



[2019] JMSC Civ. 127

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 03981**

<b>BETWEEN</b>	<b>DURRELL FOSTER</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND BETWEEN</b>	<b>CYNTHIA FOSTER</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>DAVID McCLYMONT</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ESTATE OF ERIC McCLYMONT</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Mr. Sean Kinghorn instructed by Messrs. Kinghorn and Kinghorn for the claimants.

Miss Gillian Mullings instructed by Messrs. Naylor and Mullings for the defendants.

**Heard: March 20, 2019 and June 26, 2019**

**CORAM: J. PUSEY J.**

**Delay in completion of agreement for sale of land, Purchaser in possession, termination by Notice Making time the Essence of the contract**

**THE CLAIM**

[1] By an Amended Claim Form filed in October 10, 2013 the claimant seeks the following relief:

1. A Declaration that the claimants are the beneficial owners of ALL THAT Parcel of land part of CALEDONIA known as part of NUMBER 26, CALEDONIA ROAD in the parish of Manchester and

being Lot #1 part of Caledonia and being the land registered at Volume 1309 Folio 781 of the Register Book of Titles.

2. An Order that the claimants are legally entitled to be registered as proprietors in fee simple of the said land.
3. An Order restraining DAVID McCLYMONT and the ESTATE OF ERIC McCLYMONT or anyone claiming through them from entering on the said land or in any way interfering with the quiet enjoyment of the said land by the claimants.
4. Damages to the claimant for Destruction of the claimant's property and consequent loss of earnings resulting from the unlawful destruction of the claimant's property by the defendant DAVID McCLYMONT, his agents and or employees.

**[2]** The claimant Durrell Foster is now deceased. His wife, Cynthia Foster, acts as his representative in the matter.

## **PRELIMINARY POINT**

**[3]** At the commencement of the trial and before evidence was taken, the defendants, through their attorney made an application in limine. It sought to prevent the claimant from seeking the remedy of specific performance in this claim.

**[4]** Counsel argued that the matter had proceeded through Case Management and Pre-trial Review on the pleadings outlined in the Particulars of Claim and there was no mention of the remedy of specific Performance being sought. It is only in January 2019, when the witness statement of Cynthia Foster was filed, that mention is made of specific performance. Counsel urged the court not to permit this to be argued as it was not pleaded and the claimant had ample time to amend his statement of case before January 2019.

- [5] In response counsel for the claimants indicated that it was not his intention to seek specific performance as a remedy. He argued that the defendants' application is premature as he was not seeking to amend his statement of case but was only seeking the orders mentioned in paragraph 1 above. He outlined his case to show that specific performance was not being sought.
- [6] **Ruling:** In light of the orders and declarations being sought, the court ruled that there was nothing to suggest that a remedy of specific performance was being contemplated. There is therefore no reason to exclude what was not being sought. Specific performance would not be argued in this matter.

## **INTRODUCTION:**

- [7] On February 19, 1986 the claimant, Cynthia Foster, entered into a written Agreement for Sale with Eric McClymont, now deceased, to purchase Lot 1 part of 26 Caledonia Road in the parish of Mandeville for Five Hundred and Fifty Thousand Dollars (\$550,000.00). The land was part of lands registered at Volume 1162 Folio 413 of the Register Book of Titles at the time of the agreement, subject to subdivision approval and acquisition of splinter titles. Consequently no completion date was in the Agreement for Sale. It is now registered at volume 138 Folio781.
- [8] By the agreement, the land was to be transferred to the claimant and her husband, Durrell Foster, as joint tenants in fee simple and they were put into possession in 1986 upon the execution of the agreement and payment of the deposit.
- [9] Over time a total of Three Hundred and Thirty Seven Thousand, Five Hundred Dollars (\$337,500.00) was paid by the claimant on account of the purchase price to Eric McClymont, deceased. The claimant was of the view that the balance was to be paid in exchange for Registered Title. However, the agreement for sale required the balance purchase money to be settled by the 31<sup>st</sup> December 1986. Several years passed and the claimant avers that she stood ready, willing and able to complete the purchase.

