

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2017/0154**

Between

Eustace Nisbett

Claimant

-and-

Nevis Housing and Land Development Corporation

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. Patrice Nisbett of counsel for the claimant

Mr. Terrence Byron of counsel for the defendant

2020: July, 21st
August, 7th (Written Submissions)
December, 1st

JUDGMENT

- [1] **Moise, J:** This is a claim for breach of contract. Mr. Eustace Nisbett claims against the Nevis Housing and Land Development Corporation (NHLDC) for orders for specific performance as well as orders for damages, loss of earnings/commercial profit, damages to stock and machinery and profits for the rental of premises which were subject to a lease with an option to purchase. I have determined that the claimant is entitled to an order for specific performance of the lease agreement and for damages for breach of contract. He is also entitled to enforce the option to purchase the premises as was provided for in the lease agreement. The defendant is to also pay the cost of these proceedings. These are the reasons for my decision.

The Facts

- [2] The subject matter of this claim is a parcel of land situated at Prospect Industrial Site and registered in Book 51 Folio 31 of the Register of Titles in the Nevis Circuit. The evidence suggests that the property in question had been leased by Mr. Nisbett's family for in excess of 30 years. This

lease was granted by the NHLDC or its predecessors and continued up until sometime in 2013 when it was unilaterally terminated by the NHLDC. It is not disputed that the claimant's father operated a business on the premises in which he manufactured furniture. Mr. Nisbett recalls working with his father in his furniture shop on the premises for many years. He states in his witness statement, and I accept this as proven, that his father died in 2008 and his family continued to operate and sublease the building which had been erected on the premises.

- [3] On 28th September, 2012, Mr. Nisbett entered into another lease of the premises with an option to purchase. At that time, the NHLDC recognized that there were repairs to be done to the building and agreed to allow for Mr. Nisbett to undertake those repairs at his own expense. It was therefore agreed that a 6 month moratorium would be placed on the lease payments in order to offset the cost of repairs. By way of letter dated 28th September, 2012, the then chairman of the NHLDC wrote to Mr. Nisbett stating as follows:

"We acknowledge receipt of your letter dated 28th September, 2012. Kindly be advised that your request to lease and purchase the property is approved with the following conditions:

- *You may proceed with the repairs and the cost incurred will be deducted from your lease payments;*
- *We will grant a 6 month grace period with regards to the lease payments while the building is being repaired."*

- [4] It was Mr. Nisbett's evidence that at the time of his receipt of this letter, he was scheduled to travel to the United Kingdom to further his education. He was however, substantively, the General Manager of the NHLDC on study leave. He approached a gentleman by the name of Gavin Clarke of Yuko Construction, who expressed some interest in leasing a portion of the building to operate his own business. They agreed to enter into a sublease for half of the top section of the building as well as two storerooms. They agreed on a price which was mutually acceptable.

- [5] Exhibited at trial was a letter dated 13th December, 2012 from the then acting General Manager of the NHLDC to the claimant stating that *"we are pleased to offer you a lot of land at Prospect Estate*

(Prospect Industrial Site) measuring 23,837 square feet, for the purpose of establishing a furniture manufacturing and general outlet business.” This lease was said to extend for a period of 20 years at a monthly payment of \$496.00, for which a six month moratorium was granted, during which time the claimant was to effect repairs to the building. The letter also indicated that there was an option available to the claimant to purchase the lot during the period of the lease. In order to exercise that option, the claimant was to pay a deposit of \$12,800.00 and quarterly payments of \$5,756.36. Attached to this letter was a survey plan which outlined a description of the property. The claimant was to accept this offer by 13th March, 2013 and did so by letter dated 18th December, 2012.

