[2020] JMSC Civ 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 02540

BETWEEN	**DINSDALE PALMER**	**CLAIMANT**
AND	**CARICOM HOME BUILDERS COMPANY LIMITED**	**1ST DEFENDANT**
AND	**DEVON EVANS**	**2ND DEFENDANT**

IN OPEN COURT

Ms Denise Senior Smith, Olivia Derret, Dameta Gayle instructed by Oswest Senior Smith & Company for the Claimant.

Christopher Dunkley, Carrissa Bryan instructed by Phillipson Partners for the Defendants.

Breach of Contract for the sale of two Apartment - What were the terms of the contracts - Two documents containing contractual terms - Which Document contains the terms of the contracts - Whether one of the Document was forged- Whether expenditure was incurred customizing one apartment - Whether the full contract price should be recovered – Damages - Whether damages are proven or the award should be nominal.

Heard: 9th - 10th of October 2019, 22nd - 24th of October 2019, 6th of March 2020

THOMAS, J.

Introduction

[1] This action is brought by the Claimant Mr. Dinsdale Palmer in which he is seeking orders and remedies for breach of contract against the 1st Defendant, Caricom Home Builders Company Limited, (Caricom) a company registered under the laws of Jamaica, with its registered office located at No. 7 Dukharan Avenue, Kingston 10 in the parish of Saint Andrew and the 2nd Defendant, Devon Evans, a Developer.

[2] The claim relates to contracts for sale of two apartments in which the Claimant alleges that he paid the full purchase price for both. The Claimant seeks a number of orders. However, by the time this matter came to trial, in light of pervious orders and activities on both sides, the only causes of action that remain to be tried, are:

(i) the breach of contract and consequential damages for the sale of the 2-bedroom apartment B12 the purchase price for which was $10,000,000;

(ii) The return of 2 million dollars which the Claimant alleges that he paid on behalf of the Defendants to settle outstanding mortgage in relation to apartment A9, and

(iii) The return of 2 million dollars which the Claimant alleges that he paid on behalf of the 1st Defendant. for outstanding mortgage on A9

(iv) Fraud against the 2nd Defendant.

[3] The Particulars of Claim details that:

Upon the completion of the Apartment A9 by the 1st Defendant, the Claimant got permission to enter the said apartment to refurbish and customize the same to his taste. The Claimant spent over $8,000,000.00 doing this.

[4] By way of a letter received by the Claimant's attorney-at-law at the material time and also by oral exchange between the Claimant and the attorneys-at-law for the 1st Defendant, the Claimant was informed that the sum of $2,000,000.00 was needed to pay

off the mortgage existing on the penthouse apartment for its splinter title to be released as well as $1,006,185.00 for stamping and registration fees for the said Agreement.

[5] The Claimant and the 3rd Defendant entered into further discussions whereby it was agreed that the Claimant would pay off the mortgage owing on the penthouse apartment and the 1st Defendant would be responsible for the stamping and registration of the transfer for both apartments. The Claimant paid off the mortgage owed by the 1st Defendant to the Jamaica Mortgage Bank for the release of the title. The 1st Defendant sold this apartment to a Mario Sparkes in 2015. The Claimant has lost the use of the apartment for rental and the 1st Defendant is still in possession of the monies paid by the Claimant.

[6] The particulars of breach are outlined as follows:

ii. Unlawfully imposing conditions on the Claimant which did not form part of the agreements arrived at.

iii. Excluding the Claimant from occupying the apartment.

iv. Unlawfully and dishonestly treating the two separate agreements as one agreement

[7] The particulars of loss are outlined as follows:

i. Monthly Rental of US$2,000.00 (ongoing)

ii. Attorneys Costs so far in the sum of $150,j000.00

iii. Payment of $2,000,000.00 paid to Jamaica Mortgage Bank for the release of the Title for the Penthouse Apartment

[8] The Claimant claims: Specific Performance and/or in the alternative Damages for breach of contracts against the 1st Defendant.

[9] It is also the contention of the Claimant that the 2nd Defendant has forged his signature on a document that the Defendants purport, to be the document containing the terms of the contract for sale for A9.

The Defence

[10] The Defence in this matter is summarized as follows:

i. The agreement for sale in relation to A (9) was a shell unit. By further agreement apartment A 9 was customized by the 1st Defendant.

ii. Despite paying the purchase price, full payment on the customization of the shell unit A 9 was never settled. The 1st Defendant incurred expenses of over $8,000,000 customizing A.9, $7,500,000 of which remains outstanding. The Defendants are entitled to a setoff in relation to this sum.

iii. The Claimant's signature on the Agreement for Sale for Lot A-9 was not forged

iv. The agreement for the sale of Apartment B-12 was subject to the approval of the purchase price by the 1st Defendant's mortgagees. The approval was not granted.

v. The Claimant did not pay the full purchase price, that was made subject to the approval for B12.

vi. The Claimant was never a purchaser of B12.

vii. Consequently B12 was sold to a third party. The Defendants did not breach any contract with the Claimant. Therefore the Claimant is not entitled to damages.

The Case for the Claimant

[11] The evidence of the Claimant Mr. Palmer is that:

He met Ms. Jaipaul in 2010. They developed a friendship. In or about the 1st week of November, 2011 she told him that she needed money urgently to acquire property and start construction of an apartment complex on land located at 7 Dukharan Avenue and that she intended to build 14 apartments She offered him a penthouse apartment for $10,000,00 if he put up

> $5,000,000 at the time as she urgently needed money. He agreed and gave her the $5M.The agreement for the purchase of the penthouse was reduced to writing in an agreement for sale, dated November 11, 2011. He paid the full purchase price of $10,000,000 by the end of 2012 and before construction commenced in 2013. At no time did Ms. Jaipaul tell him she was selling him a shell apartment and at no point did he understand her to mean that. Upon the completion of this pent house apartment by the 1st Defendant, he got permission to enter and customize the apartment to his taste. He spent over $8M doing this. He produced receipts totalling $7,132,000 in support his Claim.

[12] He further states that:

> There were email correspondences dated December 9th, 2014, January 12th, 2015 and February,6th, 2015 from Devon Evans regarding this. He hired a Mr. Patrick Holness to act as foreman for the completion of the penthouse apartment. After the penthouse was completed he was given letters of early possession. It took him a while to occupy the premises. It is after the filing of the claim that he was made to understand that the Defendant and Mr. Evans are now contending that he executed an agreement to purchase a shell unit instead and that it was signed by him. It wasn't until March 2015 that he was told by Ms. Jaipaul that he was getting a shell apartment.

[13] He denies signing any such agreement. He relies on the evidence of the handwriting expert Ms. Beverly East who assessed the documentation for authentication of his signature. He also relies on a letter from Mr Keith Bishop and Partners, who indicates that he did not have carriage of sale or sign or witnessed the sale agreement that purportedly carries his signature.

[14] He asserts that:

> He does not owe the Defendants any monies on the sale of the Penthouse. Ms. Jaipaul the Director of the 1st Defendant had borrowed $800,000.00 from him in January 2014, promising to repay in 1 months' time. She could

not make the repayment and sent him emails concerning this. On April 24, 2014. Ms. Jaipaul approached him with a deal to a 2-bedroom apartment on the B block for $10,000,000. He accepted the offer and paid $1, 200,000 on April 24th, 2014.She wrote him a receipt for $2,000,000 incorporating the $800,000.00 which he loaned her. This second agreement was known and accepted by himself and Ms. Jaipual acting for the 1st Defendant. It was done orally and payments amounting to $10M were made. They spoke again on April 27, 2014 and she sent him an agreement which he did not see until this matter was filed. The apartment described therein was B12 located at No. 7 Dukharan Avenue.

[15] His evidence continues as follows:

By way of a letter received by his then attorney-at-law, Mr. Ivor Peynado, and based on an exchange between himself and the Defendant's Attorneys-at-law, he learned that $2,000,000 was needed to pay off the mortgage on the penthouse (A9) and for the splinter title to be released as well as $1,006,185.00 for stamping and registration fees for the said apartment. Through his attorneys-at-law he forwarded two (2) cheques in the sum of $1,006,185.00 representing the stamping and registration fees for both apartments. Subsequently, himself and the Defendant's attorneys-at-law reached an agreement whereby he agreed to pay off the mortgage owing on the penthouse and the 1st Defendant would be responsible for stamping and registration costs for both apartments.

