[2020] JMSC Civ.188

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 03290

BETWEEN	**MARIA GREY GRANT**	**CLAIMANT**
AND	**CHRISTOPHER WOOD**	**1st DEFENDANT**
AND	**ULTRA HOME CONTRACTORS LIMITED**	**2nd DEFENDANT**

Ms Jody-Ann Gaff instructed by Vaccianna & Whittingham for the claimant.

Ms Tavia Dunn and Ms Allyandra Thompson instructed by Nunes, Scholefield, Deleon & Co for the defendants.

HEARD: 5,12 February and 25 September 2020

Breach of Contract– Sale of townhouse – Enforceability of unstamped Agreements for Sale – Consideration – Ascertainability of consideration – Variation of written documents by oral evidence – Constructive trust – Part performance – Proprietary estoppel - Stamp Duty Act, ss. 36, 43, 44 and 45 - Registration of Titles Act, s. 135. Statute of Frauds.

EVAN BROWN, J.

INTRODUCTION AND BACKGROUND

[1] The claimant contends that in exchange for naming the 1st defendant as her nominee in the purchase of two lots of land forming part of her father's estate, from the Administrator-General, the defendant promised to gift her a townhouse. This townhouse was to be built by the 2nd defendant, a company owned by the 1st

defendant. The 1st defendant, on the other hand, says, not so. The claimant was to become the owner of the townhouse upon her promise to seek subdivision approval of certain lands to facilitate development upon the lands bought of the Administrator-General. The townhouse was duly built and the claimant given possession. The claimant now wishes to have the property transferred to her but the 1st defendant refuses to do so. Hence the filing of this claim.

[2] The claimant seeks the following reliefs. One, a declaration that pursuant to section 135 of the ***Registration of Titles Act***, she is the trustee of lot G2 on the subdivision plan of part of Upper Swollowfield Estate, St. Andrew and being part of land registered at Volume 1418 Folio 126 of the Register Book of Titles, otherwise known as Townhouse G2, Brittany Manor, Watervale Avenue, Kingston 19 in the parish of St. Andrew. Two, that all the legal and beneficial estate be vested in the claimant. Three, alternatively, an order for specific performance that the 1st and 2nd defendants specifically perform and complete the terms of the Agreement for Sale and the Agreement for Construction respectively [the Agreements] and deliver the Certificate of Title registered at Volume 1418 Folio 126 of the Register Book of Titles to the claimant. Four, an order empowering the Registrar to execute all the required documents to give effect to the forgoing order, in the event of the defendants' refusal or failure to act. Five, damages for breach of contract.

[3] The dispute between the parties arose from the following admitted and/or undisputed facts. The claimant's father, Hershell Tasman Grey, died possessed of, among other properties, two parcels of land registered at Volume 1103 Folio 990 (Kembert Lodge) and Volume 644 Folio 52 (Innswood). Her father's estate fell to be administered by the Administrator-General of Jamaica. On or about 21 December 2005, the claimant contracted with the Administrator-General to purchase these two parcels of land, the former for $6m and the latter for $28.5m (the Administrator-General Agreements).

[4] On or about 26 January 2006, the claimant entered into an Agreement for Sale with the 1st defendant (the registered proprietor) to purchase townhouse G2, block

G, lot 43 on the subdivision plan of part of Swollowfield Estate, St. Andrew and being part of land registered at Volume 2377 Folio 152, later registered at Volume 1418 Folio 126 (the disputed property) for the consideration of $2m. Contemporaneously, the claimant entered into an Agreement for Construction of townhouse G2 with the 2nd defendant (of which the 1st defendant is a director) for the consideration of $11m. Clause 11 of this agreement stipulated that "the Builder shall in respect of the said townhouse credit the sum of … [$11m] against the indebtedness on a loan due and owing by the Builder to the Owner". Under clause 12 the builder agreed that "the individual Certificate of Title for the 3bedroom townhouse shall be duly issued under the ***Registration of Titles Act***, in accordance with the Subdivision Approval of the Kingston & St. Andrew Corporation and same shall be duly transferred to the Owner".

[5] The claimant also executed a Nomination Agreement with the Administrator-General in which she nominated the 1st defendant as the person entitled to receive the lands she contracted to purchase from the Administrator-General. Item three of the Schedule to the Nomination Agreement stated the contract price as $34.5m, the sum of the contract price for both parcels of land. Although the Nomination Agreement provided for the payment of the contract price to the claimant, it was accepted at the trial that the sums were paid directly to the Administrator-General. The lands were subsequently transferred into the name of the 1st defendant.

[6] Both the Agreements were properly executed by the parties. The townhouse was constructed and the claimant has been in possession. However, the claimant is yet to receive title.

Case for the claimant

[7] The claimant contended, in her examination in chief, that the Agreements were executed on the basis of a prior oral agreement between herself and the 1st defendant. The stipulation of the oral agreement called for the transfer by the defendant of the legal and beneficial interests in the townhouse to the claimant.

The consideration for this transfer of the property was the claimant naming the 1st defendant as her nominee in the Nomination Agreement referred to above.

[8] The claimant asserted that with her leave the 1st defendant took possession of the parcels of land in 2005. In September of that year her transaction with the Administrator-General was brought to completion and she discharged her obligation to the 1st defendant. In or about 31 December 2006 she was put into possession of the townhouse and remained in possession up to the time of the trial. That notwithstanding, the Certificate of Title was issued in the sole name of the 1st defendant. Several requests were made for a title to be issued in the name of the claimant, all met by various excuses. Eventually the claimant caused a caveat to be lodged against the title on 27 June 2013.

[9] In the middle of this dispute between the claimant and the 1st defendant, the Real Estate Board (REB) placed a notice in the print media for purchasers in the development to contact it. The REB tried to intervene on the claimant's behalf. The 1st defendant wrote to the REB to say, among other things, "the above unit [townhouse] will NOT be transferred to Maria Grey Grant because she has failed to deliver consideration in the sale contract". In that same missive, the 1st defendant also alleged that the claimant had failed to deliver on her commitment to him. That commitment, she later learnt, was to have sought subdivision approval for the estate lands to allow access by way of East Oakridge.

[10] The claimant denied ever having given any such commitment, whether before or after contracting with the 1st defendant or at his taking possession. In addition, the commitment the 1st defendant alleged did not find expression in any of their written agreements. She admitted, however, to showing the 1st defendant a subdivision plan which her deceased father had proposed for the estate lands, in keeping with his intentions to sell the land in lots. That showing, was to make the 1st defendant aware of the boundaries of the property. The claimant countered that it was the 1st defendant who represented to her that he would undertake the construction of the reserve road, since he had the requisite knowledge and equipment to do so.

[11] During cross-examination, the claimant was showed the plan, entered in to evidence as exhibit 28. This was a subdivision plan commissioned by her father. It bore his name and signature and was prepared by F.G. Nembhard, land surveyor. It looked like one of the plans her father would have got, according to her.

