of these applications, as expected, captures the circumstances that led to them. Therefore, a historical background of the claim will be necessary to provide context to these proceedings.

The Historical Context

- [3] On August 30, 1991, the claimant and the defendant entered into a contract to sell a plot of land. The claimant was given possession of the land and has remained in possession.
- [4] Except for a balance of United States Five Thousand Dollars (US\$5000), the claimant has declared that he paid all the sums to complete the sale, and the defendant has failed to take the necessary steps to complete the agreement and transfer the property to him to date.
- [5] The defendant, for his part, has declared otherwise. He maintained that the claimant had failed to complete his part of the agreement and that other than the initial deposit of US \$2,100.00, the claimant has made no other payment.
- [6] It is necessary to state at this juncture that the land in question was at some time owned by the defendant's uncle, Mr William Hogg. Mr William Hogg, now deceased, wrote a letter before his death noting that the defendant is free to do whatever he chooses with the land as the defendant was no longer indebted to him. It is also necessary to state that in these proceedings, this was never an issue for my consideration by either side. From all indications, the parties have accepted that the defendant is free to pass interest in the land.
- [7] At the material time, both parties engaged the same Attorney- at- Law, Mr Michael Erskine.

[8] On October 12, 2012, the claimant filed the claim against the defendant after he became aware that the defendant had commissioned a land surveyor to survey the land and had also taken steps to sell it.

[9] The particulars of claim, which set out the major planks of the claim, are as follows:

1. On the 30th day of August 1991, the claimant entered into an agreement to purchase a lot of lands part of William Hogg's subdivision, known as West Cliff and Pitkellney, in the parish of Westmoreland, for the sum of Forty-Four Thousand United States Dollars (US \$44,000.00)
2. The said agreement for sale was reduced to writing and signed by the claimant and the defendant.
3. It was agreed that the claimant would be given possession of the said land on the payment of ONE HALF (1/2) of the purchase price.
4. The claimant has since the date of the agreement herein paid the Defendant a total of Thirty- Nine Thousand United States Dollars (US \$39,000.00), leaving a balance of Five Thousand United States Dollars (US \$5000.00)
5. The claimant has been put in possession of the said land by the defendant since the year 1992 and has remained in possession since.
7. The defendant, despite acknowledging the existence of the agreement for sale, has refused to take the necessary steps to complete the agreement.

The Genesis of the Claimant's Notice of the Application for Court Orders.

- [10] On December 13, 2012, the defendant filed an acknowledgement of service to the claim and detailed that he was served with proceedings on November 30, 2012. The claimant's process server, Mr Carlton Samuels, however, filed an affidavit of service on December 17, 2012, stating that the defendant was personally served on November 23, 2012. On these facts, there is a clear discrepancy as to the date of service. I, however, will not attach any significant weight to it as I do not consider it to be important to the disposal of the proceedings. At the end of the day, seminal to the just disposal of this matter is that a defence was filed, albeit it was filed long outside the timeline prescribed by the Civil Procedure Rules, the "CPR". Accordingly, the pre-eminent issue that is now before me is whether the extension sought by the defendant ought to be granted.
- [11] Because of the defendant's failure to file a defence within the required timeline on August 22, 2016, the claimant filed a Notice of Application for Court Orders seeking specific performance of the contract, some four (4) years after instituting the claim.
- [12] The claimant refiled the application on April 1, 2019, and it was supporting by an affidavit from Mr Michael Erskine and himself. The application mirrors the relief sought in his claim. It sets out, among other things:
- a. An order for the Specific Performance against the defendant, ordering the defendant to take all necessary steps to complete the agreement for sale, dated the 30th day of August 1991.
 - b. Damages for breach of contract
 - c. Refund of monies paid by the claimant, on behalf of the defendant, for the transfer tax and stamp duty.