- [10] Durrell Foster wished to take a loan from a bank secured by a mortgage on the property and caused the vendor's attorney, Mr. Barlow Aristyde Ricketts, who gave evidence regarding the transaction, to prepare an agreement for sale for half the value of the land. The agreement was signed by the vendor and Durrell Foster and is undated.
- [11] In 1989 Durrell Foster instructed his attorney-at-law, Mrs. Merlin Bassie to have the transaction, based on the second agreement completed. The claimant had always resided in Canada but her husband lived in Jamaica.
- [12] Mr. Durrell Foster later tried to enforce the second agreement in claim number CL 1993/017. Mrs. Cynthia Foster was also named a claimant. The claim was against the vendor for specific performance of the second agreement. The vendor could not be found for some time but eventually was served by substituted service overseas and entered Appearance and counter-claimed for the balance of the purchase money under the original February 19, 1986 agreement. This lawsuit was eventually struck out in 2009.
- [13] Relations between the vendor and Durrell Foster were strained for some time. The vendor migrated and thereafter there was no communication between the parties nor was any communication forthcoming from the vendor's attorney for several years. The claimants filed this suit seeking declarations as to their rights pursuant to the first agreement.
- [14] The vendor, Eric McClymont died in 2010, three years before this suit was instituted. This was unknown to the claimants for a while.
- [15] Since then the defendant, David McClymont, acting as agent of the executors in the estate of the vendor, his late father, has carried out certain acts of ownership over the property and has refused to complete the sale to the claimant, asserting that the claimants have no legal rights over the property and are merely squatters because they had failed to pay the balance purchase money. He damaged the roof of a shop on the premises and dug a big hole in the middle of the property and caused building material to be placed on the premises. He also instructed

tenants on the premises to stop paying rent to the claimant and to make payments to him. He also was contacted by government agencies regarding accumulation of garbage on the premises and took steps to remove it.

- [16] In their defence filed, the defendants seek ownership/possession of the land. They aver that the claimants came into possession of the property as tenants and then remained in possession after part payment of the purchase price and had failed to settle the balance purchase price. The claimants therefore have no interest in the property.

## CLAIMANTS' SUBMISSIONS

- [17] The claimants submit that the sole issue for determination is whether the sale agreement of the 19<sup>th</sup> February, 1986 made between Cynthia Foster and Eric McClymont is valid and enforceable. Counsel argued that the agreement for sale did not stipulate a time for completion as it was subject to subdivision approval and the acquisition of splinter titles. The time when that could be accomplished was uncertain. Time was therefore not the essence of this agreement.
- [18] In order for the February 1986 agreement to be terminated, he argued, the vendor or his personal representative had to serve a Notice Making Time the Essence of the agreement. If the purchaser failed to complete in the time stipulated, the contract would be terminated. He cited the Head Note in ***Vincent Williams v Manchester Beverages Ltd.*** [1984] 21 JLR 277 which he says encapsulates the relevant law, and dicta by Justice McDonald-Bishop (as she then was) in ***Construction Limited v Circle B. Farm Limited Claim No. 007 HCV0511***, for this proposition.
- [19] Further he referred to evidence given by Mr. Ricketts of counsel, who had prepared the sale agreement for the parties in 1986. He gave evidence of the terms of the agreement, its preparation and execution and the absence of a completion date. Further he revealed that he knew when the splinter title for the property was ready but he was not instructed, nor did he, inform the claimants of

this. Mr. Ricketts also agreed that the agreement could be completed by the serving of a Notice to Complete by either the vendor or the purchaser.

[20] Counsel asserted that the defendants had established nothing to impugn the validity of the agreement for sale. The claimants have given Notice Making Time the Essence of the Agreement and have placed themselves in a position for the court to grant the necessary orders to have the sale completed.

[21] Counsel further argued that one of the exceptions to Making Time the Essence of a Contract is protracted delay. He argued that any delay in completing this agreement lies with the vendor. The claimants were unable for several years to contact the vendor and were always willing and able to complete. He outlined the chronology of the transaction and concluded that it cannot be reasonably argued that there was protracted delay occasioned by the claimants. The claimants have instituted litigation for completion, including the matter at bar, while the vendor has sat still and has either been unavailable or elusive.

