IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00333

BETWEEN JAJ DEVELOPMENT AND HOLDINGS LIMITED CLAIMANT

AND CHARLENE ASHLEY DEFENDANT

Contract for Sale of land – Unless order for delivery of title – Whether title with a three metre road reservation complied with order – Counter claim for trespass and breach of contract – Whether damages pleaded or proved – Judgment unenforceable until agreement stamped.

Rose Bennett-Cooper and Sidia Smith instructed by Bennett Cooper Smith for the Claimant

Aon Stewart, Andre Moulton and John Clarke instructed by Knight Junor Samuels for the Defendant

Heard: 15 – 19th & 26th May, 25th & 26th July 2023; 10th – 12th, 30th – 31st January, 14th – 17th October, 19th December 2024; 8th January and 11th April 2025.

IN OPEN COURT

Cor: Batts J.

INTRODUCTION AND THE UNLESS ORDER

[1] On the first morning of trial both parties applied for an adjournment to the following day. This was to facilitate discussions and a visit by them to the locus in quo. On the following morning two Agreed Bundles of Documents were tendered in evidence as exhibits 1 and 2. These were to be the first of many, bundles of documentary evidence, tendered as exhibits and eventually numbering sixteen in all. The documents were at times duplicated and in one instance counsel's advice to his own client was included, see exhibit 2 page 697. This suggests that, notwithstanding appropriate orders at case management, the approach to documentation in the preparation of the matter was rather haphazard.

[2] Claimant's counsel opened to her case with a submission that by virtue of an unless order, earlier made by the Honourable Miss Justice Barnaby, the only matter before the court was the Defendant's counterclaim. Counsel submitted that although a title was delivered, in purported compliance with the order, it did not correspond to the Defendant's obligations in the agreement for sale and therefore judgment must be entered on the claim. Mr. Stewart, for the Defendant, countered that the defence ought not to be struck out because the title had been delivered to the Claimant, for Lot 2 part of land registered at Volume 1262 F705 of the Register Book of Titles, in accordance with the court's order. There was, submitted Mr. Stewart, an issue to be determined as to whether the unless order had taken effect.

[3] I dismissed the Claimant's oral application, to strike out the defence, and ruled that the trial should proceed. A determination that Justice Barnaby's unless order had not been complied with necessarily involved a consideration of the evidence as to what were the Defendant's obligations under the contract. This was necessary in order to decide whether the delivery of title satisfied those contractual obligations. It would be a waste of judicial time to try that issue discreetly particularly as there was also the counterclaim to consider in any event.

THE ISSUES

[4] It is appropriate to remind myself what the claim and counterclaim are about. The Claimant is a development company. The Defendant owned land. The Claimant's principals entered negotiations with the Defendant in or about the year 2008. A joint venture development was at first contemplated and the Claimant's agent given a power of attorney. One million dollars was paid to the Defendant by the Claimant at that time, see exhibit 1 page 591. In the negotiations each side was separately represented by attorneys at law. A joint venture was not the route eventually adopted and the Defendant instead agreed to sell to the Claimant a portion of her land, see exhibit 1 page 589, exhibit 2 page 646 (letter dated 28th February 2012) and the agreement for sale, exhibit 1 page 596. The obligation to subdivide the land was accepted by the Defendant although clause 4 of the agreement suggests it was to be the Claimant's, see exhibit 1 page 598, exhibit 2 page 703 (a letter dated 11th April 2013 from Christopher O. Honeywell to Bennett & Beecher-Bravo), exhibit 2 page 623 (letter 3rd June 2009), exhibit 1 page 607 (letter 1st November 2012) and, exhibit 2 page 659 (letter dated 24th April 2014).