d. Interest as above

e. Costs

- [13] The affidavit of Mr Erskine averred that the defendant was served with the application. Mr Samuels, the process server, stated that he served the defendant on August 19, 2019.
- [14] The Minute of Order of the Court, dated 3rd October 2019, and signed by Honourable Mr Justice D. Fraser, as he was then, stated that “the matter is adjourned to await the outcome of the GLC Complaint of Mr Hogg related to this matter”. The Minute of Order further endorsed that the defendant had retained Counsel, Mr Clifford Smith. The parties present at Court on that date included Mr Erskine and Miss Kimberly Myrie. Mr Clifford Smith was absent.
- [15] Another Minute of Order dated 28th January 2021 stated that the matter was adjourned for a date to be fixed by the Registrar. The defendant was served with a Notice of Adjourned Hearing on October 4, 2022, and the Minute of the Order also indicated that the defendant needed time to obtain counsel to represent him for the hearing of the claimant’s application, which was fixed for February 15, 2023.
- [16] On 15th February 2023, the matter came before this court, as constituted, and the court commenced the claimant’s application. Mr Nelson and the defendant came during the proceedings. Mr Nelson advised the court that, though he was not properly on the record as appearing for the defendant, he would be formalising his representation and intends to represent the defendant. It was also their intention to oppose the claimant’s application and apply for permission to extend time to file a defence.
- [17] I adjourned the hearing of the claimant’s application to facilitate the defendant’s application and also made the necessary consequential orders. The matter was part-heard to March 24, 2023.

[18] In **New Falmouth Resorts Limited v NWC** [2018] JMCA Civ. 13, Morrison, JA, as he then was, stated, “where there are two applications before the court, one of which will, if granted, obviate the need to pursue the other, the sensible and most efficient course for the court to adopt will usually be to postpone consideration of the latter until after the former has been heard and determined.” I have found this to be useful guidance and, in the circumstances, diverts the court’s attention to the defendant’s application.

The Defendant’s Application

[19] Rule 10.3(9) of the Civil Procedure Rules, 2006, as amended, empowers the court with the discretion to extend the time for the filing of a defence.

[20] The bases on which the defendant sought the discretion of the court were as follows:

1. The court may make an order extending the time for filing a defence as per rule 10.3(9).
2. The court may extend the time for compliance with any rule even if the application for extension is made after the time for compliance has passed rule 26.1(2)(c).
3. The defendant is desirous of defending the claim.
4. The defendant has a defence with a real prospect of successfully defending the claim – rule 13.3 (1).
5. The defendant has a good explanation for the failure to file the defence within the time.
6. The defendant has made the application promptly, rule 26.8(a).
7. A trial date can still be met.

8. The effect of refusing the application would cause undue hardship and prejudice to the defendant, whereas granting the application would not deprive the claimant of an opportunity to obtain a favourable judgment.

[21] As was expected, the defendant's application was vigorously opposed by the claimant.

The Applicable Law

[22] As required by the court's rules, I focused on the three CPR provisions relevant to this application: rules 10.3 (1), 10.3 (9), and 26.1 (2) (c).

[23] Rules 10.3 (1) and 10.3 (9) state that:

(1) The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.

(2) The defendant may apply for an order extending the time for filing a defence as provided for under rule 10.3(9).

[24] CPR 26.1(2)(c) of the Civil Procedure Rules 2002 gives a wide remit, as it also provides for an extension of time generally. It states that:

*'Except where these Rules provide otherwise, **the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension of time is made after the time for compliance has passed.**'*
(My emphasis).

[25] Both rules 10.3(9) and 26.1(2) provide the court with discretion to decide whether to permit the extension of time to comply with a rule or court order. However, it is clear that neither rule provides the court with any set of discrete guidance in the exercise of its discretion to extend time. I will, therefore, seek to exercise my discretion in light of the overriding objective provided for under rule 1.1 of the

CPR. The Court will also have regard to the affidavit of merit and the Draft Defence of the defendant, Mr Leo Hogg.