- [6] In his witness statement, Mr. Nisbett stated that in December of 2012, whilst at home in Nevis during the Christmas recess, he made arrangements to activate his option to purchase the premises by making an initial deposit of \$20,000.00 towards the purchase price. On 17th January, 2013, the then acting General Manager wrote to the claimant confirming the deposit and advised that the balance owing on the sale of the property was \$107,927.60 payable in quarterly installments of \$5,756.36. Given the amount paid by the claimant, the letter indicated that the next quarterly payment was 17th September, 2013. The letter also stated that this price was agreed to by the board of directors of the NHLDC.
- [7] The evidence suggests that at that time, Mr. Nisbett was also engaged with the NHLDC for the sale, to the corporation, of property belonging to his father's estate. As such, the deposit of \$20,000.00, towards his own lease with the corporation was made by way of an internal transfer and not necessarily a direct deposit of that amount to the NHLDC. That contract for the NHLDC's purchase of property belonging to Mr. Nisbett's father's estate was subject to litigation and a judgment was delivered by this court on 27th February, 2020. I will address the implications of that decision and its bearing on the present case later on in this judgment, as the defendant has argued that the outcome of that case leads to a failure on the part of Mr. Nisbett to properly exercise his option to purchase under the terms of his lease.
- [8] Mr. Nisbett went on in his evidence to state that he returned to the United Kingdom in January, 2013 and that there was also a general election held in Nevis in that month. A change of government brought about a change in the chairmanship of the NHLDC. According to legislation, the Minister under whose portfolio housing and land development falls is ex officio chairman of the

board. There then existed, according to Mr. Nisbett, a rather more acrimonious relationship between himself and the new chairman, Hon. Alexis Jeffers.

[9] Mr. Nisbett also realized that he received no payments towards the sublease of the premises by Mr. Clarke. Upon enquiries, he was informed by Mr. Clarke that he had received a letter in early 2013 demanding that he vacate the premises. Mr. Clarke stated to Mr. Nisbett that he had met with Minister Alexis Jeffers, who instructed him that he should make no further payments to Mr. Nisbett. On 12th July, 2013, Mr. Nisbett received a letter from Mr. Dexter Boncamper, the then manager of the NHLDC, informing him that his lease was being terminated and that a new lease was being issued to Mr. Clarke directly. In fact, the evidence suggests that this lease to Mr. Clarke was signed in April of 2013; a full 3 months prior to the termination of Mr. Nisbett's own lease.

[10] Mr. Nisbett states that he immediately replied to that letter and informed Mr. Boncamper that the property had been leased to his family for approximately 30 years and that he was operating under a purchase agreement which was already activated. He states that he received no response to that letter and therefore sought an appointment with Mr. Boncamper, with whom he met in August or September of 2013. During that meeting, Mr. Nisbett was informed that Mr. Boncamper was not aware that Mr. Nisbett had leased the building from the NHLDC, nor that it was being sublet to Mr. Clarke. This somewhat contradicts the express content of Mr. Boncamper's letter of 12th July, 2013, in which he stated that his express intention was to terminate the lease. It was during that meeting that Mr. Boncamper requested the claimant's file in order to make further enquiries. At that point Mr. Boncamper revealed that his letter to the claimant was based on instructions that he had received. He informed Mr. Nisbett that he received a call from the Cabinet of the Nevis Island Administration instructing him to write Mr. Nisbett and advise him that his agreement was being cancelled.

[11] Mr. Boncamper corroborated much of this aspect of Mr. Nisbett's evidence. He suggested that he knew of no decision of the Board of Directors to terminate the lease agreement with Mr. Nisbett, prior to this letter being issued. His evidence was that the board only met after he had placed Mr. Nisbett's concerns before it. The outcome was however the same as had already allegedly been determined by the Cabinet of Ministers.

[12] Mr. Nisbett stated that on 19th December, 2013 he paid a further \$5,000.00 towards the purchase price of the sale of the land. It was his evidence that the cheque was eventually returned to him on the orders of Minister Jeffers. He states that no explanation was given to him as to why this cheque was returned. Despite further efforts to address the issue, Mr. Nisbett was unsuccessful in getting the NHLDC to fulfill its end of the bargain. He therefore commenced this action in court. However, by that time he had stored a generator, mill saw blades and an assortment of building supplies and materials in the upstairs portion of the building. It was his evidence that there was completed carpentry and carpentry in progress in the building as well as a large compressor machine and spraying equipment. He stated that in the lower floor of the building there was also a mill saw and other tools stored. It was his evidence that whilst he was able to sell the smaller tools, the mill saw remained as it was a specialized tool. It is now not in good working condition. A large portion of the woodwork downstairs was destroyed by termites.