## **THE DEFENDANTS' SUBMISSIONS**

[22] The defendants argued that the claimants have presented to the court contradictory evidence manifested in pleadings, statements and affidavits accompanying Suit No. 017 of 1993 and the matter at bar. The 1993 suit, instituted by Durrell Foster, was concerned with the second contract signed in 1986 for a purchase price of Two Hundred and Fifty Thousand Dollars (\$250,000.00) for the land between the vendor and Durrell Foster. It is undated and enforceable. The current claim is for the original agreement at a purchase price of \$550,000.00 for the same land and was signed February 19, 1986.

[23] She argued that in the 1993 suit, Cynthia Foster agreed, in her statement, that the correct purchase price for the land is Two Hundred and Fifty Thousand Dollars (\$250,000.00) which had been fully paid and a balance of \$140,000.00 was recoverable from the vendor. Now, in the matter at bar, the claimant is asserting that she cannot rely on that agreement and is bound by the original February 19, 1986 agreement.

- [24] Further in the particulars of claim the claimants sought to explain how the two agreements came about, in a way inconsistent with the evidence. When the defendant filed its witness statement on January 11, 2019 the claimant abandoned the second agreement and the assertion that she had paid the purchase price in full. In oral evidence the claimant denied any knowledge of the contents of the affidavit filed on her behalf in the 1993 matter although she was present when an injunction was heard and the said affidavits were before the court.
- [25] With this state of the evidence with 'irreconcilable bifurcation,' she argued whether Durrell Foster could have been said to have maintained possession of the property on behalf of his wife, who was living in Canada at the material time.
- [26] Turning to the cause of action before the court, counsel argued that there is no cause of action on the contract or for specific performance before the court. Instead, based on paragraph 15 of the particulars of claim, the claim is based on adverse possession. The defence filed on September 23, 2013 was based on the assertion that the claim was about adverse possession. On this issue counsel made the following submission at paragraph 68 of her written submission,

*In relation to the case for adverse possession we ask the court to note that the claimants came into possession as prospective purchasers. They were pursued in the court system in the counterclaim of Eric McClymont for some 13 years in the 1993 suit. The suit for recovery of possession was filed January 2013. We therefore submit that at no time can Eric McClymont or his estate be taken to have slept on their rights. While there was a hiatus between the death of Eric McClymont in 2010 and his estate stepping forward in 2013, this period was only four years and is not sufficient to ground a case for adverse possession.*

- [27] In addition the claimants' assertion that the first agreement was never completed and no sale of the property was concluded, excluded any reliance on the doctrine of specific performance. The first time the issue of specific performance arose was the filing of a Notice Making Time of the Essence of the Contract. This Notice is not a pleading or any part of the statement of case. She argued that

she rejected/refused in writing, the Notice and pointed out certain weaknesses in it.

- [28] Focussing on inconsistencies in the evidence, counsel highlighted the differences in substance between the 1993 and the 2013 claim. The statement of case in the 1993 suit spoke to the second agreement being undertaken because only a portion of the property was being sold. The evidence though of the attorney, tells a difference story about security for a loan from a bank. In addition, resulting from reliance on the second agreement in the matter at bar is an effort by the claimants to surreptitiously change their legal position for unjust gains, argued counsel.
- [29] In relation to the issue of the claimants seeking the remedy of specific performance, counsel argued that the claimants cannot seek that remedy at this time as the limitation period had run in excess of 12 years since the time the cause of action arose, as required by section 25 of the Limitations of Action Act and in excess of six years on the contract. She relied on the decision of Evan Brown J in *Marjorie Knight v Lancelot Hume* [2017] JMSC Civ 5 for the proposition that section 25 of the Limitation of Actions Act is applicable to a claim for specific performance. She argued that the determination of the time when the limitation period begins to run is important and that, as discussed by Evan Brown J, there is the need for a trigger factor to set it in motion. That trigger in the case at bar, she argued, was when the counterclaim in the 1993 suit was filed, which is well in excess of the limitation period. She proposed at paragraph 46(c) of her written submission that 2019 is put forward by the defendants as the trigger date as there is no other date for completion.
- [30] Counsel argued further that according to the agreement of sale, the payment of the full purchase price was scheduled for December 31, 1986 and is separate from the date of completion, that is, when the title would be endorsed with the purchasers' name. No claim for specific performance could arise, she urged, before the payment of the purchase price.