The Affidavit Evidence

The Defendant

- [26]** The defendant stated that he was served with the claim form and the particulars of claim but he cannot recall the date on which he was served with the said documents.
- [27]** At the core of his challenge to the proceedings brought by the claimant is that he only received the initial deposit for the land as per the Sale Agreement dated August 30, 1991, and no other payments were made to him.
- [28]** He declared that he entered into the sale agreement with the claimant to purchase a parcel of land for the sum of USD \$44,000.00. He further stated that the terms of the agreement were that the claimant was to pay an initial deposit of USD \$2,100.00 upon signing the agreement and thereafter pay USD \$38,000.00 within 90 days of execution of the agreement. He accepted that the claimant paid the initial deposit of USD \$2,100.00 on August 30, 1991, but failed to pay the outstanding sum within 90 days, which expired on the 30th of November 1991.
- [29]** He stated that Mr Erskine was Attorney-at-Law with carriage of sale for the property, and he had represented both of them. He stated that the claimant requested additional time through their lawyer, Mr Erskine to come up with the balance. He stated that he went to Mr Erskine's office on several occasions to obtain further payment, but his efforts were without success. He said the dates of his visits fell between the years 1991 to 2008.
- [30]** He further stated that approximately 17 years had passed, and the claimant failed to pay the balance of USD \$38,000.00. He stated that Mr Leyton Jackson, an agent for the claimant, met with him sometime in 2008 and gave him a blank

receipt to sign. Before signing, he observed that the receipt only had the sum of USD \$8,000.00 written on it. Nonetheless, Mr Jackson instructed him to sign the blank receipt and attend to Mr Erskine's office to collect the cash of USD \$8,000.00.

- [31]** The defendant stated he followed the instructions, as given and signed the receipt. He emphasised that when he signed the receipt, no date or information concerning the person to whom the monies were being paid was endorsed on the receipt. He stated that he visited Mr Erskine a week later to collect the USD \$8,000.00 but did not receive it. He stated that Mr Erskine requested more time to pay over the USD \$8,000.00, and to date, he has never received the cash.
- [32]** In 2010, the defendant stated that because the claimant had failed to conclude the sale, he sought and obtained another potential buyer and began the process of selling the land. He maintained that this was done because the claimant had failed to honour the terms of the sale agreement and was, therefore, in breach of the said agreement.
- [33]** He further contended that upon executing the new sale transaction, a surveyor was engaged to conduct a survey of the parcel of land, and while doing so, Mr Jackson came to the property and objected to the survey on the basis that the claimant had paid a significant portion of the purchase price for the said property and only a balance of US \$5,000.00 remained.
- [34]** He further stated that Mr Jackson furnished him with a receipt showing that the claimant paid all sums, with the exception of USD \$5,000, to complete the sale agreement. He went on to state that Mr Jackson's receipt purports that the claimant paid him \$39,000.00 up to 1992.
- [35]** The defendant has denied ever receiving such an amount and challenged the receipt, which he signed and which is now dated February 27, 1992. He maintained that it was signed by him in 2008 and not 1992. He accepted that the

court received several receipts purporting to be his signature but maintained that he only signed one, and that is for the sum of US \$8000.00. A sum he never received, though he signed a blank receipt.

[36] He contended that all the other alleged payments and receipts were forged. He is able to prove that he did not sign those other receipts, and as such, he has a real prospect of successfully defending the claim.

[37] Finally, he contended that the claimant was never put in possession of the property.

The Defence

[38] In his defence, he particularises fraud as the basis of his defence, limitation of actions for a remedy based on laches. He outlined that:

(1) He received US \$2,100.00 at the time of the execution of the contract;

(2) The sum of US \$38,000.00, as agreed to be paid within 90 days, still needs to be paid. The balance of US \$3900.00 to be paid to complete the contract was not paid either;

(3) He continued to visit their lawyer's office between 1991 and 2008 for payments but was never paid. In 2008, Mr Leyton Jackson gave him a blank receipt to sign, which bore only the sum of US \$8000.00. He signed the receipt, as was instructed, as he was told that the lawyer would pay him the sum when he attended the office. He maintained that the receipt did not have any of the following:

- i. The date: 27th day of February 1992
- ii. The name of the person who made the payment
- iii. Any information as to the purpose of the payment

iv. Any information on whether the payment was a complete or partial payment

v. Any information as to whether any balance remained payable subsequent to the payment.