[13] The defendant led evidence from Mr. Dexter Boncamper, who is the current General Manager of the NHLDC. He acknowledged that at the time of the lease agreement between Mr. Nisbett and the NHLDC, he was not the General Manager. Mr. Boncamper therefore expressed the view that he could not speak to the various correspondences and decisions taken by the Board of Directors during that time. However, Mr. Boncamper's evidence was that at the time of the lease agreement, the NHLDC was in fact not the owner of the property which it agreed to lease to Mr. Nisbett. The property was registered in the name of the crown. However, the evidence suggests that on 22nd January, 2013 a certificate of title to the parcel of land was issued to the NHLDC. This was on the basis of a crown grant signed by the Deputy Governor General of Saint Christopher and Nevis on 19th December, 2012.

[14] In so far as the evidence of this crown grant is concerned, I pause to note that Mr. Byron, on behalf of the defendant, seeks to rely on section 5 of the Interpretation Act which states that "***no deed shall be received in evidence in any proceeding, whether at law or in equity, in the State, unless such deed shall have been duly registered.***" Mr. Byron's argument is that a crown grant is a deed and given that the grant dated December, 2012, was not registered it is not admissible in these proceedings. However, in my view, this argument does not avail the defendant much. Without relying on the grant itself, there is no controversy in finding that a crown grant was in fact issued to the defendant. That much is admitted by Mr. Boncamper. By 22nd January, 2013, the defendant

had become the registered proprietor of the property, having obtained a certificate of title. In addition, Mr. Boncamper accepted that this process of obtaining legal title to the premises was undertaken for the express purpose of fulfilling the NHLDC's obligations to the claimant.

[15] In his evidence, Mr. Boncamper indicated that it was not unusual for the NHLDC to enter into agreements for the sale of crown lands. Although the NHLDC has a mandate to manage property registered in its own name, it was customary for the NHLDC to lease crown lands once approval was obtained from the Cabinet. In fact in cross examination Mr. Boncamper stated that the corporation also manages land on behalf of the crown. Even if the land was initially in the name of the crown, once the property is turned over to the corporation then it proceeds with the sale. He stated that "*Housing and Land*" would collect rent once the corporation had permission to lease and sell. The proceeds go to the NHLDC. By the time he became General Manager of the NHLDC on 3rd July, 2013, the corporation already had title to the lands which are the subject of this dispute. When asked by the court as to the purpose for obtaining title to the property in question, Mr. Boncamper admitted that this grant was sought for the express purpose of fulfilling the corporation's contractual obligations to Mr. Nisbett. This, in his view, would have been a rather normal course of the NHLDC to have followed.

[16] Despite this, the NHLDC has based its defence on the fact that it was not the owner of the property at the time it entered into the agreement with Mr. Nisbett. Mr. Boncamper states in his witness statement that he was advised that the agreement was void from its inception as the defendant had no power to enter into an agreement for the sale of crown land. He rejected the notion that Mr. Nisbett had paid the sum of \$20,000.00 towards the purchase price or any other sum at any other time. He states further that the document on which Mr. Nisbett seeks to rely states that the arrangements were subject to contract and therefore not an actual contract for the sale of the land.

[17] Before moving on to consider the legal arguments by counsel for the parties, I wish to address an issue which this court has had occasion in more recent times to comment on. It has become somewhat customary for public or quasi-public officials/corporations to appear before the court in an attempt to justify their actions on the basis of alleged decisions of the Cabinet of Ministers of the Nevis Island Administration. This justification is often not supported by any evidence of a cabinet conclusion or the minutes of the meeting during which the Cabinet allegedly came its conclusion. I

will repeat, as I have done in previous judgments, that I do not find this to be an acceptable way in which such evidence is to weave its way into the court process. Cabinet is a creature of the Constitution and the manner in which its decisions are to be communicated are prescribed therein. It would be wrong for public bodies to continue to place the court in a position to potentially impugn a decision of the Cabinet without any evidence that the Cabinet had ever acted in the manner put forward in the evidence. Likewise, if the Cabinet seeks to demand that the NHLDC terminates a lease agreement as in the present case, then it too must be careful to ensure that its decisions are properly communicate in accordance with the constitution and that due consideration is given as to whether it has the authority to demand such a termination in the first place. The notion that the General Manager of the NHLDC can receive a phone call “from the Cabinet” demanding that he terminates a lease agreement already entered into is a most troubling prospect.