[16] He further asserts that:

He paid the mortgage owing and the Title was delivered to the 1st Defendant's attorney-at law. When he got possession of the pent house apartment (A9) there was a half-done kitchen in the apartment. Tiles were not installed throughout the apartment. No partition walls were installed in the bedroom. Plumbing and carpentry were a bit complete. Painting and shower coating were not done. The apartment had four (4) windows. He is not aware of Caricom conducting repairs to any of those windows when he took possession. He had not signed any agreement for a shell penthouse

apartment in 2012 and had it witnessed by a Justice of the Peace. The Defendant had sold the second apartment to someone else and attempted to change the purchase price on him. He was sent a Mutual Release and Settlement prepared by Defendant's attorneys at law. He did not sign it.

[17] He states that:

It was his intention to use the second apartment as an investment property for rental income. He knows he could earn at least USD $2,000.00 per month. He was renting an apartment at the time and due to the Defendants' failure to give him possession he was forced to remain in the rented apartment for nearly six (6) months. When he got the apartment he saw a half done kitchen. Tiles were not installed throughout the apartment. They did not install partition walls in the bedroom. Electrical, plumbing and carpentry were not complete. Painting and side coating were not done. It had 4 windows. He is not aware of Caricom conducting any repairs to these windows. He did not give permission for the purchase price of B12 to be used for anything else. Mr. Evans was adamant that he would not get possession of the apartments even though he had no business with him concerning purchase nor customization. The 1st Defendant breached the agreements for sale and he has suffered loss and incurred expenses. The 1st Defendant has other 2 bedroom apartments available.

[18] On Cross examination he states that:

He agrees that the dispute between himself and the Defendants is now about money. Money and dishonesty because he did not get what he should get. He bought A9 for; $10,000,000 in 2011. It was a pent house apartment. He does not understand the shell defence. That is not his understanding of the agreement with them. The agreement with Caricom was for a complete unit and what Caricom gave him was a shell. He did not know Mr. Evans as a developer with American Holdings. It is after the case he now knows he is a developer. Jennifer Jaipaul is only now talking about a shell apartment. His expectation was a complete apartment. A penthouse apartment has two floors upstairs and downstairs. The kitchen area had

tiles. Outside the kitchen door, there were no tiles. He found partition walls up to the kitchen area. There was none in the bedroom, none in the bathroom. A half kitchen was in it. What he took over was a Penthouse apartment. Caricom did not continue to do work at his request. There was more work to be done to complete the apartment. He and his workmen customized it.

[19] In relation to apartment B12, he states that:

> He does not accept that it could not be sold to him because Jamaica Mortgage Bank did not approve the purchase. That is an internal affair between Caricom and Jamaica Mortgage Bank. His case is about getting back money. He does not agree with Caricom's defence that he only paid $6,000,000 and refurbishing cost $8,000,000. He insists that paid them $10M for B12.

[20] He further asserts that:

> The KSAC money is part of his claim. It was paid on the instruction of Ms. Jaipaul to pay it to the person at the KSAC for her. He got a receipt from Ms. Jaipaul. He rented a place from her. His rental arrangements with Ms. Jaipaul were different from the arrangement re, the apartment he is suing for. He agrees that Ms. Jaipaul's business is Jaipaul's business and Caricom's business is Caricom's business. He did not loan Ms Jaipaul personal money. The $800,000 that he loaned her was when the gate was blocked by Caricom's workmen about not getting paid and the workmen threatened them. It was straight business to save a person's life.

[21] His evidence on cross examination continues as follows:

> He did not take away an agreement for sale, that is three similar documents, from Ms. Jaipaul got it witnessed and returned the document. He knows Abu Dhabi was getting their funding from the Jamaica Mortgage Bank. He did not know that, Jamaica Mortgage Bank had to approve his purchase. He did not get a complete unit from Caricom and wanted them to customized it. He got an incomplete apartment and had to get it complete.

He started the work from June/July 2014-2015. Down to Christmas 2014 it was almost complete. He was in there from early September 2014. It is not true that he did not customize from September 2014. He went in and finished February 2015. He got his paperwork in March.

[22] Four ordinary witnesses gave evidence on the Claimant' s case. Additionally, one expert witness, a handwriting expert also gave evidence**.** The witness Mr. Samuel Brissett gave evidence that:

In 2014 the Claimant Mr. Dinsdale Palmer hired him to do electrical work in his penthouse apartment. The work he did included installing circuits and home appliances. He also assisted in the refurbishing of the bathroom, kitchen and bedrooms. He states that the work for Mr. Palmer was done while he was still working for the 1st Defendant. He remembers Devon Evans accosted him for doing the electrical work for Mr. Palmer. He then told Mr. Evans that he was a freelance worker and he could not tell him what to do and that he could not stop him from taking other jobs as Caricom was not an electrical company.

[23] On cross examination he states that:

He worked for Caricom and Mr. Palmer, not at the same time. The work he did for Mr. Palmer was not finish up work. It was work to install electrical fixtures in his penthouse apartment. He does not agree that the work he did for Mr. Palmer including lighting was customization. Mr. Palmer paid him for the work he did. The work he did for Mr. Palmer was after he took possession of the place from Caricom. He does not agree that the work he was engaged in for Mr. Palmer did not have JPS certification. He did not get the apartment JPS certified. He does know who did it but he did the installation. It would be illegal if the JPS certification was granted without infrastructure, without plug, light switch, without he unit being wired. He does know if the entire building got passed because he did Palmer's work. His installation work for Mr. Palmer started in June 2014. He has no ill will towards Mr. Evans or Ms. Jaipaul.

[24] The Evidence of Patrick Anthony Powell is that:

> In 2014 the Claimant hired him to do plumbing and carpentry work on his penthouse apartment. He put basins in the bathroom, toilet bowl, equipment for the operation of the washing machine. There was a plumbing system in the apartment but it was incomplete and the work was improperly done so he had to do it over. He also had to install dry wall partitions in the apartment.

[25] On cross examination he states that :

> There were two floors but both floors were incomplete. Upstairs was virgin wall. The piping on the upper floor had to be done over. The waste water sewage was connected on the normal sewage. The upstairs floor was wooden base. The bathroom was concrete looking. It was wood with concrete over it. The floor of the down stairs was concrete. There was some partition. When everything is connected to the one line, there would normally be a blockage and the water would become stagnant. He ran 2 lines. He did not have to break up the concrete. He was not the only one that was installing dry wall partition.

[26] The witness Patrick Holness in examination in chief he states that he has known the Claimant, Mr. Dinsdale Palmer for five (5) years. In or around 2014 he hired him as a Foreman for the completion of his penthouse apartment at 7 Dukharan Avenue.

[27] He does not know about the arrangement with the Claimant, and the 1st Defendant but he knows that when the Claimant got possession of his apartment it was an empty apartment. There was only a countertop and cupboard in the kitchen. There was no tile on the top floor which is referred to as the loft. There were probably four dry wall partitions which were improperly done. He realized, upon seeing the apartment, that is was basically an empty space. The loft was completed based on his recommendations and supervision.

[28] He further states that Mr. Evans saw him at the apartment working one day and he told him he came to spoil it up. There were times when Mr. Evans' workers would accost them on the premises as well. The comments of Mr. Evans' workers were always insulting and demeaning. He never responded to those comments.

[29] On cross examination he states that:

> Mr. Evans comments were not related to work inside. There was no work inside. He went to work with Mr. Palmer in 2014. Mr. Palmer sorted the appliances to be installed. He just advised. He saw a piece of dry wall partition behind the unfinished kitchen. There was no other dry wall partition to be removed. The one piece behind the kitchen was removed. The half kitchen could not be installed without it being removed. This was done years ago. When he thinks about it now, there was only one dry wall. Construction was not his day job. He has no knowledge of the arrangements between Mr. Palmer and Caricom.