(4) The payment of US \$39,000.00 is false, and the claimant and the attorney are attempting to take his property fraudulently, knowing they did not pay him.

(5) He decided to sell his property 19 years later, in 2010, when he received no further sum other than the initial deposit.

(6) They are not entitled to the specific performance of the contract.

The Claimant

[39] The claimant's evidence is that he agreed to purchase 4 acres of land from the defendant for USD 44,000.00, and the Agreement for Sale was entered into in 1991.

[40] He stated that he had an initial deposit of USD 1,500.00 and, over six months, paid the defendant the sum of USD 39,000.00. The last payment to the defendant was the sum of USD 8,000.00 made on the 22nd of February 1992, leaving a balance of \$5,000.00 to be paid upon receipt of the title. He provided all the receipts. He noted that the payments were made as follows:

- A payment of \$25,000 on the date of signing
- A payment of \$150,000.00 on October 2, 1991
- A payment of US \$15,000.00 on December 3, 1991
- A payment of US \$7700.00 on January 13, 1992
- A payment of US \$8000.00 – February 27, 1992

- [41] He further stated that he did all that he required under the contract to complete the sale. Upon making numerous requests through his lawyer, Mr Erskine, to have the property transferred to him, the defendant brought a copy of the Certificate of Title for Lot 3 that was registered in his uncle's name, stating that the land would be transferred into his name from his uncle. After that, he will be able to transfer the property to him.
- [42] He noted that notwithstanding that promise, he has yet to transfer the property, and the delay has now threatened his ownership. He stated that the defendant had refused to transfer the property to him and tried to sell the land. He is, therefore, seeking to enforce the sale agreement.
- [43] He further stated that he paid to have the agreement for sale stamped and paid the transfer tax on July 31, 2012. The Defendant refused to transfer or sign the documents, so he lodged a caveat with the Registrar of Titles in June 2019 to secure his interest.
- [44] In keeping with Morrison JA's sage words, I consider the primary application to be an application for an extension of time to file a defence out of time.

The issues:

- [45] After hearing the submissions made by both Counsel, the issues that touch and concern this application for my consideration can be briefly formulated as follows:
- a. Whether the application for the extension of time to file the defence was made promptly?
 - b. Whether the Defendant has a reasonable explanation for the delay in filing his defence?
 - c. Whether the Defendant has an arguable case to proceed to trial?

Issue# 1 Whether the application for the extension of time to file the defence was made promptly?

- [46] I accept that the parties are not on all fours concerning when service was effected on the Defendant. As stated previously, I do not consider the time differences significant. When considered as a whole, the delay in filing a defence was well in excess of the time stipulated by the CPR. It was 10 years later, and by all accounts is significant. I can find no case where such an application was considered favourable. I pay due regard to the case of **Barrington Dixon v Angella Rute and Anthony Depaul SCCA No. 105/08. July 17, 2009, relied on by Mrs Myrie Eссор**, where the court described ten years to be “unforgivably long after acknowledging service” There is no doubt that the Defendant failed to act promptly after he filed his acknowledgement of service.
- [47] Within this jurisdiction, there have been numerous decisions on the importance of observing the timelines. CPR 1.3 imposes a duty on all parties to further the overriding objective, which mandates that claims are to be dealt with expeditiously and, more importantly, requires all parties to treat each stage of the claim with alacrity. Equally, where a party has breached a rule or order of the court, they must move quickly to remedy such breach. See **Aston Wright v Attorney General of Jamaica** [2022] JMSC 25, as per paragraph 29.
- [48] It is to be noted that the mere fact that there is a delay in filing a defence does not mean that the court will refuse an application for an extension. The court must also consider all the factors other than the fact of delay. See **Attorney-General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23.
- [49] The cases have made it clear that the length of the delay, though it may be significant, may only sometimes be a determining factor. The court must also examine the reason or reasons for the delay. I will, therefore, examine the circumstances outlined by the defendant. As I have said, the delay in this matter is inordinate.