[5] In this claim, brought by Fixed Date Claim on the 7th August, 2020, the Claimant alleges that the Defendant is in breach of the agreement and claims specific performance of the Agreement for Sale being an order that:

> *"The Defendant be required to deliver up to the Claimant Certificate of Title for Lot 2 being part of the land registered at Volume 1262 Folio 705 of the Register Book of Titles within seven (7) days of the date of this order."*

[6] The Particulars of Claim allege that the Defendant was the owner of Lot 21A on a plan of Forest Hills being land now registered at Volume 1469 Folio 503 of the Register Book of Titles and that the Claimant agreed to buy a portion of that land which is identified as "*lot 2*". The Agreement for sale is at page 596 of exhibit 1 and describes the land sold as follows:

> *"All that parcel of land identified as Lot 2 on the subdivision drawing annexed hereto, part of Lot 21A on the plan of Forest Hills in the parish of Saint Andrew and being the part of the land comprised in Certificate of Title registered at Volume 1262 Folio 705 in the Register Book of titles and on the surveyor's plan dated September 2000 done by Noel Shirley and which plan is appended hereto and labelled Appendix 1."*

[7] The Particulars of Claim reference, in paragraph 4, special condition 5 of the Sale Agreement:

> *"5. The vendor shall deliver up unto the Purchaser the duplicate certificate of title for the said land free and clear of all encumbrances other than the restrictive covenants and easements (if any) within seven days of being called upon to do so and upon receipt of the full cash deposits herein and upon receipt of an undertaking from the Purchaser's Attorney to deliver to the vendor two duplicate certificates of the Title immediately after same shall have been issued by the Registrar of Titles and, bearing the vendor's name as proprietor and including Certificate of Title pertaining to the Strata Unit described below. Upon the vendor being let into possession of the said Strata unit the remaining Certificate of Title which does not pertain to said strata shall be surrendered, to the purchaser forthwith."*

[8] It is alleged in the Particulars of Claim that the full deposit was paid, and this is common ground between the parties, see exhibit 2 pages 622, 681 and 682. The Claimant alleges, in paragraph 6, the several steps taken and expenses incurred including commencement of construction. This has not been denied. On the 30th October, 2012 the Claimant requested delivery of the title for lot 2, see exhibit 1 page 605. This was not forthcoming and in paragraphs 8,9, and 10 the Claimant asserts that the non-delivery of title prevented the development proceeding further.

The Particulars of Claim end with the same prayer for relief in the Claim and makes no claim for damages. There has been no attempt to amend these pleadings.

[9] By way of Defence and Counterclaim the defence relies on special conditions five and six of the Agreement for Sale. Five is already quoted at paragraph 7 of this judgment and six reads:

> *"*6. *The vendor shall provide the purchaser with the requisite authority, written or otherwise, to deal with the land and/or duplicate Certificate of Title within seven (7) days of being required to do so* ***PROVIDED HOWEVER that the relevant Duplicate Certificate of Title has been issued by the Registrar.*** (My emphasis.)"

[10] The Defendant contends that when regard is had to special conditions 5 and 6,

> *"…it is clearly stated that the splintered title will both be in the vendor's name and as such does not impact on the execution of the development in any way. The Defendant will also state that both clauses indicate 'upon being issued by the Registrar of Titles."*

It is the pleaded defence that title cannot be delivered as the Registrar of Titles *"has not issued the same*." It was further alleged, in paragraph 5 of the Defence, that it was the Claimant's conduct which was inimical to title being obtained and the alleged conduct was chastised as "*obstructive and uncooperative*." Paragraph seven of the Defence asserts in part that:

> *"..the Claimant's aggressive action of demanding the splintered title within 8 days of signing, was unreasonable and unconscionable as all parties were aware that the title could not have been splintered within 8 days but would have taken months…"*

[11] The Defendant contends further that, although it was originally agreed that the Claimant would splinter titles, by letter of 15th July 2020 the Claimant was asked not to do so and the Defendant undertook that obligation. In evidence is a letter dated 24th April 2014 from Mr. Christopher Honeywell to Bennett & Beecher-Bravo to that effect, see exhibit 2 page 659. In paragraph 10 of the Defence a lack of clarity in their position is manifested:

> *"10. Paragraph 9 is denied. The Defendant will contend to the contrary. That, the sale agreement clearly indicates the title cannot be used to access financing, the exact location is determined by land surveyors and pegs, no environment for errors is present as markings and pegs are have* (sic) *been put in place by the seller and Mrs. Holness and her agents have purposefully trespassed and tried to illegally take possession of parts of the land which was not being considered for sale. Lot one. The title does not impact on the financing for the development in any way, no delays caused by title, the title has not impacted on the development being placed on the market. Rather Mrs. Holness has decided to ignore the terms of the sale agreement and the timelines therein and has in 2019 sought and received approval for additional developmental works thereby extending the numerous breaches of contract no loss of profits can be suffered due to a title which should be delivered as a part of payment for purchase of the land. Mrs. Holness cannot claim full ownership to the land until and unless payment for same is made".*

[12] The Counterclaim asserts breaches of Clauses 14, 16 and 20 and the Claimant's failure to make payment of a two bedroom townhouse. It is said that there has been a failure to complete the development within the 36 months agreed or in a timely manner. It is also alleged that the Claimant its servants and/or agents trespassed on the Defendant's property and used bullying and intimidating tactics causing loss. Damages are claimed by the Defendant.

[13] In its Reply and Defence to Counterclaim the Claimant admits that the splinter title should remain in the Defendant's name pursuant to Clauses 5 and 6. It is asserted that it is the Defendant's dilatoriness which prevented issuance of splinter titles. The Claimant says on the 26th July, 2012 it lodged a caveat against Vol. 1262 Folio 705 to secure its interest in the land as it had paid a deposit even before the agreement for sale was signed. The Claimant says it consented as caveator to a mortgage being granted to the Defendant. The Claimant asserts that there was no caveat to be lifted and that all property taxes have been paid since 2013. It is denied that any pegs were removed or that any trespass occurred on the Defendant's land. It is denied that copies of the Claimant's building approvals were required to obtain the splinter titles. It is denied that the eight days agreed for request of titles was unreasonable as this was a time period agreed to by the Defendant's attorneys at law. The Claimant denies ever agreeing to splinter the titles. It is contended that since obtaining subdivision approval in July 2012 the Defendant made no effort to splinter titles until some 6 years later. A status report was requested on 28th November 2020 but none was forthcoming. The assertions of trespass are denied as also the allegation of bullying and intimidation. The Reply denies that the Claimant intended to use the titles for mortgages but says that without the splinter titles the Claimant was unable to enter "*prepayment contracts*", or satisfy investors that the development is viable. The Claimant says it is the failure to deliver title pursuant to condition 5 which explains the delay in completion of the development.

INTERLOCUTORY APPLICATIONS DURING THE TRIAL

[14] On the 16th November 2020, by order of the Honourable Mr Justice Laing, the Fixed Date Claim continued as if commenced by Claim Form. It was in consequence of that Order that the Particulars of Claim and Defence cited above were filed. On the 8th November 2021 case management orders were made. It is important to note that by an application, filed on the 5th October 2022, the

Defendant attempted to amend her pleadings to include special damages. The application was refused by order of Justice Barnaby on the 9th December 2022. An oral application for leave to appeal was also refused. In the course of trial, Claimant's counsel filed an application dated 26th May 2023 for orders with respect to the impounding of title. The Defence, not to be outdone, filed an application on the 21st July 2023 for an order to remove caveat. I ruled that I would make no such Interlocutory orders, as the trial was already in progress and issue joined on the allegations, but that I would consider the applications at the end of the day.

HAS THE UNLESS ORDER TAKEN EFFECT?

[15] The trial lasted many days and several lay and expert witnesses were called. However, given the unless order referenced at paragraph 1 above, my first task is to determine whether the delivery of the title to lot 2, satisfied the order of the Court. If it did the Defence will stand and it will be necessary to decide the other issues in the claim. If it did not judgment will be entered on the claim and only the issues raised on the counterclaim will fall to be decided.