[30] On re-examination he states that in his statement he said probably 4 dry walls were not done properly and in cross examination, he said only one, he is now saying it was only one piece.

[31] The Evidence of Mr. Denva Harris is that:

> In 2014 Mr Palmer hired him and his brother Mark Harris to paint his entire penthouse apartment located at 7 Dukharan Avenue. He was introduced to Mr. Palmer by Mr. Patrick Holness who was the foreman. Mr. Holness told them what he wanted them to do and they set about doing it. The apartment took them approximately a month or two to finish. It could be more. The apartment they painted was primed and ready for painting. They used colours chosen by Mr. Palmer and were supervised by Mr. Holness.

[32] On cross examination he states:

> He is not aware of the contract between Caricom and Mr. Palmer. He was hired to paint in December 2014. When he entered the apartment, he saw primer on the walls The primer was off white.

Evidence of the expert Witness Ms. East

[33] Ms. East produced an expert report which was permitted to stand as her evidence in chief. Her unchallenged evidence is that she has training in Hand writing Science and Forensic Document examination and has been practising the science for 25 years. She has given details of her experience, work (to include publications and lectures) and association with various international colleges universities, international and local bodies. However, I do not find it necessary to include the full details of these in the interest of time. Suffice it to say that Ms. East has established that she is duly qualified to provide an expert opinion on the issue in question.

[34] Ms. East indicates that:

> She examined the signatures of Mr Palmer and Mr. Keith Bishop on certain document which she describes as" known documents" which are: the drivers licence of Mr. Palmer, issued on the 2nd of September 2010; letter dated the 14th of April 2010 on Bishop and Partner's letter head to the Clerk of Courts signed by Keith Bishop; last page of a document dated the 12th of March 2012, from Bishop and Partners signed by Keith Bishop; Proposed Draft Agreement between Caricom Home Builders Limited and Dinsdale Palmer dated th11th of November 2011 and signed by Mr Dinsdale Palmer; Jamaican Passport of Mr Palmer; and the document she described as the questioned document which is the "Agreement for sale Between Caricom Home Builders Company Limited and Dinsdale Palmer" undated for the year 2012.

[35] She found that the three signatures of Keith Bishop on the known documents are consistent with each other in pattern construction and movement, but lacks fluidity in the questioned document

[36] She discussed her findings in terms of 4 components. These are movement, form spacing and pen lift. She identified the common pattern in the known documents signed

by Mr. Palmer. That is the D is rounded and stands alone. It is smaller in height than the surnames. There is ample spacing between the initial D and the surname. The Letter P stands alone. The remaining letters are illegible but creates an apex after the second letter.

[37] In the proposed draft agreement, she found that, the movement completes upwards through the middle of the second letter. In the letter to Ivor G Peynado she found that “the signature curves upwards around the base of its formation with a final stroke through the middle of the signature”. In the Jamaican Passport she found that “the signature curves at the base and completes in an upward motion through the middle of the signature” On the Drivers Licence she found that “the signature curves around the base of the signature and complete with a stroke in an upward motion through the signature”.

[38] In the questioned document she found that the letter had a pen pause at the right of its formation**.** The letter curves around and stands alone, it is smaller in height than its surname. There is a spacing between the initial D and its surname. The letter P stands alone. The remaining letters are illegible**.** Two apexes are present, the first to create the letter L The second apex completes downwards before continuing across through the signature and beyond the signature. The signature is angular in formation**.**

[39] She explains that movement is produced unconsciously. It requires agile motor skill to produce fluidity. Too much control of the pen limits fluidity. She found that this was evident in the questioned document where the movement in the signature was created in an angular motion and downward in movement, which is the reverse movement of the known signature. She also indicates that the form is executed consciously and is determined by the agility and individual style. The form changes and completes in the questioned signature creating a different movement. There is wider spacing between the first and second name in the known document as compared to the questioned document. There are three pen lifts in the known documents as well as the questioned document. However, she found that the line quality is greatly uneven in completing the formation of the signature in the questioned documents.

[40] She identified the following discrepancies. These are:

(i) The questioned document is undated.

(ii) The signature lack fluidity that is evident in the known signatures.

(iii) The signature has a different pattern construction in the remaining letters of the surname with an additional apex created to the formation of the name.

(iv) The terminal stroke is exaggerated and continues beyond the surname.

(v) The illegible letter formations are congested after the letter “P”.

(vi) The signature above the title “Attorney at Law /Justice of the Peace” is not an authentic signature of Keith Bishop when compared and examined with known signatures of Mr. Keith Bishop.

(vii) She concluded that the signature on the questioned document was not signed by Mr. Palmer**.**

[41] On cross examination she states that when the questioned document is examined she found 4 identifiers that are inconsistent with the known signature. She named these as:

1. Congested spacing, that is tighter
2. Movement- start & end- the ending of the signature is much larger than the 4 known signatures (stroke)
3. The Apex- there are 2 visible in the questioned; 1 visible in the known
4. When examining a signature, all you need is one fundamental difference in order to void it. That is to find that it is not authentic. In this case there are more than one. There are 7. There are far more inconsistencies than variation. All her examination is carried out under a microscope.

5. On re-examination she added that as a lay person it would be difficult to identify all discrepancies but one may be able to identify some.

The Defence Case

[42] The main defence witness is Mr Devon Evan who states that he is the manager of the Defendant Company. His evidence in chief is that:

> He is manager and authorized agent of the 1st Defendant Company. He was responsible for the construction of all the apartments and penthouses, to include Lots A-9 and B-12, being the properties in dispute. As manager he is contracted to oversee the Abu Dhabi Suites development project.

[43] He managed the development project, Abu Dhabi Suites and was responsible for the completion of all penthouses and apartments including Lots A-9 and B-12, the properties in dispute**.**

[44] The Claimant purchased Lot A-9, a shell penthouse unit which had windows and doors with no plumbing or electrical fixtures. The 1st Defendant undertook the completion of a three-bedroom penthouse which included the fabrication of a loft. The Claimant has paid for the shell unit but the customization costs of the loft brought the total sale price of Lot A-9 to $18,000,000.00. The total cost of customization of Lot A-9 was $8,000,000.00 and as such there was a balance of $7,500,000.00 to pay for the costs of customization. He detailed the particulars of customization as follows:

Installation of kitchen	$800,000.00
Installation of Tiles	$650,000.00
Partitions, Walls & Trimmings	
(bedroom and bathroom)	$1,500,000.00
Electrical, Plumbing & Carpentry	$1,000,000.00
(First Floor)	

Painting and shore coating	$ 350,000.00
Attic Floor	$2,500,000.00
Repair of Six Windows	$ 700,000.00
Total	**$7,500,000.00**

[45] He further states that:

> The process included the erection of the interior staircase which leads to the overhead loft, along with the overhead loft level. The 1st Defendant also installed partition walls throughout the Penthouse. The 1st Defendant further installed a $550,000.00 pre-fabricated kitchen sold to them by Active Traders. Granite countertops were installed. The 1st Defendant had to return to the Jamaica Mortgage Bank for a secondary loan, inter alia, to fund the completion of the lofts for all the Penthouses. A Revised Bill of Quantities for additional works dated July 2014 and prepared by Davidson & Hanna, Chartered Quantity Surveyors (QS) shows that each penthouse required approximately Five Million Dollars ($5,000,000.00) to complete each of the seven lofts. With the disbursement of the secondary loan the Defendants were able to complete all seven of the penthouses including the loft area in the Claimant's Penthouse.

[46] In resisting the evidence of the Claimant he asserts that:

> The receipts the Claimant relies on to try and prove that he customized Lot A-9. do not pertain to the work done to erect the loft, and to install the kitchen, plumbing and electrical work. The receipts are mostly in relation to the fittings to the penthouse, including fans, lighting, chrome fixtures, plumbing for upstairs which remained incomplete by the 1st Defendant as a result of non-payment of the customization. Additionally, some of receipts the Claimant seeks to rely on are from unverifiable 3rd parties. The 1st Defendant maintained authorised suppliers such as Active Home Centre, Cessco Limited and BMT Building Depot Ltd., to construct all seven lofts including the Claimant's loft.