Issue # 2: Whether the defendant has a reasonable explanation for the delay in filing his defence?

[50] Paragraphs 31- 37 of the defendant's affidavit, filed on March 21, 2023, captured the reasons for the delay.

[51] I have distilled them to be as follows:

- He was unable to secure legal representation. Counsel did not assist him, though he outlined his plight to all of them and made clear that he had been defrauded.
- A Lawyer wrote to Mr Erskine on his behalf, but Mr Erskine did not respond, and the lawyer did not pursue the matter.
- He reported the matter to the police, but the police did not assist him. The police asked Mr Erskine to produce the receipts, but he did not, and the police took no further action.
- Being a layperson, he lacked the technical skills to assist in progressing his matter.
- The General Legal Council, to whom he reported the Attorney, did not assist him.

The Submissions in brief by the parties

[52] Mr Nelson submitted that the delay was due to the defendant's inability to obtain legal representation and that the defendant is of a simple character and, one who needed legal assistance in defending this claim.

[53] Mrs Myrie Eссор, on the other hand, argued that the defendant filed an acknowledgement of service without legal assistance and that the same could have been done concerning a defence.

The Analysis

- [54] It is not in dispute that the defendant was served with the claim form and particulars of claim, nor is it disputed that the defendant failed to file a defence within the stipulated time frame specified by Part 10 of the CPR.
- [55] Rule 10.3(9) of the CPR allows the court to extend the time to file a defence. CPR 26.1(2)(c) enables the court to extend the time to comply with an order, direction, or rule after the prescribed time for compliance has expired. Neither rule provides the court with any specific guidance to exercise the discretion to extend time.
- [56] The principles governing the court's approach in granting or refusing an application for an extension of time was ably summarised by Lightman, J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others [2001] EWHC CH. 456**. This case has been repeatedly relied on within this jurisdiction. Most notably, in the oft-cited **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4**, Harris JA (as she then was) at paragraph 15 invoked this dictum:

"In deciding whether an application for extension of time was to succeed under Rule 3.1 (2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice. Among the factors which had to be taken into account was the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice."

- [57] According to the authority of **Peter Haddad v Donald Silvera SCCA No. 31/2003**, Motion 1/2007, a judgment delivered on July 31, 2007, Smith JA opined on page 11, that:

The authorities show that in order to justify a court in extending the time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so, then a party in breach would have an unqualified right for an extension of time, and this would seriously defeat the overriding objectives of the rules.

- [58] I am mindful of the fact that the Defendant filed an acknowledgement of service, which, on the face of it, means he is aware of the need to impart some information to the court about receiving the documents. Further, it is clear that he has some comprehension of the process and is aware of what is required of him as a defendant. Be that as it may, I accepted that he cannot be treated in the same possession as a trained legal mind steeped in the CPR. However, he went to numerous attorneys-at-law and the General Legal Council, and at one point, he retained Mr Clifford Smith.
- [59] I am of the opinion that he could have filed a defence. Regardless of what format the defence would have taken, one could have been filed, and if need be an amended defence, he could also do, if needed.
- [60] Considering the foregoing, the defendant could have done more. While I acknowledge his extensive efforts to retain legal assistance in this matter, I do not accept that this prevented him from aiding himself in filing a defence or pushing his counsel, Mr Smith, to do so, whom he said was on record to represent him. I do not accept the explanations as reasonable in the circumstances.
- [61] Notwithstanding my conclusion in this regard, I must consider whether he has an arguable case to proceed to trial.

ISSUE # 3: Whether the Defendant has an arguable case to proceed to trial?