[12] The claimant maintained that the 1st defendant indicated to her that in addition to obtaining the lands at market value, there was value in the opportunity for him to develop the lands. It was in consequence of this that he agreed to compensate her by way of the transfer of the Certificate of Title for the townhouse.

[13] At the time of the purchase of the properties under the Administrator-General's Agreements, the 1st defendant was aware that both were accessed from Mannings Hill Road. He was never promised access by way of East Oakridge.

Case for the defendant

[14] The defendant alleged that during the negotiations to purchase Kembert Lodge and Innswood, the claimant showed him two survey plans. The one prepared by F.G. Nembhard and the other by I.G. Rose. Both survey documents showed an area which was being reserved as access to the lands. On the ground, this was a rough cut road. Based on representations made to him by the claimant, it was his understanding that he would have had access to the lands by way of apermanent road, as well as the rough cut road. Mrs Grey Grant told him that since the 1960s it was planned that access to the lands, including Innswood, would be by the rough cut road.

[15] He, however, agreed that Kembert Lodge is accessed from Mannings Hill Road. Innswood too is accessible from Mannings Hill Road. However, that access point is at the lower end of the land. The "developable" section of Innswood is in proximity to East Oakridge. To get from that lower end of Innswood to the "developable" section there is a steep gradient. He identified two problems in

getting access to Innswood via Mannings Hills Road. First, the cost associated with doing so would be prohibitive. Second, from an engineering perspective, doing so would not be possible because of the nature of the land.

[16] Two other factors also militated against accessing Innswood from the lower end. The first one was the presence of about thirty squatters. The Administrator-General had the squatters removed in 2013. The second factor was a church sited on the land. The church was removed in 2009.

[17] Before purchasing the lands, the 1st defendant had two meetings with the Administrator-General's Department. He wished to confirm that a new subdivision approval was being sought in respect of the remaining lands in the estate. The importance of this appears to lay in this assertion. Access to Innswood via the rough cut road would be over lands still in the possession of the estate. Hence, to traverse the rough cut road would amount to a trespass. Therefore, subdivision approval was needed to create access by road from East Oakridge to the Innswood property.

[18] The 1st defendant had therefore signed the Nomination Agreement based on the statements made to him by Mrs Grey Grant. Mrs Grey Grant had agreed to ensure that there would be subdivision approval of the remaining estate lands to provide an access road to the Innswood land. So that, at the time of their initial discussions, they agreed that he would transfer one of the townhouses he was building to Mrs Grey Grant in exchange for her seeking subdivision of the remaining estate lands.

[19] The agreement to construct the townhouse was with the 2nd defendant. The total construction and land cost was $13m. Although their agreements stated what monies were to be paid, none in fact changed hands. The townhouse was to be compensation for the works to be done in furtherance of the subdivision. That is, to offset the cost, which was about $10m.

[20] However, in 2012, the claimant told the 1st defendant that she was not going ahead with the subdivision. Furthermore, she was objecting to the any subdivision being done by the Administrator-General. So, he asked her what about access to Innswood. Her response was to offer an easement. An easement, he advised her, would more than likely be unacceptable to government agencies for a multi-family development.

[21] The 1st defendant contended, therefore, that Mrs Grey Grant failed to deliver on the consideration. Therefore, she is not entitled to an order that she is the owner of the townhouse.

Issues for determination

[22] A compendious expression of the claim is that it sounds in the vein of a breach of contract. The principal dispute centres on the agreed consideration. Therefore, the first issue for resolution is, do the parties have a valid contract for the sale of townhouse No. G2? That is, are the agreements enforceable? If the agreements are not enforceable, secondly, can the claimant obtain specific performance by reliance upon acts of part performance? Thirdly, can the claimant obtain the relief sought through proprietary estoppel although it was not pleaded? Fourthly, is the claimant entitled to relief under section 135 of the ***Registration of Titles Act***?

Issue #1: Do the parties have a valid contract for the sale of townhouse No. G2?

[23] The first issue identified for resolution by the claimant's counsel, which strikes at the heart of the validity of the Agreements, is, what was the consideration for the agreement for sale of the townhouse and was this consideration met? Counsel for the claimant recounted the evidence that the Agreements (for the land and construction of the townhouse) speak to a monetary consideration of $13m. The oral evidence demonstrated that no money changed hands. In her submission, both parties accepted that the sums written in the contracts represented the value of an agreed promise that was to be executed by both parties. Counsel framed the

question in terms of what was the true consideration or oral agreement since each party alleged a "slightly different oral agreement". Assimilated into this inquiry is also the issue of the acceptability of the consideration in the eyes of the law.

[24] The dictum of Lush J in ***Currie v Misa*** (1875) LR 10 Ex.153 on what may constitute valuable consideration was cited. In that passage, a valuable consideration was said to consists in some right, interest, profit or benefit accruing to the promisor, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the promisee. In sum, consideration is either a benefit to the promisor or a detriment to the promisee. Reliance was also placed ***Chitty on Contracts*** 28th edition volume 1 chapter 3. There the learned authors opined that enforceability of a promise depends on the giving of something of value in the eyes of the law. So that, an informal gratuitous promise falls short of a contract.

[25] From those authorities, it was said that consideration for the sale of land can take the form of actions, if they hold value in the eyes of the law and the parties. Accordingly, the acquisition of the two properties through the assistance of the claimant was valuable consideration in the meaning of Lush J, and the price the defendant paid for that consideration was the transfer of the townhouse. The court, it was urged, is not obliged to question the adequacy or fair value of the consideration. Once that was the bargain struck between the parties, the consideration given cannot be interfered with save for fraud or undue influence. ***Haigh v Brooks*** (1839) 113 ER 119 was relied on as authority for the preceding statement of the law. In that case, the consideration given for the payment of certain bills was the surrender of a document which purported to be a guarantee. The guarantee turned out to be virtually worthless but that was held not to be a defence to an action on the promise. In the instant case, the matter of what was the consideration comes down to question of credibility, in which event, the court was asked to prefer the evidence of the claimant.

[26] Learned counsel for the defendants made the following points on the issue of consideration. The major plank of the wide ranging submissions was that extrinsic

evidence is generally inadmissible to add to, vary or contradict the terms of a transaction required to be in writing, or a document constituting a valid and effective contract or other transaction. ***Cross and Tapper on Evidence*** 8th edition at pages 765-766 was relied on for that proposition. Judicial pronouncement to the same effect in ***Bank of Australasia v Palmer*** [1897] AC 540, at page 545, was also prayed in aid. Local application of these principles was provided in the reference to a section of the judgment of my learned sister Simmons J in ***Communtel Broadband Limited & Another v Alfred McKay*** [2012] JMSC Civ 10.