[47] He further contends that:

> The cash receipts from the Claimant's third parties cannot justify $6,000,000.00 worth of customization in relation to the erection of the loft, kitchen, plumbing and electrical writing. There are no receipts adduced by the Claimant in relation to the kitchen. Further, the receipts by the Claimant do not show the material needed to erect a loft, which ought to have included treated lumber with brackets and plycem board (waterproof/weatherproof board). By the time the Claimant was given early possession of the penthouse on March 24, 2015 the unit was completed. All the work was completed and all the lofts for the seven units were completed with people living in at least 50% of the properties.

[48] Further:

> To the best of his knowledge, only $6,000,000.00 was received by the 1st Defendant in relation to B-12. The Claimant as one of the 1st Defendant's pre-construction customers paid in his presence the sum of $5,000,000.00 as evidenced by his receipt dated November 16, 2011. The receipt dated July 27th, 2012 indicates that the sum of $7,500,000.00 was received towards the payment of Lot A-9 and that a balance of $2,500,000.00 remained outstanding. The total sum paid for the shell unit was, as admitted by the Claimant, $10,000,000.00, Any allegation regarding a breach of obligations of the Kingston and Saint Andrew Municipal Council (KSAC) requiring payment to the KSAC is also denied. The Claimant was given the Agreement for Sale and he returned same to the 1st Defendant signed and witnessed by a Justice of the Peace. The Claimant was one of their pre-construction purchasers and in fact his Agreement for Sale was used, amongst others, to secure the loan from the Jamaica Mortgage Bank to finance the development.

[49] On cross examination he states that:

> At the time when he was associated with the work at Abu Dhabi suites, he did not have the requisite licence from the Real Estate Board. He was acting in the capacity of a contractor as the developer was Caricom Home Builders. He agrees that the documents for Caricom Home Builders from the Company's Office has not named him as shareholder or officer He agrees that in none of the defence, and as part of their statement or any document, the Defendants have produced any documents that Mr. Palmer purchased a shell unit**.** He is aware that Mr. Palmer and Ms. Jaipaul agreed to the agreement for sale for the purchase of A9. He also recognises his brother's signature, Richard Evans. In saying CARICOM undertook the completion of the 3-bedroom Penthouse for Mr. Palmer, the completion he is talking about is the customization. To his knowledge, the apartment was completed in September 2014.
>
> He agrees that 51 items of the purchases he exhibited were made after the apartment was completed. That is after September 2014. He agrees that the purchase price agreed for apartment A9 based on his recollection was $10M. He would not agree that titles were installed in the apartment for $600,000. He agrees that the production of receipts and documentation would substantiate that CARICOM installed the fixtures and tiles he alleges were installed.

[50] Continuing on cross examination following responses have also been given by Mr. Evans:

> Workmen were working on the site constructing the apartment complex 10 hours a day. They were paid by him on site. Jamaica Mortgage Bank made payment to control & control paid the subcontractors and workers. Caricom provided documents**,** receipts on the invoices, for the court to show that Caricom spent $7.5M for customization of apartment A9. The difference between a penthouse and, other apartments, is that a penthouse has an

> additional 500 square feet and comprises of 2 floors with an office or a loft. It is not true that there were only 4 windows at apartment A9. He disagrees that, the painting that was done in A9 was done by Mr. Denva Harris employed by Mr. Palmer. He disagrees that the electrical work in Mr. Palmer's apartment was completely done by Mr. Samuel Brissett employed by Mr. Palmer.

[51] He states that:

> Practical completion certificate was issued in September 2014. One of his workmen gave evidence on behalf of Mr. Palmer. He has no workmen giving evidence on Caricom's behalf. Caricom would communicate with Mr. Palmer directly and by email sometimes in the emails Caricom communicate to Mr. Palmer about money owing.

[52] However, when his affidavit was shown to him he agrees that there is no such email attached**.**

[53] He agrees that:

> There are no receipts evidencing, Mr. Palmer paid $500,000 for mobilization fee. He agrees Ms. Jaipaul gave permission to Mr. Palmer to carry out work in his apartment through Williams McKoy and Palmer. CARICOM is not suing for stamp duty., nor for attorney's fees amounting to $2.7M. The email dated December 09, 2014 does not set out details of any customization work for Mr. Palmer. It does not set out that Mr. Palmer owes money for customization done. He sent Mr Palmer an email in November 2014.

[54] He further states that:

> Mr Palmer was given permission to carry out work late 2014, to early 2015. It could be November 2014 to January/ February 2015. It would be impossible for Mr. Palmer to carry out work in June 2014.

[55] He admits that:

> The time Williams McKoy & Palmer became the attorneys-at-law for Caricom was about December 2013. All the payments made by Mr. Palmer in relation

> to A9 were through Williams McKoy and Palmer. If Williams McKoy and Palmer should say they were retained in November 2013, and were privy to matters in 2011 when the Claimant and 1st Defendant entered into sale agreement for the purchase of 2 apartments, that would be correct**.** There was an attempt to negotiate an amicable settlement. Williams McKoy and Palmer did not have carriage of sale of A9- B12. They were not involved in the collection of the purchase price of B12

[56] He accepts that Mr. Palmer paid $2M to Williams McKoy and Palmer for the discharge of the mortgage on A9. There was a settlement between Caricom and Mr. Palmer

[57] He states that according to the settlement any legal fees including the $2M payment was to be borne by Mr. Palmer, to be paid to the same Mortgage Bank plus stamp duties and taxes for discharge of the mortgage and all liens on the title. He says thereafter Mr. Palmer would be placed in temporary possession to begin his customization work. Mr Palmer should withdraw the report made about him to the real estate board. Once he received temporary possession everything changed.

[58] He agrees that:

> In the letter from Williams McKoy and Palmer proposing a settlement between Caicom and Mr. Palmer there is no indication that Mr. Palmer is to pay any customization cost. In this proposal Caricom was to pay $10M to Mr Palmer and the title was to be delivered to Mr. Palmer. Mr. Palmer sent over two manager's cheque in the sum of $1,060,188 each to Williams, McKoy and Palmer for stamp duty, transfer tax and fees. $2,000,000 was made payable by Mr. Palmer to the bank to release the certificate. The letter did not say temporary possession. It was not until July 2019 Mr. Palmer received his title based on a consent order of the court. There is no communication from Caricom to Mr. Palmer to offset customization costs from his $10,000,00for B12. The $2,000,000 that Mr. Palmer paid to discharge the mortgage that money was not repaid.

[59] He states the $2,000,000 was not repaid because it was not a loan. He does not agree that Mr. Palmer was led to believe he should pay $2,000,000 to discharge the mortgage and he would get the instrument of transfer of possession.

[60] He further states that the instruction or directive to pay the mortgage for Caricom came from the Defendant's Attorney-at-law, Williams McKoy and Palmer. He disagrees that the directive to pay off the mortgage on A9 was as a request from Caricom. He disagrees that Ms. Jaipaul was the one who approached Mr. Palmer to purchase a 2nd unit because she owed him money that she could not pay.

[61] He says that he did not know that Ms. Jaipaul in around early 2011-2012 was borrowing money from Mr. Palmer.He agrees that Ms. Jaipaul acknowledged by Email that there was a loan owed to Mr. Palmer in 2014. He not sure if Ms. Jaipaul and Mr. Palmer entered into an agreement for B12 after this email. He knows the agreement for B12 was 2014 but he is not sure of the timeline. He agrees he did not receive and payment from Mr. Palmer for the sale of B12.

[62] He further asserts that Jamaica Mortgage Bank sent out directives sometime in January 2015. that the apartment B12 should not be sold below $15,500,000. He agrees that he has no documentary evidence from Jamaica Mortgage Bank of this. He disagrees that Mr. Palmer was only being notified of this, around late 2015. He disagrees that up to February 2015 Mr. Palmer had sent 2 cheques for stamp duty and transfer tax for both apartments His understanding, is that the remaining apartment should not be sold below $15.5M. He disagrees that apartment B12 was never sold for $15.5M. I it was sold for $15.5M. He agrees that the agreement with Mr. Palmer was in 2014.