The issues

[18] On the basis of the facts led in this case I have determined that there are 4 issues for the court to consider. These are:

- (a) Whether there is a valid lease agreement between the parties, with an option for the claimant to purchase the property; and if yes;
- (b) Whether the claimant has in fact exercised that option;
- (c) Whether the defendant was entitled to terminate the lease agreement and if not;
- (d) Whether the claimant is entitled to damages and an order for specific performance

Was there a valid lease agreement with an option to purchase?

[19] The defendant does not generally deny that the NHLDC agreed to lease the property to the claimant. In fact, Mr. Boncamper accepted that the basis upon which the NHLDC sought a grant from the crown for the property was to fulfill its obligations to Mr. Nsibett. He also accepted that it was common practice for the NHLDC to lease property registered in the name of the crown,

provided that certain internal conditions are met. The evidence also suggests that this particular parcel of land had been leased to the claimant's family for in excess of 30 years. However, the defendant seeks to deny this claim on two main grounds. Firstly, it is argued that the contract is void, given that the NHLDC was not the owner of the property at the time the lease was entered into and secondly, that the then acting General Manager had no authority to offer the land for lease to the claimant.

[20] In his written submissions, counsel for the defendant refers the court to section 4 of the **Conveyancing and Law of Property Act**¹ which outlines the requirements for a contract for sale or conveyance of land to be valid. The section states as follows:

No action may be brought upon any contract for the sale or other disposition of and or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him or her lawfully authorised.

[21] Counsel also refers to the case of **B.B Inc. v. Lewis Hamilton**² in which Thom JA noted that there were two requirements to be satisfied in order for there to be a valid agreement in accordance with the legislation. These are “***(i) the agreement must be in writing, or there must be some memorandum or note of the agreement in writing; and (ii) the written document must be signed by the party against whom the action is brought.***” Thom JA also highlighted 4 propositions relating to the requirements of the section. These are as follows:

(1) The agreement to be enforced need not be in writing. There could be a memorandum or note in writing which contains all of the material terms of the agreement.

(2) The memorandum or note need not be a document which was prepared to satisfy the statutory requirement, what is critical is that the memorandum or note must be in existence before the commencement of the action.

¹ CAP10.04 Revised Laws of Saint Christopher and Nevis

² GDACVAP2015/0035

(3) The agreement could be contained in several documents. Where the writing relied on consists of more than one document, but only one document is signed by the defendant or on his behalf, then if the document that is signed by the defendant contains some express or implied reference to the other document(s), oral evidence is admissible to identify the other document(s) and they may be read together: Timmins v Moreland Street Property Co Ltd.

(4) The signature need not be at the foot of the document or at any particular place, provided that it authenticates the document.

[22] Counsel for the defendant readily concedes, that the letters written to and by the claimant all amount to a written confirmation of the agreement between the parties. He however contends, that the letters do not contain some of the essential terms of the agreement in order for it be valid in accordance with the law. For one, he argues that given that the crown was the owner of the land at the time of the agreement, it had to have been a party to the contract, as the NHLDC had no authority to alienate land belonging to the crown. For that proposition counsel refers the court to section 7 of the **Nevis Housing and Land Development Ordinance**³. This section outlines the powers of the corporation which includes the power to ***“alienate land vested in the Corporation for agricultural, industrial and tourism or for other developmental purpose”*** and ***“to enter into such agreements and to do such acts and carry on such functions as are necessary for the carrying out of the objects of the Ordinance.”*** On that basis counsel argued most forcefully that *“it is clear from this section on the powers of the defendant that [it] has no power to alienate land not vested in it.”*

[23] Counsel also relies on the case of ***Pinekerry Ltd. v. Kenneth Needs (Contractors) Ltd***⁴ where the following was stated:

³ CAP4.01

⁴ (1992) 64 P&CR 245

“A vendor, who lacked any title to the land that he had contracted to convey, and also lacked any right to compel a third party to convey it, had neither power to convey the land nor to compel anyone else to. In the instant case, however well-founded the expectations of the vendor were that it would be registered as the proprietor and thus acquired the legal estate, they were not a sufficient basis for requiring the purchaser to complete the purchase beforehand. It followed that until it was registered proprietor of the land in July, the vendor was in default within the conditions of sale and that part of the appeal would be allowed.”