[27] However, it was submitted, where one consideration is stated in a deed, proof may be given of any other consideration which did not take place, and which does not contradict the instrument, citing ***Clifford v Turrell*** [1841] 62 ER 826. Extrinsic evidence is admissible to prove the real consideration in any of the following circumstances: (a) either no, or a nominal, consideration is expressed in the document; (b) the expressed consideration is in general terms or ambiguously stated; (c) a substantial consideration is stated but an additional consideration exists. The latter submission was premised on ***Pao On and Others v Lau Yiu Long and Others*** [1980] AC 614, at page 631.

[28] The effect of the foregoing submissions, couched within the context of the relief for specific performance, is that the claimant has not fulfilled her obligations under the contract. That is, she has not paid the stated consideration. And, as I understand the submissions, cannot now rely on consideration which is at variance with that stated in the Agreements. Therefore, the claimant is not entitled to an order for specific performance.

[29] So then, in the submissions of learned counsel for the defendants, compendiously stated, the problem which the claimant faces is one of admissible proof of its case. Consequently, it is appropriate that I take up at this time defence counsel's submissions on the stamping of the Agreement for Sale. In essence, the defence contends that the Agreement for Sale is a document which the **Stamp Duty Act**

requires to be stamped before it can be relied on by the claimant. Section 36 of the ***Stamp Duty Act*** was cited. Since the Agreement for Sale was admitted into evidence by the agreement of the parties, it was further submitted that the parties are not at liberty to waive the requirement of the statute by virtue of that agreement, relying on ***Nixon v Albion Marine Insurance Company*** [1867] LR 2 Ex.338.

[30] The claimant's counsel filed written submissions (filed 21 July 2020) in reply to defence counsel's submissions. Ms Gaff submitted that the court may proceed under sections 43, 44 and 45 of the ***Stamp Duty Act*** as the monetary value of the consideration has not been disputed and is therefore ascertainable. Ms Gaff sought to rely on ***Henrich Fitz-Gordon v Bernet Spence Lana Spence and Ceris Wint-McCaulsky*** (unreported) Jamaica, Supreme Court Civil No. E114/1989 judgment delivered 26 April 1996 (***Henrich Fitz-Gordon***), a decision cited by the defendants. While the defendants' counsel acknowledged the powers of the court under sections 43 and 44, it was further contended that the exercise of these powers is contingent on the ascertainability of the consideration.

Discussion and analysis

[31] I will take the question of the stamping requirement of the document first. As a matter of law, this submission is impregnable. The law is, a document which is required to be stamped cannot be deployed in evidence in civil proceedings unless it is duly stamped. The following passage from Adrian Keane & Paul McKeown, ***The Modern Law of Evidence*** 12th edition, at page 296, makes this clear:

> *"Certain documents are required to be stamped for the purposes of stamp duty. Although in criminal proceedings such a document is admissible if unstamped, in civil proceedings a document requiring a stamp shall not be given in evidence unless it is duly stamped in accordance with the law in force at the time when it was first executed or, the court having objected to the omission or insufficiency of the stamp, and the document being one which may be legally stamped after its execution, payment is made of the unpaid duty, together with any penalty payable on stamping, and a further sum of one pound. The parties cannot waive these rules. If a document requiring stamp cannot be found or is not produced after notice to do so, it is presumed to have been duly stamped. However, if there is evidence to*

> *show that the document was not duly stamped, it is presumed, in the absence of evidence to the contrary, that this remained the case".*

[32] I will now examine the relevant provisions of Jamaica's ***Stamp Duty Act***. Section 36 is in the following terms:

> *"No instrument not duly stamped according to law shall be admitted in evidence as valid and effectual in any court proceedings for the enforcement thereof".*

Sections 43, 44 and 45 provide, respectively:

> *43. "Upon the tender in evidence of any instrument, other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the Judge to any omission or insufficiency of the stamp; and the instrument if unstamped or insufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, to be determined by the Judge, and the penalty required by this Act, together with an additional penalty of Five Hundred Dollars, shall have been paid".*
>
> *44. "Such officer of the Court shall, upon payment to him of the duty payable upon such instrument, and of the penalties imposed by this Act, endorse on the instrument a memorandum of the payment of such payment and penalties, stating the amounts thereof respectively, with the date of such payment, and the name of the cause and the court in which paid; and thereupon such instrument shall be admissible in evidence, saving all just exceptions on other grounds; and an entry of the fact of such payment, and of the amount thereof shall be made in a book kept by such officer, who shall at the end of each sitting make a return of, and pay over the moneys so received …"*
>
> *45. "The Commissioner shall, upon production of the document with such memorandum thereon, perforate such instrument with or, as the case may require, impress thereon, the proper stamp or stamps, in conformity with such receipt".*

[33] Section 36 makes it mandatory that the document be stamped before the court can look at it; that is, admit it into evidence. However valid or sufficient in law, for example as a memorandum of an oral agreement for the purposes of the doctrine of part performance, section 36 makes it unenforceable if it is either unstamped or insufficiently stamped. Since this is a statutory requirement, as opined by the learned authors of ***The Modern Law of Evidence***, the parties cannot by

agreement waive the stamping requirement. The ***Stamp Duty Act***, directed as it is towards the protection of the State's revenue base, contains facilities to cure the omission or deficiency. And it is to those provisions that I now turn my attention.

[34] The court in ***Henrich Fitz-Gordon*** considered the legal effect of sections 36, 43 and 44. In that case the plaintiff sought a declaration that upon the true construction of a lease agreement he had a valid option to purchase the demised property. He therefore attempted to tender a photocopy of a document (presumably the lease agreement) into evidence. Objection was raised on the ground that the document had not been stamped as required by the ***Stamp Duty Act***. The court accepted that the document was non-compliant with the law.

[35] Counsel for the plaintiff valiantly tried to avoid the impact of section 36. He submitted that the stamping defect could be remedied by resort to sections 43 and 44. Harris J (as she then was) was of the opinion that section 43 contemplates the stamping of the original document subsequent to being tendered into evidence (see page 7). Harris J went on to state (after referring to section 44) that the document only became admissible into evidence after it had been endorsed showing the payment of stamp duty and penalties. I agree with Harris J.

[36] How does the foregoing discussion apply to the instant case? It is beyond dispute that the documents (Agreement for Sale and Agreement for Construction of Townhouse, collectively referred to above as the Agreements) agreed to be admitted into evidence as exhibits 5 and 6 respectively, are unstamped. Accordingly, the Agreements are non-compliant with section 36 of the ***Stamp Duty Act***. Since the documents are not stamped, neither of them can be enforced before the claimant makes good on the omission. In the circumstances contemplated by sections 43 and 44, the lack of stamping having been brought to my attention, I am required to make the assessment of the duty payable, together with the penalties applicable. The defendants' counsel advanced, however, that I am hamstrung in this regard. It is to that contention that I next turn my attention.