[63] He agrees that the apartment B12 was transferred to Mr. Scott on the 12th of August .2015. He agrees that CARICOM has not provided evidence of Jamaica Mortgage Bank's refusal to accept the purchase price of $10M for B12. He agrees that Caricom has not provided documents from Jamaica Mortgage Bank to indicate Caricom notified them of the purchase of B12 by Mr. Palmer. He is aware that Mr. Palmer made statements to the Real Estate Board, complaining about sale agreement for shell apartment A9. He became aware of this for the 1st time through Caricom's lawyers. In both agreements that Mr. Palmer had with Caricom, he disagrees that he was a pre-

purchaser. He was for A9. but was not for B12. He is not sure if Mr. Palmer paid monies for B12 before it was completed. When a purchaser pays up all their money, that is all the purchase price before the completion they are considered pre-purchasers.

[64] He further agrees that:

> The responsibility to disclose to the Bank that a purchaser has paid up all his money is that of the Developer. There is no document before this court to show that Caricom notified Jamaica Mortgage Bank of the sale of apartment B12 to Mr. Palmer. He is not certain of the date that CARICOM entered into agreement with Mr. Palmer for the purchase of apt B12. There was a request for further and better particulars filed January 20, 2018 and served the 30th of January, 2018. The request was for details of the persons who did the customization work, and documents to include, receipts evidencing payment, and described detailed work done to kitchen, attic floor and bathroom.

[65] He says he is not certain any signed document had been provided setting out the detail work described in the request. It has been provided through invoices. He disagrees that he did not receive an agreement for sale that Mr. Palmer had signed, and witnessed by a Justice of the Peace. He does not agree that if Mr. Palmer is purchasing a Penthouse apartment he should get a loft. He agrees Mr. Palmer has not been returned the $10M paid for B12.

[66] On re-examination he states that practical completion of a building, is where the building is fit and proper and, liveable with; water, electrical lighting, windows, tiles and doors completely secured. He was asked to explain what is the relationship between completion and practical completion. He states that “practical completion of a unit is when the engineers and architects, deemed it ready/safe. It being fully secured with windows, doors, roofing, tiles, electrical/plumbing infrastructure. “A complete unit is one that does not require any further work. Only necessary work would be a walk through”. Mr Palmer purchased a penthouse. It did not provide for an attic.

Issues

[67] The issues which arise for my determination are as follows:

(i) What were the terms of the contracts between the parties;

(ii) Whether the Defendants breached the terms of the contracts

(iii) Whether the Claimant suffered any damages arising from breaches of the contracts.

The Law

[68] It is trite law that a contract is breached where:

(a) a party fails to perform his or her obligations under the contract or

(b) behaves in a manner that demonstrates an intention not to perform that obligation (anticipatory/renunciatory breach**) or**

(c) where performance is rendered impossible by the act of the defaulting party.

[69] Generally, for all breaches the innocent party can sue for specific performance and or damage. However, where the breach goes to the root of the contract, whether by renunciation, impossibility of performance or substantially depriving the innocent party of the benefit he was entitled to receive as consideration for his performance that party is entitled to terminate the contract and sue for damages. (See ***Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)*** *[1979] AC 757,* ***Universal Carriers v Citati*** *[1957] 2 QB 40*

Analysis

[70] I am grateful for the submissions of both counsel which assisted me tremendously in arriving at my decisions. In light of the nature of the case these submissions were inevitably, in the main, a review of the facts, and the view of each counsel on these facts. In the interest of time, I will not record these submissions in details. Nevertheless, during the course of my discussion I will highlight the salient points.

What were the terms of the contract between the parties?

[71] There is no dispute that there were in fact 2 contracts for the purchase of two apartments by Mr, Palmer. That is for apartment A 9 and B 12. It is also accepted by the Defendants that the Claimant paid the sum of $10,000,000 for the 1st apartment and paid moneys for the second apartment. Additionally, the Defendants have not disputed the claim of the Claimant that the second apartment was subsequently sold to someone other than Mr. Palmer. There is also consensus on the evidence that Mr. Palmer has not been returned the sums paid for the second apartment, that is B12.

[72] The matters in dispute in relation to apartment A9 are:

i. The nature of the apartment that was purchase under the contract. That is whether it was a contract for the 1st Defendant to sell the Claimant a shell apartment and

ii. Whether having sold the Claimant a shell apartment, the Defendants by agreement with the Claimant, customized the shell apartment at their own expense.

iii. If the answer to (ii) is in the affirmative whether the Claimant has failed to pay the Defendants, the full cost for the customization.

iv. Whether $2,000,000 paid by the Claimant to clear outstanding mortgage of the 1st Defendant on this property should be repaid.

[73] In relation to apartment B 12 the matters in dispute are:

i. Whether Claimant only deposited $6,000,000 or he paid the full contract price of $10,000,00
ii. Whether the contract was contingent on the purchase price being approved by the 1st Defendant's Mortgagee
iii. Whether Money deposited on B12 should be used as a set off for expenses for the customization of Apartment A9.

Whether the Contract For Apartment A9 was for a Shell Unit

[74] My determination of this issue is first of all dependent on which document contains the terms of the contract in relation to apartment A 9. This issue really turns on the credibility of the evidence and documents produced by both parties. The Defendants have not mounted any challenge to the authenticity of the document evidence by Mr. Palmer in relation to the agreement for sale of A9. However, Mr. Palmer contends that he did not sign the second document being relied upon by the Defendants to support their Claim with regards to Apartment A 9, that it was a shell apartment that Mr Palmer agreed to purchase. Essentially Mr Palmer is alleging that his signature was forged on that document**.**

[75] These Two (2) documents have been admitted into evidence in relation to the purchase of apartment A 9. The first document is dated the 11th of November 2011. It bears the Company Seal of the 1st Defendant. It is signed by Ms. Jaipaul as CEO of the Company, Mr. Palmer and a witness. The property is referred to as "Apartment A.7 Abu Dahbi Suites" (Which the parties agree that the reference to apartment 7 should be apartment 9.). It refers to the purchase price of "10 million dollars, 5 million on deposit, balance payable, 1 million per month in 5 months, treated as a cash sale". Mr Palmer contends that this is the agreement that he signed.

[76] The other document is just dated 2012 without any specific date of that year. The purchase price is the same and terms of payment are the same. This document is purportedly signed by Mr. Palmer, Ms Jaipaul as the director of the Defendant Company, a Secretary and a J P or an Attorney-at-Law. However, the description of the property is "Apartment A 7 being all that parcel of Land Volume 1422 Folio 60, ***sold as a Shell Unit Without Fixture***'

[77] Section 3 of the **Forgery Act** provides a definition for forgery. It states:

> *(1) For the purposes of this Act, "forgery" is the Definition making of a false document in order that it may be used as genuine, and, in the case of the seals and dies mentioned in this Act, the counterfeiting of a seal or die; and forgery with intent to*

defraud or deceive, as the case may be, is punishable as in this Act provided.

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by, or on behalf or on account of a person who did not make it nor authorize its making; or if, though made by, or on behalf or on account of, the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false-

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein, or

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it: Provided that a document may be a false document notwithstanding that it is not false in such manner as is in this subsection set out."

[78] Despite the fact that offences created by the Forgery Act are triable in a criminal court, I agree with the submission of counsel for the Defendants that the definition for "forgery" would still be applicable in civil proceedings. However, the standard of proof in

the civil proceedings would remain on a balance of probabilities, as opposed to the criminal standard of beyond a reasonable doubt**.**

[79] Mr Palmer in support of his Claim on this issue relies on the evidence of handwriting expert Ms. Beverley East, as also a letter from the attorney –at – law Mr. Keith bishop who purportedly witnessed the signature of Mr. Palmer indicating that the signature that appears on the document is not his, and that he did not prepare or sign the document. The evidence of Ms East in fact supports Mr. Palmer's assertions that the signature on the second document in relation to the purchase of Apartment A9 is not that of Mr. Palmer. Once this is found as a fact on the evidence the element of forgery in accordance with section 3 (2) of the Forgery Act would have been proven.