[16] Justice Barnaby's unless order was among other orders made at a pre-trial review on the 14th November 2022. It is order number 8 and reads as follows:

> *"8. Unless the Defendant delivers up to the Claimant the Certificate of Title for lot 2 being part of the land registered of [sic]. Volume 1262 Folio 705 of the Register Book of Titles* ***as required by the Agreement for Sale*** *by 13th December 2022 at 4:00 pm the Defence shall stand struck out save that the Counterclaim will remain"* [emphasis mine]

[17] The highlighted words in the order make it clear that the title to lot 2 must conform to that which was agreed in the contract of sale. In that regard it is common ground that the agreement provided a description of lot 2 which was to be a part of land

registered at Volume 1262 Folio 705 on the surveyor's plan dated September 2000 done by Noel Shirley and which plan was annexed to the agreement for sale, see paragraph 6 above and exhibit 1 page 602. The plan exhibited is virtually illegible, even with the aid of a magnifying glass, however a clear diagrammatic representation was put in evidence as exhibit 5. The letter demanding delivery of title is dated 30th October 2012 and is at exhibit 1 page 605.

[18] Mrs. Holness stated her expectations as follows:

> *"A. One, 7 days after signing the sale agreement and making payment required to cash of $7 million. On making that payment the vendor would turn over to the purchaser an unencumbered title save and except if I remember the restrictive covenants and easements. Q. Turn over title*
>
> *A. I expected to be handed through my attorney a title to lot 2 with no mortgages on it so I would have a clear title to engage my investors. My expectation is when I needed strata titles the title would be splintered into strata titles. My attorney would have her sign transfer document to procure the strata title and my attorney would be required to undertake to provide Mr. Ashley two strata titles. One for her unit as declared on the agreement for sale and another one to be held by her until certificate of practical completion was provided to her by me."*

[19] When asked about the title for lot 2, which was delivered by the Defendant, the witness stated:

> *"Q. Have you received any title at all?*
>
> *A. Yes. I received from my attorney purporting to be title of lot 2 about 6 months ago.*
>
> *Q. Why purporting?*

A. Several obstacles because (1) major problem is only 3 metres of access way is on that title compared to 8 metres which was on approved subdivision drawing attached to the sale agreement that I relied on to get approval and build. The access way remaining on the new title with buildings already on ground in keeping with the approval would make the development one that does not conform to approval one that would be inaccessible because only one car could go in or out at a time. (3) it would not feature the requirements by fire department for access to the development. Three matters would make development a totally failed development."

[20] The witness was not, when cross-examinined, challenged on her assertion that the diagram attached to the sale agreement provided for an 8 metre access roadway. Furthermore, in answer to the court the witness stated:

"Judge: What about the title prevents you [proceeding with development]

A. In preparing for this case I had a clearer appreciation of not only my need to have an access way of a particular size but more so minimum requirements.

The access way of 8 metres per subdivision approval could have been approved if requested by individuals to be a minimum of 6.2 metres. The title has only 3 metres for access road. It also has new concrete structures built that have closed section of access way and have gone even further into access way than they were originally in designing the development. All units that required the access way are on ground, there is no space on the development to make any correction to facilitate this reduced access way unless fixed I have on my hand a totally failed development impossible to use, impossible to sell."

In questions arising from my questions neither Counsel asked or challenged the evidence about the width of the access way.

[21] The Defendant, when giving evidence, had this to say about her contractual obligations with regards to the width of the reserved road:

> *"Q. Page 36 of Ex 13. Sorry also Exhibit 5. Do you see ……. of areas?*
>
> *A. Yes*
>
> *Q. is information the same as on page 36 Ex 13?*
>
> *A. One has ….. 6 metre wide road and one has 8 metre wide road.*
>
> *Q. What accounts for the difference*
>
> *A. When application made to KSAC initially drawing has 8 metres.*
>
> *Q. Is that what is in sales agreement?*
>
> *A. The drawing that is on sales agreement which indicates size of lot 2, 8 metres is what is on sale agreement. This drawing is 6.2 which is also in application letter KSAC did not reflect the corrected area within the wording of the approval."*