[37] The problem identified by defence is one of quantification, predicated on a finding that the consideration for the Agreements cannot be ascertained. The evidence in the case is that no moneys exchanged hands. In the absence of that evidence, the problem of the unstamped Agreements would be soluble through the mathematical exercise of using the consideration stated therein as the basis for assessment of the duty payable. The applicable penalty is fixed by the ***Stamp Duty Act*** and therefore requires no calculation. However, the matter has been complicated by the jettisoning of the consideration in the Agreements. And that in the face of the law's prohibition of varying the terms of a written document by oral evidence, as the defendants' counsel correctly submitted.

[38] It has long been the law that extrinsic evidence is generally inadmissible, if its receipt into evidence would have the effect of adding to, varying or contradicting the terms of a document required to be in writing: ***Cross & Tapper on Evidence*** 8th edition, at page 765. The learned authors of ***Cross & Tapper on Evidence***, at page 766, referred to Lord Morris' statement of the rule in ***Bank of Australasia v Palmer*** [1897] AC 540, at page 545, which I shall shortly recite after a summary of the facts of that case.

[39] In ***Bank of Australasia v Palmer***, the question for the Privy Council was whether the trial judge fell into error in allowing into evidence the conversation between the plaintiff/respondent and the manager of the appellant. The contention was that the evidence ought to have been rejected as its purpose was to contradict the written agreement between the parties, either in part or in whole. The respondent contended that the document was properly admitted as it was explanatory of the circumstances in which the respondent came to sign a document after the conclusion of the agreement.

[40] The question arose in the following circumstances. The bank extended an overdraft facility to the respondent to the tune of 2000 for six months, secured by his mother's guarantee and deposit of certain deeds. At the trial the application was shown to the respondent. The contention concerned whether the facility

extended to '4th April 1895 or on demand at your discretion'. The respondent testified that on seeing the printed words, 'or on demand at your discretion' he enquired of the manager if he could call up the overdraft at any time to which the manager responded, "certainly not". It was then that the manager wrote in the words '4th April 1895'. The bank honoured two drafts on the facility but dishonoured a third, falling within the limits of the facility, on the basis that the respondent ought to have given a first lien over the assets of the company the respondent had contracted with. The plaintiff/respondent denied that the bank was to be given a first charge. The jury found that the first charge was not a condition precedent and the facility was not terminable at the bank's discretion before the expiration of six months.

[41] In dismissing the appeal, it was accepted that it was common ground that the overdraft application did not contain the real agreement between the parties. It was against that background that Lord Morris observed there was consensus between counsel concerning oral evidence. At page 545 Lord Morris said:

> *"… parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract".*

[42] So then, to reiterate, oral testimony is inadmissible to, in short, contradict the terms of a written agreement or contract. It appears that oral evidence is permissible if its intent is to explain the circumstances under which the document came to be executed. Additionally, oral evidence is admissible where the document in question does not contain the parties' agreement, so the rule would not be engaged in the first place. For the rule to apply, it seems to me the document must embody the totality, or substance, of the agreement between the parties and the oral evidence must have as its purport, some derogation or dilution (whether by addition or subtraction) or supplantation of the term or terms of the agreement. Those are the principles to be distilled from the authorities cited above. The Grundnorm, or basic norm, in conveyancing is the requirement for all contracts for the sale or other disposition of land to be in, or evidenced by, writing, since the ***Statute of Frauds***

1676. This promotes certainty. In this context, the court adopts the learning in ***Cross & Tapper on Evidence***, at page 766, attributed to ***Goss v Lord Nugent*** (1833) 5 B & Ad 58, that oral evidence is particularly unwelcome in conveyancing in light of the premium placed on certainty.

[43] Against the backdrop of ***Bank of Australasia v Palmer***, I return to the case at bar. The claimant asserted that the consideration for the transfer of the townhouse was naming the 1st defendant as her nominee in the Administrator-General's Agreements to purchase the two lots from her father's estate. Ms Gaff accepted this in her written submissions filed on 9 March 2020 and marshalled her arguments, supported by authorities, towards the court's acceptance of it.

[44] Faced with the defendants' submission on the point, Ms Gaff argued (see submissions filed 21 July 2020) that the values in the unstamped documents should be used to assess the stamp duty payable. As a corollary, Ms Gaff submitted that the Tax Administration of Jamaica has the discretion to assess the Agreement based on a value determined by its valuators, should there be disagreement on the price stated in the documents. In learned counsel's appreciation of the case, although the parties disputed the basis for the consideration, they did not advance that the consideration was for a value other than that stated in the documents. The value is therefore ascertainable and the court ought to accept the $13m.

[45] Learned counsel for the claimant urged the court to find that the allegations of the defendants that the land in the Agreement for Sale was given to the claimant in exchange for infrastructure work to be undertaken by the claimant to allow the 1st defendant access to the lands in the Administrator-General's Agreement, is not supported by other evidence, coming as it did during cross-examination. The court should reject also the defendants' further contention that the consideration for the nomination agreement was the claimant's retention of lands upon which she had erected permanent structures. All of this was new and additional variation by the defendants concerning what was the consideration for the claimant's assistance.

Following these submissions Miss Gaff cited dictum from ***Clifford v Turrell*** [1841] 62 ER 826, which will be more fully quoted below. This is the passage upon which counsel relied:

> *"The rule is that, where there is consideration, stated in the deed, you may prove other consideration which existed, not in contradiction to the instrument …"*

[46] Much to the court's amazement, Miss Gaff went on to submit that the court should appreciate that the claimant has not contradicted the written evidence in the Agreement by her oral evidence. The claimant was said to have maintained her position that the transfer of the townhouse was payment for her assistance in the defendants' acquisition of the lands under the Administrator-General's Agreement. The value of that assistance, Miss Gaff advanced, was what was stated in the Agreements. It was her conclusion that the fraud the court should prevent from taking place is the defendants' contradictory extrinsic evidence that the moneys stated in the Agreements is the estimated cost for the infrastructure work to be carried out by the claimant.

[47] As I understand the foregoing submissions, the claimant's counsel urged me to accept that although the evidence that the consideration for the Agreements find no expression in the documents, that evidence does not in any way vary, add, subtract or contradict the Agreements. At the risk of repetition, the claimant's oral evidence was that the consideration was in kind while the Agreements declared money consideration. That is plainly a contradiction and consequently outside the law laid down in ***Bank of Australasia v Palmer***.

[48] As it concerns using the dollar amounts in the Agreements to calculate the stamp duty, I find this submission problematic. Firstly, the prices stated in exhibits 5 and 6 ($2m and $11m respectively) were repudiated by the claimant as the consideration for the respective agreements. It was Mrs Grey Grant's clear evidence that the consideration was her naming Mr Christopher Wood, the 1st defendant, as her nominee in the Administrator-General Agreements. Nowhere did

Mrs Grey Grant allege the contention that now forms the basis of Miss Gaff's submission; namely, that the prices stated in the Agreements reflect the agreed value of her assistance to Mr Wood to obtain the lands under the Administrator-General's Agreement. On the contrary, it was Mr. Wood who testified that those values approximate the cost of the infrastructure work to be undertaken by the claimant. However, that is part of the "extrinsic" evidence the claimant has asked me to reject.