- [62] This case concerns a breach of contract regarding the sale of land, and an Order is now being sought for Specific Performance, some over twenty years after the parties signed the agreement. The defendant contended that he agreed to sell the claimant the land for USD 44,000.00, which was agreed to be completed within 90 days. It was not completed until 1992, way beyond the 90 days.
- [63] The defendant contended that the respondent paid a deposit of USD 2,100.00 and made no further payments after that. He further alleged that the claimant and his counsel should have completed the contract within the stipulated time.
- [64] On the other hand, the claimant has exhibited several receipts showing he paid the defendant US \$39,000.00 and left a balance of only US \$5,000.00. Critical to all of this is that, except for one receipt for US \$7,700, which was signed for by Mr Erskine, all the other receipts were said to have been signed by the defendant. The claimant also led evidence that he had been in possession since 1991.
- [65] I find the evidence proffered by the defendant alleging breach of contract questionable at best. The defendant said he signed a blank receipt for USD 8,000.00 in 2008 and did not receive the money. This receipt in question later reflected that a payment of USD 39,000.00 was made, leaving an outstanding balance of USD 5,000.00. The claimant does not deny his signature being on the receipt but rather the amount paid, namely, USD 39,000.00.
- [66] The defendant is now contending fraud. Other than his say-so, no evidence has been placed before this court. This is now ten years later. This is a very tall hurdle for the defendant to climb to demonstrate that he has an arguable case. Coupled with this hurdle is the fact that he has admitted that he signed at least one of the receipts, though it was blank; that receipt, as is evident, is the most critical of all the others. It is USD 39,000.00

- [67]** For his part, the claimant is adamant that he paid the initial deposit of US \$2,100.00 and made several payments to the defendant, totalling USD 39,000.00, in keeping with the agreement. The claimant contended that he completed the payments and paid them to the defendant in 1992.
- [68]** Both parties have presented conflicting versions of events that led them to appear before this court. This court is now called upon as the arbitrator of law and facts to determine which party has presented cogent evidence on a balance of probabilities to show that they have an arguable case. This will ultimately determine whether the applicant himself has an arguable case if this Court rules in his favour.
- [69]** On examination of the evidence presented by the defendant, I find the defendant's case unsustainable compared to the evidence advanced by the claimant. Regarding the allegation of breach of contract, the agreement stated that it was to last for six months and not 90 days.
- [70]** The claimant has provided to this court receipts dated the 30th of August 1991 for the sum of \$25,000.00, the 2nd of October 1991 for the sum of JMD 150,000.00, the 3rd of December 1991 for the sum of \$15,000.00, the 13th of January 1992 for the sum of USD 7,700.00 and dated the 27th of February 1992 for the sum of USD 8,000.00 totalling payment of USD 39,000.00. Some of these receipts, if not most, bear the defendant's signature except for one with Mr Erskine's signature.
- [71]** While it is clear that one receipt did not bear the defendant's signature, the evidence regarding the other receipts bearing the defendant's signature is overwhelmingly clear. It made it clear that monies were paid to the defendant under the said agreement, so much so to the partial satisfaction of the agreement.

- [72] Without more, I cannot accept the defendant's assertion that these receipts were fraudulently obtained. As such, I do not find sufficient evidence pleaded in the defendant's defence nor affidavit to dispute the alleged payments made to him since these receipts bear his signature.
- [73] Regarding fraud, I find it difficult to accept that the cause of action has been properly laid to amount to an arguable defence. The defendant contends that the receipts representing payments of USD 39,000.00 are fraudulent, even though they bear his signature, which he admits to having signed. A burden of proof is placed on the defendant to prove on a balance of probabilities that the receipts were obtained through fraud. Whilst at this stage, I am not required to engage in a mini-trial of the issue, I am required to assess whether the defendant has an arguable defence.
- [74] To that extent, I do not find that the defendant has successfully raised a defence for fraud to amount to an arguable defence. This is because the standard of proof required to prove fraud in civil matters is on a balance of probabilities. However, when considering a case of fraud in a civil matter, a court will, of course, require a higher degree than in a case of negligence see the authority of **Hornal v Neuberger Products Limited [1957] 1 Q.B 247**.
- [75] As such, considering the evidence the defendant is seeking to rely on to mount his defence in fraud, it is quite slim, and this court finds it difficult on the evidence set out in the affidavit of merit to accept that anyone would have signed a document or any purported document that is bereft of essential information. In these circumstances, the defendant would be bound to the document he signed regardless of alleging he is unaware of the contents of the document he signed.
- [76] In the case of **L'Estrange v F Graucob Ltd [1934] 2 KB 394**, which deals with terms and conditions in a contract, the principle is equally applicable at bar that the document binds a party who signs it, whether he read or understood the terms and conditions of the document. It is the signature on the receipt that gives