- [31] Counsel further argued that while the claimants may argue that they had no knowledge that the registered title was available, they should have taken steps to protect their interest before the period of limitation had run and file the appropriate action or amend the existing one. Their failure to do so has rendered the remedy of specific performance unavailable to them at this juncture.
- [32] The claimants, counsel urged, are guilty of gross, inexcusable and unreasonable delay in the performance of their obligations under the contract and therefore are not entitled to any equitable relief. In support of this contention she referred to dicta in ***Park Traders (Jamaica) Limited v Bevad Limited and Transocean Shipping Limited*** Suit No. E 224/90.
- [33] Turning to the issue of the Cynthia Foster's assertion that she is ready, willing and able to settle the balance purchase price, counsel contends that no evidence of this has been forthcoming. It was open to the claimants to have given an undertaking to settle the balance purchase money. The claimants, counsel argued, were aware from at least 2013 that the splinter title was available and could have moved to complete the transaction. She relied on ***Albert Thompson v Myrtle Rosalie Johnson*** (unreported) E 259/84, and ***Malhotra v Choudhury*** [1979] 1 AER 186 for the proposition that 2 – 3 years delay was a reasonable time within which to seek specific performance.
- [34] Counsel further referred to ***Earline Lawrence v Dean Edwards*** [2017] JMSC Civ 121 where Campbell J indicated that in contemplating whether an order for specific performance should be made, a court should examine factors such as unconscionable dealings by the claimant, hardship and whether some other order would do justice. Counsel concluded that the claimants had acted unconscionable in the 1993 suit and allowed inexcusable and unreasonable delay in seeking to complete the sale and the court should not allow them to avail themselves of the equitable remedy of specific performance. She further concluded that the gross and inexcusable delay in completing the first agreement renders that agreement incapable of enforcement.

[35] Counsel posited that should the court find the first agreement enforceable, the vacillations of the claimants between enforcing the second agreement and then resorting to the first agreement and by obtaining injunctive relief, remained in possession of the property collecting the rents and profits there from without paying the balance outstanding on the purchase money for over 30 years. They therefore are unjustly enriched and have unclean hands and should not benefit from any equitable remedy. However, should the court be minded to uphold the agreement, the sum payable for the balance purchase money should be updated to today's money using the Consumer Price Index. That balance outstanding of \$212,600.00 updates to \$11,499,870.00. The parties varied the terms of payment originally agreed to and '*what is reasonable in the circumstances should be regarded*'.

[36] Counsel posed the question of what is the effect of there being no completion date in the first agreement while there was a stipulated date for settling the purchase money. In answer she said that there was no provision in the agreement for completion and so a completion date cannot be read into the agreement without more.

[37] Counsel also asked the question whether the remedy of specific performance could be made available to the claimants in the absence of specific pleadings. She answered this question by stating that there is no pleading about the purchasers being ready willing and able to complete. The vacillations, contradictions and omissions in the pleadings did not properly direct the defendants to the case to be answered. She argues that even if the pleadings could be extended to statements in the witness statement and documents being relied on, it was only in January 2019 that it arose. To quote from the written submissions,

*In such circumstances the costs incurred in defending the other abandoned claims and causes of actions must be countenanced by the claimants.*

[38] Counsel contended that there is no evidence giving a reason for the invocation of the equitable jurisdiction of the court and to eliminate the alternative that damages would be an adequate remedy. All that is done by the claimants is a reliance on the first agreement and awaiting the splinter titles as the basis of their claim.

[39] Counsel concluded that in light of the foregoing none of the relief being sought by the claimant should be granted by the court.

## ISSUES

[40] The issue to be decided is whether the agreement for sale dated February 19, 1986 is still valid and subsisting, rendering the claimants entitled to the Declarations being sought.

## THE LAW

[41] In the matter at Bar the claimant seeks declarations concerning their interest in the land the subject matter of the sale. They also seek a declaration that they are entitled to recover the value of items destroyed by the defendant.

[42] The manner in which the defence herein has been pitched especially in relation to the remedy of specific performance, makes it prudent to examine the nature of declarations, although it has not been argued in this matter. Rule 8.6 of the Civil Procedure Code 2002 (the CPR) deals with declarations. It states that,

*'A party may seek a declaratory judgment and the court may make a binding declaration of rights whether or not any consequential relief is or could be claimed.'*

[43] CPR R8.6 makes it clear that the court has jurisdiction to grant declaratory judgments even in the absence of a claim for any other relief.