[49] Secondly, quite apart from not stating that the values in the Agreements reflect the value of her service in naming Mr Wood as her nominee, Mrs Grey Grant accepted that the Agreements did not reflect the true legal arrangement between herself and Mr Wood. Specifically, it was her further admission, the Agreements did not say what they were obligated to do. All this was capped by the frank admission that no money changed hands. This takes me to Miss Gaff's reliance on ***Clifford v Turrell***.

[50] In ***Clifford v Turrell*** the plaintiff sought specific performance of a deed of assignment which he alleged he signed upon the defendant's collateral promise of an annuity for his life and a house worth $10 [pounds] per year. The terms of the collateral agreement were not in the deed. The defendant denied making the collateral agreement. The defendant argued that the reception of the evidence would contravene the rules of evidence by allowing oral testimony to contradict the express terms of the deed. While the court acknowledged that oral evidence may be excluded where it is inconsistent with a written instrument, it was held that the rule did not apply to consideration. According to Knight Bruce VC, at page 830:

> *"The rule is that, where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated. Taking therefore the evidence to prove an additional consideration beyond the consideration expressed in the deed, there is no sound objection in law to affect the reception of that evidence".*

[51] In that case there was no dispute concerning the consideration stated in the document, the unexpired portion of the lease which was said to be worthless. The

plaintiff there contended that he was hesitant to sign the lease because giving up his farm and everything in it, meant also surrendering his home and occupation and therefore his means of income. He was therefore persuaded to execute the deed upon the strength of the collateral promise which assuaged his fears. That court went on to receive evidence that demonstrated the plaintiff's objection to execute the assignment until the collateral promise had been made to him.

[52] It is clear that the position in ***Clifford v Turrell*** is unlike the situation in the instant case. The claimant in the instant case did not allege the gift of the land and townhouse to be collateral to anything in the Agreements. Mrs Grey Grant's assertion was that the gifts of land and townhouse were the consideration for naming Mr Wood as her nominee in the Administrator-General's Agreements. So that, Mrs Grey Grant did not ask me to accept the promise of land and townhouse for naming Mr Wood as nominee in addition to what is stated in the Agreements. Rather, what Mrs Grey Grant invited the court to do is to accept the promise in place of what the Agreements recite as consideration. And that, in my understanding of the Knight Bruce VC, is the law's proscription.

[53] This appears to be the position. The Agreements the claimant sought to enter into evidence are unstamped. Therefore, by virtue of section 36 of the ***Stamp Duty Act*** they cannot be admitted into evidence until that omission has been made good. While sections 43 and 44 of the ***Stamp Duty Act*** provide for stamping of the Agreements while the matter is being heard, the value of the consideration must be ascertainable to facilitate the calculation of the applicable stamp duty. In the ordinary case that calculation would have been based on the consideration stated in the documents. However, the incontrovertible evidence is that the consideration stated in the Agreements never changed hands. Furthermore, both parties, while contradicting each other on what was the consideration, have together sought to contradict the Agreements concerning what was the consideration. I cannot, however, prefer the evidence of the claimant and accept oral evidence of the consideration she alleged in contradiction of that stated in the Agreements, as this

would be contrary to law: ***Clifford v Turrell***. In any event, her oral evidence cannot alter the terms of the Agreements: ***Bank of Australasia v Palmer***. The upshot of this is the lack of ascertainability of the consideration. And since the consideration cannot be ascertained, I am unable to calculate the stamp duty payable, which makes the Agreements unenforceable.

Issue #2: Can the claimant obtain specific performance by reliance upon the doctrine of part performance?

[54] It may be recalled that the evidence disclosed that the claimant was given possession of townhouse G2. That provided a springboard, and as a sort of prelude to her submissions on consideration, for Miss Gaff to raise the question of part performance, citing the well-known decisions of ***Maddison v Alderson*** (1883) 8 AC 467 and ***Steadman v Steadman*** [1976] AC 536. Learned counsel also referenced ***Francis (Sharon) v Luciana Hines*** [Consolidated Appeals] (unreported) Court of Appeal, Jamaica [Supreme Court] Civil Appeal No 94/1998, judgment delivered 6 April 2001, in which Langrin JA said, "entry into possession coupled with receipt for payment may be sufficient acts of part performance, if proved".

[55] Counsel for defendants made three points in reply. Firstly, the circumstances in which the 1st defendant gave the claimant possession of the premises do not show part performance of the contract. Secondly, the doctrine does not apply where the defendant has been induced by the claimant to alter his position on the faith of the contract and representations of the claimant. Thirdly, the issue of part performance does not arise. The premise of the third submission is that for part performance to apply the agreement must be oral, whereas the evidence is that the parties entered into a written agreement. For this proposition the first instance decision of ***Faulknor (Aubrey) v Pearjohn Investments & and Yvonne Claudius*** (unreported) Supreme Court Civil C.L.1994/F-097 judgment delivered 15 September 2000 was cited (***Faulknor v Pearjohn Investments Ltd***).

[56] In Miss Gaff's rejoinder, filed 21 July 2020, she contended that the defendants' submission on part performance was not a true representation of the spirit or purpose of the ***Statute of Frauds***. It was Miss Gaff's assertion that the legislators could not have intended that for the statute to apply the agreement must be an oral one only. If this was the case, counsel argued, then the wrong being prevented would not have been achieved and there would have been no need to require that there be a memorandum in writing signed by the party to be charged. Miss Gaff further submitted that it was accepted that the statute is mostly applied in oral agreement cases but it certainly does not only apply in such cases. Counsel insisted that part performance was a live issue and the actions of the parties and their agents required the court to give it due consideration in arriving at a decision.

[57] In light of my understanding of the law, it is necessary to treat only with the third point raised by learned counsel for the defendants. The starting place is section 4 of the ***Statute of Frauds***, 1676. As it was then enacted, the section required contracts of guarantee, sale of land, promises by executors or administrators to answer damages out of their own estates, agreements made in consideration of marriage and agreements to be performed within a year to be in writing or evidenced by writing: ***Actionstrength Ltd v International Glass Engineering INGLEN Spa and another*** [2003] 2 AC 541, at page 549 (***Actionstrength Ltd***). The common law mischief which the legislature sought to cure was the calling of perjured testimony to substantiate spurious oral agreements: ***Actionstrength***, at page 544.