And later,

> *"Q. Page 1* [of agreement] *refers to sale of lot 2 also refers to a survey diagram which forms part of agreement. A. Yes diagram by Noel Shirley.*
>
> *Q. Diagram shows 8 m.*
>
> *A. It has a line that shows an 8m road with an explanation.*
>
> *Q. When you put that diagram you were trying to trick the claimant?*
>
> *A. No because there was a letter, a million percent no.*
>
> *Q. the claimant should not rely on 8m road in diagram?*
>
> *A. Mrs. Holness could not there was a letter when she requested that clause 19 or 20 be extended to indicate it must be in line with KSAC approval and we indicated that no we would exit the contract.*

Q. Suggest there is no such letter making reference to line being extended and reliance on KSAC?

A. Words not exact but there is a letter."

The letter to which the witness refers is dated 17th October 2012 from her attorneys to the Claimant's attorneys, see exhibit 15. It is a refusal of a request, contained in a letter dated 12th October 2012, to amend special condition 20 of the sale agreement to stipulate that an easement was being granted in accordance with the approved subdivision plan, see exhibit 14.

[22] The Defendant, also in cross-examination, made further telling admissions:

"Q. This difference in the width 3 metres on drawing is substantially different from 6.2 metres set out in Exhibit 5?

A. Yes.

Q. Half of the road no longer exist as a road in your new title?

A. One is 6.2 one is 3.

Q. 3.2 metres missing?

A. Not missing. It went to lot 2

Q. You agree that a 3 metre road is substantially different from 8 metre road on the plan in the agreement for sale? A. yes two different numbers.

Q. So if Claimant were to rely on expectation of 8 metre road that this new title you obtained her taking away 487 metres?

A. No claimant is to rely on sales agreement

Q. You agree that this 3 metre road was not approved at December 2011 KSAC meeting?

A. No drawing did not indicate 3 metre."

And finally, with reference to exhibit 13 page 31, the Defendant gave the following answers:

"Q. Did he [Jerome Lofters] do this December 4, 2012 survey on your instructions?

A. I'd have to cross-check the dates

Q. So you're not sure whether this was done on your behalf?

A. I thought you were asking about the dates

Q. Not the date, did he do this survey on page 31 on your instructions?

A. I can confirm that Jerome Lofters did survey for me yes, I can't confirm the date.

Q. In the middle of the page do you see a diagram?

A. Yes

Q. Does it show an 8 meter wide road?

A. Yes

Q. The agreement for sale was signed by you and the claimant in or around October 2012. So this survey at page 31 would have been done a few weeks after the agreement for sale was signed in October 2012.

A. The dates on this are not clear. If the dates are accurate then that's true.

Q. The agreement for sale that was done and signed by you and the claimant, it has never been amended, correct?

A. No we don't have any amendments

Q. So this survey at page 31 by Jerome Lofters shows a 8 metre wide road and the date on it was December 2012, and the survey on the following page on page 32 also done by Jerome Lofters for the same location and done June 2020, it shows a 3 metre wide road

A. Right"

[23] The Defendant gave evidence which contradicted her earlier statements. She was asked about a letter dated 26th September 2014, exhibit 3 page 758:

"Q. I suggest that paragraph 4 of this letter that makes reference to approximately 7-8 feet is referring only to the entrance of the access road from the main road

A. Definitely not so. It was speaking to what we had agreed which is that she gets a space of 1-2 meters assuming she is not going to destroy my property and hit down any concrete structures. Q. I suggest that as this making reference only to the entrance of the access road, that all other parts of the access road ought to have remained at 8 metres wide.

A. There was never an agreement for 8 metres wide. I would not have gone into the agreement, there is a letter speaking to that as well. We were clear that we could never be able to do that, I would not be able to park my car in my driveway, I would not have my house, I'd have to abandon my home.

[24] The evidence establishes that both parties agree that the diagram attached to, and referenced in, the agreement for sale has an 8 metre road reservation. There is no plea that the contract was varied. The Defendant in evidence admitted there was no variation. The letters to which the Defendant refers in her evidence, exhibits 14 and 15, do not change the reality of that which had already been agreed. The other letter, exhibit 3 page 758, she clearly misconstrues. On a true construction of the agreement for sale the Defendant was to provide an 8 metre road reservation, or easement, for access. The title delivered to the Claimant by the Defendant had only a 3 metre wide road reservation. It therefore is not in conformity with the contract and materially different to that which was promised by the agreement. I find therefore that the order of the Hon. Miss Justice Barnaby, referenced in paragraph 15 above, has not been complied with. It follows that the unless order will be given effect.