[44] The nature and operation of declarations were clearly and fulsomely outlined in ***Legal Officers' Staff Association and others v The Attorney General and the Minister of Finance and Planning*** [2015]JMFC FC 3 (unreported judgment) by

Mrs. McDonald-Bishop J (as she then was) in a passage that I will reproduce in its entirety,

*A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position **is** and what **are** the rights of the parties. A declaratory judgment pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant (see Smith, Wolf & Jowell, **Judicial Review of Administrative Action**, paragraphs 18-001 page 735). The declaratory decree cannot be obtained as of right. It is well established that the grant of declaratory relief is discretionary. The discretion is, however, wide. The court has a general power to make declarations although a claim to consequential relief has not been made or has been abandoned or refused. However, it is essential that some relief should be sought or a right to some substantive relief established. The declaration being claimed must relate to some legal right(s) and must confer some tangible benefit on the claimant (Halsbury's *Supra* para. 1610). The court, however, will not make a declaratory judgment where the question raised is purely academic, the declaration would be useless or embarrassing or where an alternative remedy is available. The authorities have explained that it is of the greatest importance in deciding whether or not discretion should be exercised in favour of granting declaratory relief that the relief should serve some useful purpose. If it does not, it is difficult to see what reason there can be for granting relief. Usefulness does not have to take a material or tangible form; all that is required is that the declaration should resolve a real difficulty with which the claimant or applicant **is** faced (See *de Smith, Woolf & Jowell, Judicial Review of Administrative Action. Para. 18-022 and Halsbury's (supra) para. 1611*).*

[45] Implicit in this is, if the claimant is to succeed she must have a recognised interest in the subject matter to underpin the declarations being sought.

[46] The claimants asserts that they have a proprietary interest in the lands the subject of the agreement for sale because they entered into a valid agreement for sale with Eric McClymont, deceased in 1986 and has been put into possession of the lands.

- [47] In The Law of Real Property 4<sup>th</sup> Edition the learned authors R.E. Megarry and H.W.R. Wade at page 542 makes the following statements regarding contracts for the sale of land;

*....As soon as there is an agreement for valuable consideration between the parties in definite terms, there is a contract; and this is so whether the agreement was made orally or in writing.*

*But although a valid contract relating to land may be made orally, it will be unenforceable by the most important method of enforcing contracts, namely, by action, unless either the statutory requirements as to written evidence of the contract, or the requirements of equity as to part performance, have been satisfied. These requirements put contracts for disposition of land into a special category by themselves. Another distinguishing rule, peculiar to such contracts, is the rule that **a purchaser, even before conveyance, acquires an immediate equitable interest in the property.***

*(Emphasis mine)*

- [48] This principle was reiterated by Jessel M.R. in **Lysaght v Edwards** [1876] 2 Ch D 499. At page 506 of the judgment he said;

*The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, and a right to retain possession of the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.*

- [49] The argument posited by the claimants' attorney is that the contract is valid and subsisting and has not been terminated, despite the death of the vendor and the actions and assertions of the defendant. In order for the agreement to be terminated either party must serve a Notice Making Time the Essence of the Contract and failure to complete by either side thereafter would repudiate the contract.

- [50] In the case of *Vincent Williams v Manchester Beverages Limited Supra* it was decided that where time is not made the essence of a contract with a stipulated time for completion, the contract remains valid and enforceable and the vendor may be entitled to damages proved. Equity will give relief by specific performance, even if the date assigned by the contract has passed for the steps towards completion if it will do justice between the parties.
- [51] Also in *JTM Construction Limited v Circle B Farms Limited Supra* it was reiterated that, where completion is delayed, if the innocent party wants to terminate the contract, he must serve a notice making time the essence of the contract and if not completed by virtue of the notice, the non-performance will be treated as a repudiation of the contract.
- [52] The defendant has argued that the claimant is not entitled to specific performance of the contract of sale as she is guilty of unreasonable and unjustifiable delay in completing the sale. The claimants sought to enforce a second contract as the original and therefore have unclean hands and cannot invoke the equitable jurisdiction of the court to access the remedy of specific performance. As will become apparent in this judgment, the principles and limitations to the doctrine of specific performance need not be recited or analysed as it is not a remedy sought by the claimant.