[58] Soon after the passage of the ***Statute of Frauds***, it became apparent that the law in curing one mischief gave birth to another, perhaps equally odious mischief. That is, a party who had entered and acted upon what he understood to be a binding oral agreement, could find it unenforceable for want of required documentation. According to Lord Bingham, at page 545:

> *"It quickly became evident that if the 17th century solution addressed one mischief it was capable of giving rise to another: that a party, making and*

> *acting on what was thought to be a binding oral agreement, would find his commercial expectations defeated when the time for enforcement came and the other party successfully relied on the lack of a written memorandum or note of the agreement".*

The court of equity was not slow to respond to this mischief. Its response was the introduction of the doctrine of part performance. Lord Hoffmann in ***Actionstrength***, at page 549, observed:

> *"Very soon after the Statute of 1677, the courts introduced the doctrine of part performance to restrict its application to sales of land. It was held that a contract, initially unenforceable because of the statute, could become enforceable by virtue of acts which the plaintiff did afterwards".*

[59] The provision in respect of sales of land was re-enacted in section 40 of the ***Law of Property Act*** 1925. That section provides (quoting from Cheshire and Burn's ***Modern Law of Real Property*** 17th edition, at page 864):

> *"(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*
>
> *(2) This section … does not affect the law relating to part performance …".*

The learned authors make two observations on the section, the second of which is relevant for present purposes. First, the provision does not make writing a requirement for validity of the contract. Rather, the section makes the contract unenforceable in the absence of writing. Second, part performance was expressly allowed to continue as an exception to the requirement for writing. The effect of the ***Statute of Frauds*** 1676 remains in force in most Caribbean jurisdictions (see Gilbert Kodilinye ***Commonwealth Caribbean Property Law*** 2nd edition, at page 272).

[60] I return to the submissions made by counsel for the claimant. It is apparent that the major premise of Miss Gaff's arguments is that the doctrine of part performance is a creature of the ***Statute of Frauds***. We need look no further than the passages quoted from ***Actionstrength*** to see that that is a false premise. The ***Law of***

Property Act 1925 did not create the doctrine of part performance. It merely preserved it, in much the same way as the ***Trade Marks Act*** preserved the common law action of passing off (see section 4 (3) ***Trade Marks Act***).

[61] The doctrine of part performance was the court of equity's invention, and intervention, to prevent defendants from setting up the statutory provisions as a defence in circumstances where it was unconscionable so to do. I.C.F. Spry ***The Principles of Equitable Remedies*** 7th edition, at page 254, describes it as "a particular kind of equitable or constructive fraud" which arises in circumstances where it would "give rise to an unconscionable advantage to a defendant who might otherwise successfully rely on the lack of a sufficient memorandum in writing".

[62] Not only is it false to claim statutory parentage for the doctrine of part performance, it is equally fallacious to contend that the reach of the doctrine stretches to written agreements. Firstly, that contention flies in the face of the origin of the doctrine as declared in ***Actionstrength***. Secondly, the very operation of the doctrine of part performance refutes an extension to written agreements. That is to say, part performance makes enforceable a contract for the sale or other disposition of land enforceable, which would otherwise be unenforceable at common law for want of written evidence as required by the ***Statute of Frauds*** (see Gilbert Kodilinye and Trevor Carmichael ***Commonwealth Caribbean Law of Trusts*** 3rd edition, at page 28). Thirdly, for the doctrine to be applicable the acts alleged to be in part performance must, on a balance of probabilities, be referable to some contract, consistent with that entered into: ***The Principles of Equitable Remedies***, at page 265.

[63] The point may be emphasized by the reference to the procedure advocated as correct whenever an act of part performance is alleged as evidencing the existence of a contract. The following extract is taken from ***Halsbury's Laws of England*** 4th edition, Vol 9(1) at para 44:

> *"The correct procedure is to ask first whether the alleged act of part performance proves that there is a concluded contract of such a nature that, if it were evidenced in writing, the court would enforce it. If then the act in question can be explained reasonably only by reference to some contract concerning land, and on the balance of probabilities refers to the contract alleged, an equity arises against the defendant which precludes him from relying on the absence of writing. Oral evidence is then admissible to prove the terms of the contract, even though the terms go beyond those to which the act of part performance relates".*

In fine, where the claimant proves a sufficient act of part performance, equity will enforce an oral contract by a decree of specific performance, notwithstanding the absence of a written memorandum. The doctrine of part performance came into being and exists solely for the enforcement of oral contracts which would otherwise have been unenforceable because of the lack of written evidence. That is the purpose which justifies the existence of the doctrine.

[64] In ***Faulknor v Pearjohn Investments Ltd***, the plaintiff was in a similar position as the claimant in this case. In that case the plaintiff's counsel conceded that no reliance could be placed on the plaintiff's unstamped agreement on account of section 36 of the ***Stamp Duty Act*** (discussed above). There, as here, counsel contended for reliance on the doctrine of part performance. Opposing counsel submitted, amongst other things, that the agreement must be oral for part performance to apply. F.A. Smith J (as he then was) agreed. He expressed himself as follows, at page 11:

> *"I am inclined to the view that part performance cannot be relied on to establish a written agreement which has not been stamped with the relevant stamp duty and with the time specified by the Stamp Duty Act".*

[65] According to the doctrine of *stare decisis*, ***Faulknor v Pearjohn Investments Ltd*** is not a binding precedent, emanating as it did from another trial court of parallel jurisdiction. Its value is persuasive only. However, in light of the principles and authorities cited and discussed above, the law is as declared by F.A. Smith J, one of this jurisdiction's most respected jurists. Furthermore, as I intimated earlier, on its material facts ***Faulknor v Pearjohn Investments Ltd*** is indistinguishable from

the instant case. As a result, I see no reason, neither in principle nor logic, to depart from it.

[66] Consequently, the valiant efforts of Miss Gaff notwithstanding, the doctrine of part performance bears no application to this case. The claimant's statement of case and evidence make it pellucid that the agreements she seeks to enforce are those documented and entered into evidence as exhibits 5 and 6, collectively referred to in this judgment as the Agreements. Since part performance is inapplicable to the case for the claimant, the doctrine cannot be relied on to make an order for specific performance. I feel constrained to make the following observation. Were it possible for the claimant to obtain specific performance of an agreement contained in documents required to be stamped, but unstamped, through the device of part performance, that would be a fraud on the revenue. And that is a circumstance no court can countenance.

Issue #3: can claimant rely on Proprietary estoppel?

[67] Counsel for the claimant also sought to rely on the equitable relief of proprietary estoppel. Counsel for the defendants was content to oppose this on two grounds. One, the absence of evidence to satisfy the criteria for the relief and two, a failure to plead proprietary estoppel as a claim.

[68] I will address the complaints in reverse order. The view has been expressed that proprietary estoppel is an independent cause of action which enables a court to create property rights in land (see Graham Virgo ***The Principles of Equity & Trusts***, at page 345). If that is a correct statement of the law, then it ought to have formed part of the claimant's pleaded case. An examination of the Fixed Date Claim Form (FDCF) does not show any averment of fact, or mixed fact and law, that the defendants are barred from asserting. Neither is there any averment that the claimant claims entitlement to the subject-matter of the Agreements by the vehicle of estoppel. So, the case was neither pleaded nor presented on the basis

of proprietary estoppel. Consequently, there was no answer from the defendants; therefore, the precise limits of the claimed estoppel could have been charted.