the receipt its binding validity, and it is the only evidence before this court concerning this receipt. The defendant's evidence is neither corroborated nor supported by any other independent evidence of the stage, also bearing in mind this is well in excess of thirty years.

[77] The defendant, however unfortunate it turns out to be, cannot now come before this court and cry forgery simply because he failed to take prudent steps in protecting himself. His signature is on the final receipt. On that premise alone, this is overwhelming documentary evidence that he had received monies from the claimant.

[78] The receipt dated the 27th of February 1992 is evident to this effect. If the defendant wishes to or wants to challenge this document, he would have to prove that actual fraud was committed and that Mr Jackson, an agent of the claimant, intentionally deceived him. At this moment, the court is devoid of any evidence to this effect, and this is detrimental to the defendant's application in warranting this court to exercise its discretion in his favour.

[79] I, therefore, do not find that the defendant has an arguable case in advancing his defence.

Prejudice

[80] Paragraphs 39, 41, and 44 of the defendant's affidavit set out the prejudice that would befall the defendant. Mr Nelson argued that the defendant would suffer real prejudice if his application were refused. However, I must give due to both sides and the overriding objective laid out in rule 1.1 of the CPR.

[81] The issue of prejudice, in my mind, arises on any occasion where a party who is entitled to an Order is deprived of actualising that order to facilitate the defaulting party. Accordingly, there exists likely prejudice to be suffered by both parties in granting or refusing this application.

[82] I find neither the issue of laches nor the issue of limitation relevant. The claimant had been put in possession of the property and did all he could to pursue his claim. I consider the case of **Marjorie Knight v Lancelot Hume** [2017] JMSC Civ. 51, also relied on by the claimant, to be applicable and one I can rely on.

[83] I also find that specific performance is a remedy available in the circumstances of this case to the claimant, and I also accept the authority of **Worrell Green v Julia Green and the Administrator General of Jamaica** [2016]JMSC Civ. 161/ para 29-30 relied on by Mrs Myrie Eссор.

The Final Disposition of the Matter

[84] Accordingly, in the final disposition of this application, I make the following orders in full and final disposition of the claim:

1. The defendant's Notice of Application for Court Orders filed on March 21, 2023, to file a response to the claim filed on October 10, 2012, is refused.
2. The claimant is granted specific performance against the defendant regarding the Agreement for Sale dated 30th August 1991, in respect of the Notice of Application for Courts filed April 1, 2019
3. The defendant is to sign all documents to complete the transfer of the subject property within 15 days of receipt of the relevant documents to complete the sale from counsel for the claimant.
4. The Registrar of the Supreme Court is directed to sign all documents on behalf of the defendant for the completion of the sale where the defendant fails, refuses and or neglects to sign all such documents.

5. Mr Michael B. Erskine and Company is to have complete carriage of the sale to complete the transfer of the subject property.
6. The parties are to attend a Pre-Trial Review in the Assessment of Damages Court on February 15, 2024, at 12:30 p.m. for half an hour (1/2) via Video Conference.
7. Leave to appeal refused
8. Costs of the Application to the claimant are to be taxed if not agreed.
9. The claimant's Attorney-at-Law to prepare, file and serve this order.

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Maxine C. Jackson
Puisne Judge (Ag.)