## **ANALYSIS AND CONCLUSION**

- [53] There is no controversy that the agreement for sale dated the 19<sup>th</sup> February 1986 is a valid agreement for the disposition of the land in question and governs the relationship of the vendor and the parties herein in relation to the land. The claimants are seeking a declaration of their interest in the land in the face of being in undisturbed and undisputed possession of the land from 1986; protracted delay in completing the sale; the death of the vendor; the actions of the defendant; previous lawsuits concerning the said land and the non-payment of the balance purchase price.

- [54]** According to the claimants the non-payment of the balance purchase money is in part the result of her waiting on the vendor to complete the subdivision application and acquire the splinter title for her lot. It was also occasioned by the unavailability of the vendor to complete, as he had migrated from the country and could not be contacted by the purchasers. Neither did his attorney at law contact the purchasers to complete the sale. The defendant asserts that his father had to flee the island in fear of Durrell Foster, who he describes as a dangerous man. Whatever the reason may have been, what is clear is that the vendor was unavailable to complete the sale.
- [55]** Time rolled on until the 1993 suit was filed. However misconceived that suit may have been, what it demonstrates is that the vendor, by his counterclaim, reinforced the binding nature of the February 19, 1986 agreement some seven years after its execution and his desire to complete that sale. The only other step towards the completion of the sale is the claim at Bar.
- [56]** The vendor died in 2010 and his estate has been administered. The defendant herein acts by a Power of Attorney from the executors of the vendor's estate. Can he unilaterally terminate the contract of sale by destroying assets on the land, digging a hole on the premises and storing building material on the land, instructing tenants on the land to treat him as owner and asserting that the claimants are squatters because the balance purchase price is outstanding? I think not.
- [57]** Among the duties of an Executor of an estate is the realization of the estate, that is, to collect all the assets of the estate including to call in debts. (See page 785 Modern Law of Real Property, 13<sup>th</sup> edition by E.H. Burn). It is therefore the duty of the executors of the vendor's estate to complete the sale and collect the balance purchase money as a debt due to the estate. As late as seven years before his death the vendor acknowledged the sale to the claimant and the existence of the outstanding balance purchase money. The defendant, as the attorney for the executors, can do no more than they are authorised to do by law. He cannot unilaterally cancel the sale, without more.

- [58] The authorities, *Vincent Williams v Manchester Beverages Limited Supra* and *JTM Construction Limited v Circle B Farms Limited Supra* demonstrates that for the sale to be completed, a Notice Making Time the Essence of the Agreement must be served by either the vendor or the purchasers on the other party. If the defendant is desirous of terminating the agreement acknowledged by the deceased, he should serve the requisite notice. Assertions that the contract is vitiated because the balance purchase money is unpaid for a protracted period is not an accurate representation of the legal obligations attached to the sale of land.
- [59] In like manner, assertions that the balance purchase money outstanding, which according to the evidence amounts to Two Hundred and Twelve Thousand, Six Hundred Dollars (\$212,600.00), should be upgraded by the Consumer Price Index to today's value – some Eleven Million Dollars (\$11m) - is questionable.
- [60] In contemplating the issue of completion and the settlement of the balance purchase money, there has been arguments concerning who is responsible for the delay. There is no dispute that the vendor kept away and was not available to complete the sale. In oral evidence his attorney-at-law says he was not instructed to inform the purchaser when the title was ready or to complete the sale. In the 1993 suit it was clear the purchaser wanted to complete. It would not be unreasonable to conclude that the vendor, though able to complete took no steps to do so. The protracted delay seems therefore to be contributed to by the deceased vendor. It begs the question why should he be made to benefit, if it were possible, from updating the sale price to today's value? No authority was submitted to support the right to this updated price and I am not satisfied that it can be done.
- [61] According to the Agreement for Sale the outstanding balance purchase money attracts interest at a rate of 12% from December 31, 1986 until settled. In *Sale v Allen* [1987] 36 WIR 294 the Privy Council held that even where delay was the fault of the vendor, a purchaser in possession and in receipt of the rents and profits of the property sold was liable, on completion, to pay interest on the

unpaid balance of the purchase money. The deceased's estate is therefore entitled to the balance purchase money with interest at 12% per annum from the 31<sup>st</sup> December 1986 until settled, in exchange for Registered Certificate of title with the claimant endorsed as the proprietor of the land thereon.