[25] I pause to observe that the agreement for sale contemplated the purchaser making the relevant applications, see special condition 4. This is the reason special

condition 5 requires delivery of title to the purchaser within seven days. It is not the subdivided title which was to be delivered but the Defendant's title to lot 21A, that is the title to be subdivided. The purchaser (Claimant) would after subdivision, and splintering, return two titles to the Defendant, one, the title to Lot 1 with her house, and the other the title to her townhouse after certificate of practical completion, see special conditions 5, 6, 7, 8 and 9. It is clear that the parties varied this arrangement to the extent that the Defendant agreed to subdivide the property and obtain separate titles for lots 1 and 2. This change did not affect the obligation to provide title in accordance with the agreement for sale, that is lot two with an 8 metre wide road reservation. The Defendant, as she stated in evidence, was upset that planning authorities demanded she abandon her gateway and use a shared entranceway on the access road as a condition of the grant of subdivision. This caused her to reject the approved subdivision. It is that rejection which delayed the issue of titles for lots one and two, see Defendant's evidence in amplification on 19th May 2023 at 10 am.

[26] The unless order takes effect as the Defendant did not deliver a title in accordance with her obligations under the agreement for sale. Judgment will be entered for the Claimant on the claim but the only relief claimed is an order for specific performance. This is an equitable remedy. The court must consider whether it is appropriate to grant that remedy. It is not automatic. In speaking notes, filed on the 7th January 2025, the Defendant's counsel opposed the grant of specific performance on several grounds. In this regard relevant considerations include whether it is still possible to perform that term of the agreement and whether, in all the circumstances, it is just to make the order.

SHOULD THE REMEDY OF SPECIFIC PERFORMANCE BE GRANTED?

[27] In this case the Defendant says that the term in the agreement is unclear therefore the remedy should be refused. For reasons stated earlier I do not agree there is lack of clarity about the Defendant's obligations. It is to provide title in accordance

with the diagram annexed to the agreement for sale. The Defendant also complains that the Claimant has breached certain terms of the agreement by, the delay in completing construction and, its destruction of concrete structures and/or trespass. It is contended that requiring another title to be produced would create undue hardship for the Defendant and that an 8 metre wide "*road*" would result in damage to her house and an inability to use or access her home. Neither of these extraordinary contentions were borne out by the evidence.

[28] Insofar as concrete structures, within the path of the *"road"* are concerned, the evidence I accept is that the dog house rested on a concrete foundation. The doghouse was not, however, a concrete structure within the meaning of the agreement. It was lawfully removed by the Claimant. On a true construction of the agreement the Claimant is entitled to an 8 metre wide road reservation subject only to its use not impacting any concrete structures. I find that the Claimant did, in breach of special condition 20, destroy a concrete terrace or part of it and this will be elaborated on when the counterclaim is discussed below. However, I do not find that the conduct of the Claimant or its agents, in relation to the Defendant's concrete structures, is such as to deny the Claimant an order for specific performance of the agreement.

[29] The alleged delay in completing construction is largely irrelevant as the Defendant was equally delinquent in providing title pursuant to the agreement. The delay in commencing an action for specific performance caused no prejudice to the Defendant and created no situation to which a plea of laches might arise. It is of relevance that the Claimant has already spent $687,505,785.36 on this project, see exhibit 8 (a). The unchallenged evidence is that without the title for lot 2 and an appropriate access road the development will fail, see paragraph 44 of the witness statement of Juliet Holness. The expert evidence is that when completed the townhouse will value $35,000,000, see exhibit 9(a). The Claimant is therefore in all probability in a position to discharge its contractual obligations to the Defendant.