[80] I accept the submissions of Counsel for the Defendants that: "The court is not bound to accept the evidence of the expert as conclusive. The evidence should be assessed in relation to all the other evidence". (He relies on the case of **Fuller v Strum** [2001] WTLR677). I am also cognizant of the principle that "the more serious the allegations, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and those to prove it'. (See **Paul Griffiths v Claude Griffiths** [2017] JMSC CIV.136)

[81] The case of **Fuller v Strum** (supra), involved the validity of a will. At the trial the main issue in that case was forgery. The expert in her report opined that the signature of the testator was forged. The report was admitted into evidence without the expert being called to give oral evidence. In that case the propounder of the will, the only surviving attesting witness and another witness gave evidence on the due execution of the will . In those circumstances the Judge having assessed their demeanour and viva voce evidence concluded that they were credible, and on the evidence preferred their evidence over that of the expert in the report. It should be noted that aspects of the trial court decisions were overturned but not on this issue

[82] However, in the case at bar, there has been no serious challenge to the expertise and knowledge of Ms. East in the area. Her evidence was not discredited. Neither is there any contradicting evidence from any person who were allegedly present or who allegedly witnessed the signature of Mr. Palmer.

[83] Therefore, I accept her evidence, not just because she is an expert in the area but because I find her to be credible both in her viva voce evidence and her deamenour. Despite the questions posed on cross examination I find that she was not discredited. She has provided sound evidence, substantiating her expertise, knowledge experience and methodology of her examination. I find that her evidence was clear and consistent and that she provides a cogent explanation for her findings.

[84] Her highlight of the following has been very instructive:

> "The questioned document is undated. The signature lack fluidity that is evident in the known signatures. The signature has a different pattern construction in the remaining letters of the surname with an additional apex created to the formation of the name. The terminal stroke is exaggerated and continues beyond the surname. The illegible letter formations are congested after the letter "P". The signature above the title "Attorney at Law Justice of the Peace" is not an authentic signature of Keith Bishop when compared and examined with known signatures of Mr. Keith Bishop he questioned document has uneven line quality."

[85] I accept Ms. East's evidence that the finer details of the discrepancies I would not be able to detect with the naked eye. However, observing with my naked eye I see that in the questioned document the terminal stroke or horizontal line appears to be much longer than, that in the known signatures. Additionally, in the known signature the aspect that she describes as the apex is more rounded or looped in the known signature while in the questioned document it appears to be more sharp than rounded or looped, closer to the angle of a triangle.

[86] I accept the presence of these and the other discrepancies that she has found between Mr. Palmer's signature on the known documents and the questioned document. Counsel for the Defendants has submitted that the Claimant has not addressed the implication of the signature being witnessed by a Justice of the Peace and that such evidence is prima facie evidence that the agreement for sale was in fact signed by Mr. Palmer. However, it is important to note counsel's own argument that, the evidence to which he points is prima facie and not conclusive. That is rebuttable evidence which can

be displaced with cogent evidence to the contrary. It is my view that such evidence has been produced on the evidence of Ms. East.

[87] This is also against the background as I noted earlier that there is no evidence identifying this Justice of the Peace or from this Justice of the Peace challenging Mr Palmer's evidence and Ms. East's findings. Additionally, the Defendants have chosen not to call as a witness any of the other signatories to the questioned document.

[88] Therefore, the available evidence in relation to the questioned document is that of Ms East the hand writing expert, Mr. Palmer himself and that of the Defence witness Mr. Evans. I find that the evidence of Mr. Evans that Mr. Palmer took the document away to sign and that the document was witnessed by a Justice of the Peace is less than convincing. This Justice of the Peace was never produced to the court. Incidentally, the question also arises as to how Mr. Evans knows that it was a Justice of the Peace that witnessed Mr. Palmer's signature in circumstances where he was not present at the witnessing of Mr. Palmer' signature.

[89] Essentially, I accept Mr Palmer and Ms East as witnesses of truth on this issue. I reject the evidence of Mr. Evans on this issue. Consequently. I find that The Claimant has established on a balance of probability that he did not sign the questioned document but that his signature was in fact forged.

[90] However, I am not prepared at this stage to say who is in fact responsible for the forgery. That is whether it is Mr. Evans, an agent of Caricom or a third party. The fact is the evidence is not sufficient for me conclude whose handwriting is responsible for the forged signature or at whose instance the signature was forged.

[91] However, I can conclude and do conclude that the Defendants cannot rely on this document as a basis for their contractual relationship with Mr. Palmer. In light of this fact I find that the agreement between Caricom and Mr. Palmer in relation to A9 was not for the purchase of a shell pent house apartment.

Whether the Defendants by Agreement Incurred Expenses Customizing Mr. Palmer's Apartment.

[92] It is my view that Mr. Palmer has brought more convincing and credible evidence regarding the customization of A9. Such evidence are receipts and invoices dated between April 2014 to May 2015.These evidenced the cost of material and labour for work done. These include, labour cost and material, to install dry walls for lower level and upper level; to install upper and lower hard wood floors and hand rails; to pipe the master bed room in the loft, which consist of Jacuzzi, shower, toilet and face basin; to paint walls and ceilings; tiling in the bathrooms ground and upper floor; granite job in bathrooms upper and lower floor; to install upper and lower floor closets; stair case and loft.

[93] Additionally, Mr Palmer also relies on supporting evidence of Mr Deva Harris, Mr Samuel Brisset, Mr Patrick Anthony Powell and Mr. Patrick Holness, who all testify that they were contracted by Mr Palmer to performed work on his apartment. None of these witnesses were discredited on cross examination. They all strike me as witnesses of truth. Mr Evans states that, the receipts by the Claimant do not show the material needed to erect a loft, which ought to have included treated lumber with brackets and plycem board (waterproof/weatherproof board,) However there is in fact a receipt from Mr. Owen Shaw to install 600 square foot of hardwood floor and hard post hand rail.

[94] Additionally, I find the letter dated the 24th of March 2015 written by Attorneys-at-Law Williams Mckoy and Palmer, the Defendant's Attorneys-at-Law to Mr. Palmer's attorney-at-law very instructive. At paragraph four (4) of that letter, in an offer for "full and final settlement", the proposal was for Caricom to repay to Mr. Palmer "on or before the 31st of July 2015 the sum of $10,000,000 plus interest at 12% from September 2014, being the date the final amount of $10,000,000 was paid by Mr. Palmer". I note also that it states that it was "full and final settlement of all matters touching and concerning 7 Dukharan Avenue Kingston 8 and specifically Strata Lots 9 and 12"

[95] First of all, the Attorneys-at-Law would have been acting on the instructions of their clients, the Defendants. In this proposal there is no mention of any monetary or financial obligation on the part of Mr. Palmer. Essentially, if there was any such obligation. I would expect to see the mention of the outstanding sums for the customization and any

outstanding balance for B12, and either the mention of a set off, or that the Defendants were willing to forego the sum. Therefore, it is my view, a view also posited by counsel for the Claimant that this is significant factor that affects the credibility of the defence.

[96] I also examined the letters from the 1st Defendant to the Claimant. A letter dated December 8, 2014 from the 1st Defendant, refers to the November 19th, 2014 correspondence. It states that "Formal and permanent possession has not been bestowed" upon Mr. Palmer "until final settlement of all outstanding, closing cost inclusive of Stamp Duty, full transfer cost in addition to legal fees". It quoted the precise sum to be $2,750,000.00. The letter stated that the information was highlighted to him in the letter of November 2014. The letter also indicated that he is prohibited from "executing any further personal modification and or addition unless full payment of all outstanding fees". In this correspondence also there is no reference to customization or outstanding sums. I also take note of the closing paragraph. It also spoke to Mr. Palmer alteration without permission. It spoke specifically to erection of bathroom window, internal floor structure, erection of additional powder room on the balcony area without authorization.