[62] The claimants by this claim are seeking declarations regarding their interest in the land, the subject of the February 19, 1986 Agreement for Sale. The defendant contends in their written submissions filed, that the claimant is seeking specific performance of the said Agreement for Sale and should be barred from doing so. The reasons they should be barred include the fact that the remedy of specific performance was not pleaded in the statement of case. What was pleaded was possessory title by long possession. In addition there has been inexcusable and unreasonable delay in seeking this remedy and unconscionable behaviour evidence in the institution of the 1993 suit, masquerading the second agreement as the true agreement between the vendor and the purchasers.

[63] CPR 8.6 provides that a claimant can seek a declaratory judgment without seeking any consequential relief. McDonald-Bishop in the **Civil Service Association case** mentioned above explained succinctly the nature of the remedy. She said;

*A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties. A declaratory judgment pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant*

[64] It is clear from the outline of the orders being sought in the Amended Claim Form, set out in paragraph 1 herein, that no specific relief or remedy is being sought. The claim is based on the interpretation of the contract and the activities surrounding the contract by the contracting parties. To my mind, and having regard to the nature of declarations, no remedy or relief of specific performance is being sought. This was the ruling of the court when the application to bar specific performance as a remedy obtainable was made in limine.

Notwithstanding, counsel for the defendant made fulsome submissions on specific performance and invited the court not to permit it to be made available to the claimants, disregarding the ruling made on the in limini application. Without wishing to minimize or avoid counsel's submission, I find it beyond the scope of what is to be decided in this matter to analyse and make conclusions on the applicability of the doctrine and I repeat my earlier ruling that the remedy is not being sought by the claimant. What is being sought are declarations of rights vis-a-vis the contract.

**[65]** The defendant submitted that when the claim was filed the claimants based their right to the land on adverse possession. In the 1993 suit the vendor counterclaimed for balance purchase price. In the 2013 Fixed Date Claim Form the defendant herein sought recovery of possession against the claimants. These actions, she urged, demonstrate that the defendant made manifest his interest in the land. The vendors were not sleeping on their rights to the land. In any event, four years from 2013 is not sufficient to ground adverse possession.

**[66]** An examination of the Amended Claim Form and Amended Particulars of Claim reveal, to my mind, no reliance on adverse possession. What was recited in the Particulars of Claim, that the claimants have been put into possession from 1986 and remained in undisturbed possession until 2014, are the consequences of performance of the contract. The statement of case and remedy being sought places reliance on the February 19, 1986 contract and seek a declaration of what rights exists. I therefore do not agree with counsel that the claim is grounded in the doctrine of adverse possession.

**[67]** The 2013 Fixed Date Claim Form filed by the defendant herein for recovery of possession was included in the Core Bundle filed in this matter. Counsel for the claimants made no arguments in relation to it, while the defendant in her written submission only mentioned that it was consolidated with this claim. Notwithstanding, based on the conclusions reached regarding the respective rights of the claimant and the defendants in this matter, it is clear the defendant is not entitled to recover possession of the property at this time.

**[68]** In light of the foregoing the following declarations and orders are made;-

1. It is hereby declared that the claimants are the beneficial owners of ALL THAT Parcel of land part of CALEDONIA known as part of NUMBER 26, CALEDONIA ROAD in the parish of Manchester and being Lot #1 part of Caledonia and being the lands registered at Volume 1309 Folio 781 of the Register Book of Titles.
2. The claimants are legally entitled, on completion of the agreement for sale, to be registered as proprietors in fee simple of the said land.
3. DAVID McCLYMONT and the ESTATE OF ERIC McCLYMONT or anyone claiming through them are restrained from entering on the said land or in any way interfering with the quiet enjoyment of the said land by the claimants.
4. The claimants are entitled to damages for the destruction of the claimant's property and consequent loss of earnings resulting from the unlawful destruction of the claimant's property by the defendant DAVID McCLYMONT, his agents and or employees.
5. Costs to the claimant to be agreed or taxed.