[69] Counsel for the claimant implicitly accepted the omission from the statement of case but contended that it arose on what was characterized as the "facts" and "evidence" before the court. This, therefore, calls for an examination of the evidence. Before doing so, however, I will first set out the ingredients of the doctrine.

[70] There are four requirements to be satisfied in proof of a claim for proprietary estoppel: representation, reliance, detriment and unconscionability (see ***The Principles of Equity & Trusts***, at page 344). The claimant in the instant case must prove, firstly, that the 1st defendant made a sufficiently clear and unequivocal representation or assurance to her that she would have an interest in townhouse G2. Secondly, the claimant must establish that she relied on this representation or assurance and that it was reasonable for her to have done so. Thirdly, it must be demonstrated that the claimant suffered some detriment in reliance on the defendant's representation or assurance. While the detriment need not involve expenditure, although it quite often does, it ought to be sufficiently substantial to warrant equity's intervention (see ***Thorner v Majors*** [2009] 1 WLR 776). Lastly, while this is not a discrete ingredient, it serves as a unifying factor of the preceding three. Unconscionability is said to be that point in the analysis where the court steps back, considers the first three ingredients and asks itself whether its conscience has been shocked (see ***The Principles of Equity & Trusts***, at page 345).

[71] In the typical case where proprietary estoppel is successfully relied upon, the claimant (C) has incurred expenditure or forgone a benefit in building or working on the defendant's (D) land in the belief, that he will acquire a good title to that land, while D has encouraged or acquiesced in C's conduct. The most well-known exposition of the doctrine was expounded by Lord Kingsdown in ***Ramsden v Dyson*** [1866] LR 1 HL 129, at page 170, where he said:

> *"If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation".*

[72] A modern example of proprietary estoppel is the case of ***Inwards v Baker*** [1965] 2 QB 29. In that case a father suggested to his son that he construct his own house on land belonging to the father. The house was duly built. Upon the death of the father, ownership of the land passed to other beneficiaries who sought to evict the son. The English Court of Appeal held the father and his successors in title to be estopped from evicting the son. The son was granted an indefinite licence to occupy the land upon which the house stood.

[73] With that said, I turn to the first ingredient and the pertinent evidence. What was the clear and unequivocal representation or assurance that the defendants made to the claimant that she would have an interest in the subject-matter of the Agreements? The answer is not to be found in the Agreements as they have been rendered inadmissible by virtue of section 36 of the ***Stamp Duty Act***. That leaves the parol evidence alleging naming the 1st defendant as the claimant's nominee in the Administrator-General's Agreements as the real consideration. This evidence was inadmissible for the purpose tendered, the variation of the Agreements. There is, therefore, no admissible evidence of any representation or assurance on the case for the claimant.

[74] Lord Kingsdown's remarks in the quotation above make it clear that there should be an agreement between the parties in 'expectation class' proprietary estoppel; an agreement in which it may be said that the representation or assurance was made. In the absence of evidence of what was agreed, the basis upon which possession of townhouse G2 was given to the claimant cannot be ascertained. And since no positive finding can be there made, it cannot be said that her

occupation of townhouse G2 was in reliance on the yet to be established representation or assurance.

Issue #4: Is the claimant entitled to relief under the Registration of Titles Act, section 135?

[75] The principal relief sought by the claimant is a declaration under section 135 of the ***Registration of Titles Act***. Section 135 falls under the part of the Act sub-headed, "Registration of Transfer on Sale under a Writ or Order and of Vesting Orders". I quote below the relevant portion of section 135:

> *"Whenever any person interested in land under the operation of this Act, or any estate or interest therein, shall appear to the Supreme Court … to be a trustee of such land, estate or interest, within the intent or meaning of any law or statute now or hereafter to be in force relating to trusts and trustees, and any vesting order shall be made in the premises by the said court, the Registrar, on being served with such order, or an office copy thereof, shall enter in the Register Book on the certificate of title and the duplicate instrument (if any) the date of the said order, the time of its production to him, and the name and addition of the person in whom the said order shall purport to vest the said land, estate or interest; and upon such entry being made in the Register Book, such person shall become the transferee, and be deemed to be the proprietor thereof".*

Under section 135 the claimant has to establish, as a prerequisite, the existence of a trust between herself and the defendants or, elicit sufficient evidence from which the trust may be inferred. It is only then that the court may make a vesting order which, upon entry in the Register Book, makes the claimant the transferee and deemed proprietor.

[76] Jessel MR, had to consider the legal relationship of the vendor and purchaser after they had entered an agreement for the sale of property and before the sale was completed in ***Lysaght v Edwards*** (1876) 2 Ch. D 499. There was no uncertainty here as the law had been settled for more than two centuries. The relationship was unequivocally one of trust. At page 506 the Master of the Rolls expressed himself as follows:

> *"It appears to me that the effect of the contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that 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, a charge or lien on 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 an express contract as to the time of delivering possession".*

[77] The indispensable conditionality of the trust relationship where it arises between vendor and purchaser is, therefore, a valid contract for the sale of the property. So that, before a declaration can be made under section 135 of the ***Registration of Titles Act***, not only must the claimant prove the existence of a trust, but it must also be established that there was a valid agreement between the parties. That leads me to the question, what is a valid contract?

[78] That was a question that Jessel MR posed to himself in ***Lysaght v Edwards***, at page 507. In so far as real estate is concerned, a valid contract must be one that is not liable to be set aside and the vendor must be able to give a title in accordance with the contract. In the words of the learned Master of the Rolls:

> *"Valid contract" means in every case a contract sufficient in form and substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties. As regards real estate however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be valid unless he has either made out his title according to the contract or the purchaser has accepted the title".*

Jessel MR accepted that it is a constructive trust that is created between the vendor and the purchaser (***Lysaght v Edwards,*** at page 509).

[79] Although the learned Master of the Rolls went on to treat it as settled that the vendor becomes a constructive trustee for the purchaser from the moment the contract is entered into, at page 510, I do not understand him to be chipping away at the prerequisite of validity. A valid contract for the sale of land, aside from the formalities to satisfy the ***Statute of Frauds,*** must evince finality and agreement on

its essential terms. That is, the parties, description of the property or estate and the consideration: Cheshire and Burn's ***Modern Law of Real Property*** 17th edition, at page 854. So that, when Jessel MR speaks of the form and substance of the contract, I understand him to be referring to the requisite formality as well as its terms. If that is a correct understanding, then a valid contract means as well an enforceable contract. Therefore, the vendor does not become a constructive trustee for the purchaser unless and until the contract is enforceable.