[97] When I examine the certificate of title Volume 1482 folio 693, that relates to apartment B12 I observe that this property was transferred to Mr. Maro Sparkes on the 12th of August 2015. Therefore in the absence of any evidence to the contrary, such as any correspondence between Caricom or Mr.Evans or Ms Jaipaul and Mr Palmer in relation to the inability of Caricom to complete the agreement for the sale of B12, and the diversion of the sums paid by Mr. Palmer to satisfy any obligations of Mr. Palmer to Caricom, I find that it is reasonable for me to infer that up to December 2014 the contract in relation to B 12 was still intact. Inferentially, I find that the aforementioned correspondence in relation to outstanding obligation on the part of Mr. Palmer in relation to closing cost relates to A9. Against this background I notice that the only outstanding sum referred to by Caricom in relation to Mr. Palmer is the closing cost. The precise sum was earlier mentioned.

[98] I now turn to the final paragraph of the letter dated December 8th 2014. It states that "Caricom Home Builders Limited will categorically reiterate that all previous construction related expenses which are currently being undertaken by Mr Dinsdale Palmer and or his agent during the erection of a ground floor powder room , and the ***attic***

floor is being ***executed solely at the expense of Mr Palmer and his agent*** and at no time did Caricom Home Builders Company Limited and its agent ever indicate or gave any undertaking that any consideration refund or rebate would have been executed by us. This being said, Caricom Home Builders Company Limited is hereby indemnified by Mr. Dinsdale Palmer and or his agent from all future financial obligations and Cost which may arise from his completion works at the above-mentioned premises".

[99] The impression I form from the afore-mentioned correspondence is that the position of CARICOM as at that date was that the only remaining obligation they had towards Mr Palmer in relation to A9 was to formally hand over possession but they needed him to settle the closing cost mention earlier in order to do so. In fact, the letter made mention, that they were not a part of any further work being undertaken by Mr. Palmer on A9. I also pay particular note to the fact that the correspondence mentioned the erection of the attic floor.

[100] Mr. Evans agrees on cross examination that the attic is another name for the loft. Therefore, I find that in this correspondence there is acknowledgment that Mr. Palmer was engaged in the construction of the loft for which the Defendants were not taking any responsibility. This stands in stark contradiction with the evidence of Mr Evans that the Defendants undertook customization work on behalf of Mr. Palmer which included the construction of a loft.

[101] Therefore, when I examine the evidence of Mr. Evans, his account in relation to the customization work on A9 by Caricom appears quite incongruous to the circumstances depicted in the letter. Additionally, it also appears inconsistent with the Statement of Case of the Defendants that "The 1st and 2nd Defendants will say further that full payment on the shell unit was never settled and remains outstanding". If that were in fact so I would have expected Mr Evans to mention this in his communications to Mr. Palmer in his letters of November and December 2014 when he was mentioning outstanding fees.

[102] As I indicated earlier, the contents of the letter of December 8th 2014, also contradicts Mr. Evans' evidence that Caricom erected the loft (attic). Additionally, I identify further inconsistencies in his evidence. He maintained that the 1st Defendant

constructed all seven lofts including the Claimant's loft. Furthermore, his evidence is that to his knowledge, the apartment was completed in September 2014. The completion he is talking about is the customization. Nevertheless, the receipts and the invoices that he has exhibited with the exception of three, span the period of December 2014 to March 2015. The exceptions I refer to are three invoices from "Unique Living" which are for the period September 2014. These are for, Hinge and Plate for $6,558.95; Eight (8) showers and Tub, and 8 Temp valve for $128, 910.44, and for 7 showers only, for $77,472.50

[103] A rational approach to the evidence would suggest that, any receipt evidencing items purchased after September 2014 are unrelated to Mr. Palmer's apartment. This is in light of the fact that Mr. Evans states that practical completion was in September 2014.He also agrees that Mr Palmer was given permission to carry out work in his apartment. However, he disagrees this was in June 2014. He is contending that it was in 2015.However the letters and e-mails from the Defendants indicate that Mr. Palmer was engaged in work in the apartment at least by November 2014. In any event all the receipts and invoices produced by the Defendants are for a quantity of items with no supporting evidence of installation of any of these in A9.

[104] In fact, even as it relates to the items purchased in September 2014, which are for seven showers, and eight tubs, notwithstanding, the evidence of these purchases there is no evidence that A9 contained 8 tubs or seven showers or that any of these items were installed in A9. In any event having rejected the evidence of Mr. Evans that the contract for sale in relation to A9 was for a shell apartment, I find that that under the contract the bathrooms should have been refitted with basic items such as showers and or tubs, toilets and basins**.**

[105] Mr**.** Evans states that workmen were working on the site constructing the apartment complex 10 hours a day. In spite of this assertion, not one single workman has been brought to say that he did work customizing A 9 on behalf of Caricom. In fact, Mr. Evans has indicated that one person who was working for Caricom gave evidence on behalf of Mr. Palmer. Mr. Brisset did testify that at the material time that he worked for Mr Palmer on A 9 he was also contracted to Caricom. Mr. Evans disagrees that, the painting that was done in A9 was done by Mr. Denva Harris employed by Mr. Palmer. He disagrees that the electrical work in Mr. Palmer's apartment was completed by Mr.

Samuel Brissett employed by Mr. Palmer. Nonetheless he has not brought anyone to say they performed these jobs on behalf of Caricom. I also take account of the following factors:

(i) The original agreement was reduced to writing.

(ii) The 1st Defendant is a company.

(iii) There have been several written communications between the Defendants and the Claimant during the course of their contractual relationship.

[106] Therefore it is my view that if there was in fact an agreement for customization, there would have been some documentary evidence in that regard. That is in relation to the proposed work and an estimate of the cost. Additionally, having completed the work I would expect that a Bill for the work would have been sent to Mr. Palmer with a demand for payment. Therefor I find on a balance of probability that Caricom did not expend any money to customize A9.

Whether the Claimant is Entitled to the Return of moneys paid to clear the Mortgage

[107] Mr. Evans has not denied that Mr. Palmer did in fact pay these moneys for the mortgage on behalf of Caricom. However, Mr. Evans contends that there was no agreement that it was a loan or that it should be returned. In order for me to make a determination on this issue I must first determine whether the moneys were paid as a gift for Caricom it was paid under terms or arrangements, with the expectation that it would be repaid. Mr Evans has denied that it was loan as there was no agreement that it was. However, he has pointed to no other contractual basis on which Caricom would be entitled to retain the sums.

[108] He has neither alluded to nor established any consideration moving from Caricom or himself or Ms. Jaipaul in relation to the sum. Additionally, in light of the evidence that it was a business relationship that existed between the Claimant and Caricom, there is no basis for me to find, neither is it being alleged, that this 2 million dollars was a gift. Additionally, Mr. Evans has pointed to no obligation on the part of the Claimant Mr. Palmer to Caricom in relation to this sum.

[109] The evidence of Mr. Palmer is that:

> He learned that $2M was needed to pay off the mortgage on the Penthouse for the Splinter Title to be released as well as $1,006,185.00 for stamping and registration fees for said apartments. An agreement was reached between the parties whereby he agreed to pay off the mortgage owing on the penthouse and the 1st Defendant would be responsible for stamping and registration costs for both apartments. He has produced documentary evidence of these payments.

[110] Mr. Palmer's evidence of the purpose for these payments was not challenged. Therefore, I find that there was a contract between the parties. Mr Palmer was to pay the 2 million dollars to clear the mortgage and the Defendant was responsible for the stamp duties and registration fees for both apartments. Therefore, having paid the 2 million dollars, and also the stamp duties, the 1st Defendant was obligated to repay him the 2 million dollars. Consequently, I find that Mr. Palmer is entitled to the return of this sum of the two million dollars.

Whether The Contract For B12 was breached by the 1st Defendant

[111] Mr Evans has not denied that Apartment B12 was sold to a third party in August 2015. By virtue of that act the subject matter of the contract was no longer available to the Claimant essentially terminating the contract. The issue for me to be determined at this stage is whether this termination is tantamount to a breach. This depends on whether the1st Defendant had by that time acquired a right to terminate the contract.