[30] On the matter of hardship, and impossibility to perform, the evidence about the title, how it was obtained and whether it ought to be referred to the Registrar for cancellation, must be considered. The Claimant's application, referenced in paragraph 13 above, to have the title impounded by the Registrar of Titles is therefore relevant. Each party made submissions and having carefully considered the arguments, and the relevant law, I agree that the application is improperly grounded in section 29 of the Evidence Act. No Duplicate Certificate of Title is in evidence before me. This is however an appropriate case to direct the Registrar of Titles to call in the title and consider whether it should be cancelled. The evidence, which I accept, is that there is no approval of the plan which provides for a three metre wide road reservation as appears on the title registered at Volume 1566 Folio 197 of the Register Book of Titles, see exhibit 13. Exhibit 13 contains drawings by Jerome Lofters which depict a 3 metre wide roadway. However, the Parish Council notes of approval, in exhibit 13, reference a 6.2 metre roadway, see exhibit 13 (the meeting of the 6th June 2012) and exhibit 2 page 643 dated 5th January 2012. The title Vol 1566 Folio 197 on its face refers to the Parish Council approval dated 7th December 2011 which approves a reserved road of 6.2 metres, see exhibit 3 pages 765 and 788. There is also in exhibit 13 a declaration by Mr Lofters but, as he was not called as a witness before me and therefore unable to defend himself, I will make no adverse remarks in that regard. Save to say it is a matter the Registrar of Titles should consider because the approvals, put in evidence before me, provide for either an 8 metre road, as per Mr Shirley's plan or, a 6.2 metre road, see minutes dated 7th December 2011 exhibit 2 page 686 and, letter dated 6th June 2019 from the Kingston & St Andrew Municipal Corporation, exhibit 3 page 796.

[31] The further expert report of Mr Donovan Hugh Simpson, exhibit 10(b), attaches a diagram which shows the marked difference between the approved plan and the new title issued insofar as the reserved road is concerned. He also opines, and I

accept, that the stone wall and the zinc fence erected by the Defendant straddle a part of the 8 metre reserved roadway. The report of Mr Gordon Langford, exhibit 9 (a), has excellent photographic depictions and his answers to questions posed, exhibit 9 (b), show at page 4 the route of the access road. These suggest that the roadway, contemplated by the agreement, is workable and therefore possible provided the zinc fence erected on it by the Defendant is removed. Mr Langford was not cross-examined. The evidence of Mr Timothy Thwaites did not dissuade me from these findings and conclusions. I preferred the evidence of Mr Simpson.

[32] It is ultimately a matter for the Registrar of Titles, perhaps in consultation with the other appropriate agencies, to decide whether to cancel the title and what title to issue in its place. There may after all be other planning related issues, of which I am unaware, which render an 8 metre wide roadway unworkable. I will make an order, that the Defendant specifically perform her obligation, as she is duty bound to make good faith efforts to keep her bargain.

THE DEFENDANT'S COUNTERCLAIM

[33] The Defendant counterclaimed for alleged breaches of contract and trespass. It is alleged that clauses 14,16 and 21 were breached because there has been a failure to complete the development within 36 months and, there has been a failure to provide a townhouse as per contract. The Claimant's evidence, which I accept, is that without the title it was difficult to attract investors for the project. In any event the Claimant made it clear that time to perform these obligations did not begin to run until the titles were returned, see exhibit 2 pages 627, 630, 651 and, 702. I find that on a true construction of the agreement the time to perform its obligations did not arise until and unless the Defendant delivered the title.