[80] That seems to have been the view of the High Court of Australia in ***Chang v Registrar of Titles*** (VIC) [1976] 137 CLR 177, a case relied on by counsel for the defendants. This was an appeal against the refusal to grant a vesting order, vesting the land (owned by the Republic of China) in the appellants in circumstances where a contract of sale had been executed by the parties. The appellants/purchasers paid the deposit and balance of the purchase price to the vendor's solicitors, as the contract provided. There was doubt, however, whether the price had been received by the vendor. The appellants were given possession and remained in possession at the time of the appeal. Signed memoranda of transfer of land were executed on behalf of the vendor and handed over to the appellants, but before the payment of the price. The source of the difficulty in completing the transaction appears to have been the change in the recognition of the government of the Republic of China from Taiwan to Peking by the government of Australia.

[81] The appellants contended that upon the execution of the contract for the sale of the land, they became the equitable owners of the land and that the vendor's interest was limited to its security for the balance of the purchase price. Having paid the balance, the argument ran, the vendor became their trustee with no other right than to convey the land to them. Consequently, it was expedient or convenient to make the vesting order, it was urged.

[82] Barwick CJ, at page 181, viewed those submissions as flawed. He opined that the purchaser of land under a contract of sale only becomes its owner in the eyes of

equity if the contract is specifically enforceable. Among the reasons given by Barwick CJ for saying the contract was not specifically enforceable was the uncertainty whether the vendor had received the cash balance due under the contract. For that reason, and others set out in his judgment, he concluded that it had not been shown that there was a trustee relationship (see ***Chang v Registrar of Titles***, at page 182).

[83] Mason J was of a similar view. He addressed specifically the question of the time the trust relationship arises in these circumstances. After reviewing the older cases, including ***Lysaght v Edwards***, *supra*, Mason J expressed the view that the existence of the relationship of constructive trust is contingent on the availability of the remedy of specific performance (see ***Chang v Registrar of Titles***, at page 184). So that, it seems correct to say the existence of the relationship of trust between the vendor and the purchaser abides the fulfilment of outstanding obligations under the contract of sale.

[84] And it is here that the case for the claimant breaks down. Counsel for the claimant cited four well-known authorities in this area: ***Azan v Azan*** (1985) 25 JLR 301, ***McCalla v McCalla and others*** 2005 HCV 002335, ***Gissing v Gissing*** [1970] 3 WLR 255 and ***Westdeutsche Landesbank Girozentrale v Islington London Borough Council*** [1996] 2 AC 669 (***WLG v Islington LBC***). Respectfully, none of these precedents advance the case for the claimant. The point in issue in this case is whether a trust relationship arises from the fact of having entered into the relationship of vendor and purchaser of registered property. In ***Azan v Azan***, the issue before the court was whether there was a common intention that the respondent should acquire a beneficial interest in shares the appellant obtained from forming a company with his brothers. ***McCalla v McCalla*** concerned the beneficial ownership of property in circumstances where it was alleged that promises concerning acquisition of the full title were made in exchange for liquidation of the mortgage and escalation cost. Likewise, ***Gissing v Gissing***

concerned the existence of a common intention that the non-legal owner should share in the beneficial interest at the time of acquisition of the property.

[85] ***WLG v Islington LBC*** was a case about interest rate swap. In this transaction, the fixed rate payer agreed to pay the floating rate payer interest at a fixed rate on a notional capital sum over a stipulated period. The floating rate payer, correspondingly and over the same period, agreed to pay to the fixed rate payer interest on the same notional sum at market rate, determined by a certain formula. Local authorities began to enter these transactions. It was subsequently decided that these transactions were ultra vires. Consequently, banks and other financial institutions sought to recover from the local authorities the balance of the money paid, together with interest. The question arose as to whether a resulting trust arose in circumstances where money had been paid under a contract which was ultra vires and therefore void from the beginning.

[86] At page 705 of the judgment, Lord Brown-Wilkinson set out what he categorized as the four relevant principles of trust law, the first two of which were cited by counsel for the claimant. The principles are reproduced below, verbatim:

> *"(i) Equity operates on the conscience of the owner of the legal estate. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).*
>
> *(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect the conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the use of a constructive trust, of the factors which are alleged to affect his conscience.*
>
> *(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if it does not receive identifiable trust property.*

> *(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice".*

[87] Aside from placing reliance on principles (i) and (ii) above, Miss Gaff submitted that in determining whether a constructive trust exists, the court will place its attention on the entirety of the defendant's conduct and that of his agents, acting on his behalf. Respectfully, this submission completely avoids the major premise upon which a constructive trust is imposed in circumstances such as those obtaining in this case. That is, there must be a specifically enforceable contract for the sale of the property (see ***Commonwealth Caribbean Law of Trusts*** 3rd edition, at page 98; ***Lysaght v Edwards***; ***Chung v The Registrar of Titles***).

[88] Without retracing my steps over ground traversed above, there is no evidence before me of a valid contract between the parties. That is, the Agreements upon which the claimant intended to rely are not properly before me for want of non-compliance with the ***Stamp Duty Act*** and the corresponding unascertainability of the consideration for the purpose of the relevant stamp duty assessment. In short, the claimant has failed to establish an enforceable contract of sale between herself and the defendants. Therefore, the court has not been placed in a position to make the vesting order sought under section 135 of the ***Registration of Titles Act***.

Conclusion

[89] The upshot of the foregoing discussion and analysis is that the claimant is not entitled to any of the orders sought in the FDCF. The fatal and foremost flaw in the claimant's case is the unstamped Agreements. The Agreements were reduced to a value inferior to the paper upon which they were written. That is, the Agreements told a lie about a material term of the contract, the consideration. In the end, that proved to be the parties undoing as they disputed what was the actual consideration which, unfortunately, remains unresolved on the evidence. Without

being able to resolve that question, the omission under the ***Stamp Duty Act*** could not be made good, resulting in a complete erosion of the substratum of the case for the claimant. I therefore give judgment for the defendants. Costs are awarded to the defendants, to be taxed, failing agreement.

Postscript

[90] A brief explanation for the delay in delivering this judgment is in order. Judgment was originally reserved for delivery on 3 July 2020. That abided the parties complying with the orders to file and exchange written submissions on or before 6 March 2020, and any necessary reply on or before 27 March 2020. Neither side filed as ordered. The claimant's submissions were filed on 9 March 2020. The submissions for the defendants were not filed until 4 June 2020. The defendants' submissions were wide-ranging and supported by two volumes of authorities.

[91] In the wake of that late and voluminous filing, counsel for the claimant requested and was granted an extension of time within which to respond. That response was filed on 21 July 2020. The judgment is therefore being delivered two and a half months after the last set of submissions was filed. While it is possible the COVID-19 pandemic may have affected the flagrant late filing of submissions by the defendants, that is a matter of speculation as no extension was sought. The submissions were simply filed out of time without explanation.