[112] Mr. Dunkley in his submission suggests that the contract was contingent on the purchase price being approved by the 1st Defendant's mortgagees. However, I find that there is no evidence supporting this contention. Mr. Evan's evidence is that he was not even present when this contract was formed. There is no evidence that this information was conveyed to Mr. Palmer at the time of the formation of the contract.

[113] On the evidence of Mr. Evans this issue arose after the formation of the contract. Therefore, the next question is whether the event can be construed as giving rise to a frustration of the contract.

[114] A contract is considered to be frustrated where supervening event occurs, after the formation of the contract which makes further performance impossible, or makes performance under the contract so extremely different from that which was envisaged by the parties that it would be unjust for the contract to continue. (See, ***Robson -v- Premier Oil and Pipe Line Co Ltd*** [1915] 2 Ch 124; ***BP Exploration Co (Libya) Ltd -v- Hunt (No.2)*** [1976]1WLR 788; ***Lauritzen AS -v- Wijsmuller BV (The Super Servant Two)*** [1990]1Lloyd's Rep.)

[115] Mr. Evan's evidence is that the directive he received from the Mortgagee was that the "remaining apartment" should not be sold for less than 15.5 million dollars. This directive was received in January 2015. However, the evidence indicates that the contract with Mr. Palmer in relation to B12 was prior to September 2014 and that payment was completed by September 2014. In arriving at this conclusion I based my findings on the admission of the 1st Defendant's attorneys –at – law in their correspondence dated the 24th of March 2015 to the Claimant's attorney –at- law with regards to the proposed settlement It states that the 14th of September was the date, the final amount of the $10 ,000,00 was paid**.** Having found that the contract with Mr. Palmer had been formed prior to the directive of the Mortgagee, I find that B12 would not fall in the category of "remaining apartment." Without even the necessity to make a determination as to whether the directive of the mortgagee is sufficient to amount to frustration, I find that the directive did not relate to the contract for B12. Therefore, the 1st Defendant did not derive the right to terminate the contract for B12.Consequently the termination amounted to a breach.

<u>Whether The Claimant should recover the full contract price of B12</u>

[116] I find that Mr, Palmer has produced supporting document in relation to his claim that he paid $10,000,000 for B12. He produced evidence of payment of $6,000,000 on one occasion and $200,000 on another occasion, and several sums totalling 2 million dollars, inclusive of a payment of $1,000,000 to KSAC. I also take into consideration the Email signed by Ms. Jaipaul on behalf of Caricom admitting to a loan by Mr. Palmer to

Caricom. Additionally, there was reference on the documents produced, to “apartment on Block B”. Two of these bear Caricom’s seal. That is one with a sum of $200,000 and another with a sum of $2,000,000. The Defendants have accepted that $ 6,000,000 was paid as deposit. Additional the fact that the document with the sum of $2,000,000 and 200,000 bear Caricom’s seal is sufficient for me to find that t there is sufficient evidence of payment of at least $8,200,00 to Caricom

[117] However, I also examine this evidence against the proposed settlement of the Defendants. In that proposed settlement they offered to repay Mr. Palmer $10,000,000 for payment on B12. I find that if Mr. Palmer’s payment had fallen short of the $10,000,000 on B12 the Defendants would not have proposed to repay that sum. Consequently, I accept the evidence of Mr. Palmer that he paid the full purchase price of $10,000,000 of Apartment B12. I reject the evidence of the Defendants that Mr. Palmer did not pay the full sum of $10,000,000. Essentially I find that Mr. Palmer is entitled to return of the full purchase price of $10,000,00.

[118] On the totality of the evidence in relation to the issues discussed the case of Mr Palmer appears more probable and credible. He and his witnesses appear more convincing, in both demeanour and viva voce evidence on all the issues. At no point were they discredited on cross examination.

[119] I find that Mr Evans was less than convincing. The case of the Defendants was fraught with unresolved inconsistencies and contradictions. While I find that the evidence of the Claimant falls short of proof of forgery against the 2nd Defendant in his personal capacity I find that the document, that is the undated contract, on which he seeks to rely as manager of the Defendant Company, in its defence and counterclaim against the case of the Claimant was in fact forged**.**

[120] Therefore, as it relates to liability I hold that Mr. Palmer has discharged his burden on a balance of probability that the 1st Defendant Caricom has breached their contractual obligation to him. Additionally I find that the Defendants have failed to establish that the Claimant has breached any contractual obligation to them in relation to the customization of A 9.

[121] Consequently, I find that the 1st Defendant is liable in damages to the Claimant Mr. Palmer for breach of contract. Additionally, I find that the Defendants have failed to establish that they are entitled to a set off of $7,500,000 which they claim in relation to A9. Therefore I enter full judgment for the Claimant .

Damages

[122] In light of the fact that Apartment B 12 has been sold to a third party and the fact that the Claimant has admitted on cross examination that it was monetary compensation he was interested in I find that damages rather than specific performance is the most appropriate remedy for the Claimant.

[123] The general principle for the assessment of damages is compensatory. That is the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one for sale of land, this principle normally leads to assessment of damages as at the date of the breach. This principle was expressed in the case of **Johnson v Agnew,** [1979] UKHL J0308-2. In that case it was further stated that:

> "In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. (See the Judgment of **Lord Wilberforce)"**

[124] Counsel for the Defendant contends that The Claimant should not be awarded the sum claimed for special damages in relation to the Claim for loss rental as this has not been proven. He further suggests that the award should be nominal.

[125] However, while I agree with Counsel for the Defendants that Mr Palmer has fallen short of proof in relation to his claim for Special Damages for intended rental of apartment B12 or in relation to expenses he incurred for rental as a result of late delivery of A 9, I do not share his view that in the circumstances only nominal damages should be awarded. I do find that Mr Palmer's evidence is lacking in proof in relation to the Special Damages

that he is claiming for loss of rental income of Apartment B12 or expenses he incurred for rent in relation to late delivery of A9. It is trite Law that Special Damages must be specifically proven except in circumstances such as in the informal sector where it is unlikely that any receipts would be generated (See **Desmond Walters v Carline Mitchell**, (1992) 29. JLR 173)**. (Abbas (Kamran) v Carter (Sheron)** [2016] JMCA Civ 4) As I have earlier indicated, Mr. Palmer has failed to produce any evidence of actual or proposed rental. Neither has he provided any basis for me to depart from the application of the general principle in relation to the assessment of special damages. Therefore he cannot recover these sums for special damages that he claims.

[126] Nevertheless, as Ms Senior Smith correctly submits, the normal measure of damages in relation to breach of contract for sale of land is the difference between the contract price and the market price of the property on the date of the breach. Case law also suggests that the price at which the vendor resells the property is sometimes accepted by the Court as prima facie evidence of the market value of the property (See the case of **Johnson v Agnew Supra**)**.** This is not to say that where the resale price is lower than the actual market price that the court will rely on the resale price to reduce the normal measure of damages**. (See Brading v Mc Neil** [1946] CH 145

[127] Where this evidence of the resale price is not challenge as in the present case then that price can be used as the basis of the assessment for damages. In the case at bar Mr. Evans admits that the apartment B12 was sold in August 2015 for 1.5 million dollars. The difference between the purchase price and the contract price would be 5 million dollars. I find that the date the contract was lost is the date when it was sold to the third party Mr. Scott. Therefore In light of the fore going discussion I make the following orders.

ORDERS

[128] I enter judgment for the Claimant.

[129] I make no order for Set off in favour Defendants.

[130] **Damages:**

Damages are awarded to the Claimant as follows**:**

(i) (a) General Damages for the breach of contract for

Apartment B12 $ 5,000,000

(b) Actual expense/ Losses of purchase price paid $ 10,000,000

_____

Total $ 15,000,0000

(c) Interest at the rate of 6% from the 12 of August 2015 to the 6th of March 2020.

(ii) The sum paid for mortgage payment on A9 that is $ 2,000,0000 is to be repaid with interest at the rate of 6% from the 12 of August 2015 to the 6th of March 2020 to the Claimant.

(iii) Cost to the Claimant against the 1st Defendant to be agreed or taxed.