[34] There is also an allegation of trespass, damage to trees, damage to terraces and, to pipes underground. There is no evidence of the value of such damage. The Defendant's application for permission to plead special damages was refused, see

paragraph 13 above. Defence counsel urged me to order a separate trial on damages. That application has come rather late in the day. It would be a device to circumvent Justice Barnaby's earlier ruling which was not, it seems, appealed. It would not be fair to the Claimant to do so. Trespass is actionable without proof of loss but in this case the evidence of trespass is not such as, on a balance of probabilities, I will accept. It seems to me that the Defendant's confusion stems from her erroneous belief that the Claimant was not entitled to an 8 metre wide road or access way. The agreement expressly permitted the Claimant and her agents to traverse that portion of the land. It cannot therefore be called a trespass. The allegation may have been better phrased as a breach of contract not to damage concrete structures. There were some terraces and a dog house in the 8 metre roadway. I have already decided that the doghouse was not a concrete structure its demolition was therefore not a breach of the contract, see paragraph 28 above. There was, however, damage to the terraces and this would constitute a breach of special condition 20. In the absence of evidence as to the value or replacement cost of the terrace the court will make a conventional (not a nominal) award. The terrace had sentimental value, must have cost something to erect and will cost something to repair or replace. In the absence of expert or other evidence of value the court can only do the best it can with the information it has and its own experience. In the circumstances I make an award for the damage to concrete structures, particularly the terraces, in the amount of $1,000,000.

[35] On the other aspects of the counterclaim I do not find, on a balance of probabilities, that the Claimant, its servants and/or agents did the excavation alleged to the rear of Lot 1. Mr Thwaites' evidence that he saw an excavation, exhibit 16(a), does not assist in determining who did it. There is uncontested evidence that the Defendant also used a back hoe on the premises. The burden of proof is on the Defendant and I am not satisfied, on a balance of probabilities, that the servants or agents of the Claimant did excavations to the rear of lot 1. Insofar as the damage to the Defendant's sewer line is concerned this was within the 8 metre reserved roadway and therefore did not constitute a trespass. The pit, because of its location, was to

be removed in any event and therefore damage, due to passage of construction vehicles, does not constitute an actionable breach of contract. The allegations of intimidation and "*bullying"* have also not been proven to the requisite standard. I find that the Defendant's upset and apparent tirade resulted from her failure to appreciate that the Claimant was entitled to an 8 metre roadway. It is significant that the police attended the scene but made no arrests and issued no caution. The matter of picking fruit from trees is not such as to provoke an award of damages because I deem it, in all the circumstances, de minimis.

[36] The Defendant's application to remove caveat would have been dismissed given my decision at paragraph 32 above. However, by written submission filed on the 23rd December 2024 (at paragraph 5.3) the Defendant's counsel sought permission to withdraw the application with no order as to costs. This I readily grant.

DECISION AND ORDERS

[37] On the 10th April 2025 I had a meeting in chambers with all counsel and their clients. It was agreed that the stamped agreement for sale must be produced before this decision becomes enforceable. The Claimant's counsel was also permitted to file a written submission in answer to written submissions filed by the Defendant on the 18th March 2025 without permission. In the result there will be judgment for the Claimant on the claim and for the Defendant on the counterclaim as follows:

1. The Defendant is ordered to, within 90 days, deliver up to the Claimant a registered title for All That Parcel of Land identified as Lot 2 on the subdivision drawing part of Lot 21A on the plan of Forest Hills in the parish of Saint Andrew and being the part of the land comprised in Certificate of Title registered at Volume 1262 Folio 705 in the Register Book of Titles and on the surveyor's plan dated September 2009 done by Noel Shirley

attached to the agreement for sale entered into between the Claimant and the Defendant.

2. The Registrar of Titles is directed to call in the duplicate Certificates of Title registered at Volume 1469 Folio 503 and Volume 1566 Folio 197 of the Register Book of Titles.
3. The Registrar of Titles is further directed to consider whether the said Title or Titles is or are to be cancelled and replaced.
4. In the event the Defendant fails, neglects and/or refuses to execute any documentation necessary to give effect to these orders the Registrar of the Supreme Court is authorized to execute such documentation on the Defendant's behalf. 5. Liberty to Apply
6. Damages in the amount of $1,000,000 to the Defendant on its counterclaim.
7. The Claimant has been substantially successful, and I award two thirds' costs of the matter to the Claimant against the Defendant. Such costs are to be taxed if not agreed.
8. This Judgment will not be enforceable unless and until the duly stamped Agreement for Sale is produced on affidavit to the Registrar of the Supreme Court by either party.

David Batts

Puisne Judge.