[24] On the basis of that authority counsel for the defendant argued that the defendant had no legal or equitable interest in the land at the time the contract was entered into and that the agreement must therefore be void as a result. I do not agree with that submission. In fact, it seems rather clear to me that the dictum referred to does not invalidate the agreement but rather seeks to indicate that the vendor could not force a third party to convey its property to the purchasers. The court also went on to make it clear that the vendor was in default ***“until it was registered proprietor of the land...”*** There is nothing in this authority to state that a contract for sale is in effect void on account of the fact that the vendor expected to become registered proprietor of the land at a future date.

[25] To my mind, the nature of the contract must be placed in its proper context. The contract is for the lease of the land with an option to purchase. The General Manager, who gave evidence at trial, accepted that the NHLDC has long embarked on the lease of property belonging to the crown. There was no dispute that this particular property had been leased to the claimant's father for in excess of 30 years. Mr. Boncamper also indicated that there is a process, which is endorsed by the crown, in which such properties are leased in this manner. Further, agreements to purchase land of this nature are entered into by the NHLDC on the understanding that it would seek a crown grant in order to fulfill its obligations. This had been reinforced by the crown's own willingness to grant title to the NHLDC for that very purpose.

[26] I can find nothing in the law which prohibits the parties from entering into a contract on the basis of an expected future event. Certainly, if the event does not materialize then the contract may be

frustrated or perhaps amount to a failure of consideration⁵. But that did not occur in this case. No one is attempting to demand that the crown, as a third party to the contract, conveys its property to the claimant. Mr. Boncamper accepted that the letter written to the claimant offering the land for lease appeared to have been a standard letter of the corporation and that a crown grant was sought and obtained for the express purpose of fulfilling the NHLDC's obligations to the claimant. Yet, having obtained title, the NHLDC seeks to rely on an overly pedantic legal argument to justify its unilateral breach of the agreement. I can see no reason not to demand that the NHLDC be called upon to fulfill its obligations in much the same way as any other person would be required to do.

[27] Counsel for the defendant also questions whether proper process had been followed in the NHLDC's decision to lease the land to the claimant. Counsel points the court to the Ordinance which states that the administration of the NHLDC is vested in its Board of Directors which comprises a chairperson, a vice chairperson and two other members. He states that all decisions of the NHLDC are to be under seal and signed by the Chairman. Whilst counsel acknowledges that the initial offer for the lease of the land was communicated by the then Chairman of the Board of Directors, he states in his written submissions that *"one is left to wonder, however, at the unseemly rush with which State property was being agreed to be handed to the General Manager of the NHLDC by the Chairman of the NHLDC without any price, without any valuation."*

[28] Counsel goes on to submit that *"the inadequacy of the Chairman's purported approval is compounded by the fact that on 13th December, 2012, the acting General Manager, Mr. Warner purports to write to the Claimant offering him the 23,837 square feet of land on terms and conditions set out in the letter which the claimant accepts on 18th December, 2012."* Counsel expresses some confusion in his mind as to whether Mr. Warner's letter was referring to the same parcel of land already referred to by the Chairman of the Board and, if so, whether Mr. Warner had any authority to make such an offer; despite the fact that there is clear correspondence which indicates that the Board of Directors had approved the agreement. For my part, I do not share counsel's confusion. To my mind the issues in this case are rather clear and unambiguous.

⁵ See Vincent Buckley v Eldora Hodge SKBHCV2012/0339

[29] Firstly, the property is one which had already been subject to contractual relations between the parties (or at least the claimant's father) for an extended period of time. That was way before the claimant ever became General Manager of the NHLDC. The claimant's father had occupied these premises for over thirty years; during which time he operated his furniture shop from there. It is not disputed that the claimant, or perhaps his family, had equipment located on the premises and continued to occupy even after his father's death. It is not that the NHLDC was seeking to alienate state land on a whim. I am of the view that the property had been occupied by the claimant's family for such an extended period of time, that the court is left in no doubt as to the purpose and propriety of such a transaction. In fact, on the contrary, I find it rather improper for the current administration of the NHLDC to have reneged on its agreement in these circumstances for no other reason than to lease the premises to someone else; who, by the way, had already sub-let from the claimant.

[30] Secondly, I find nothing odd about the letters of the Chairman of the Board and that of Mr. Warner. The Chairman had clearly indicated the approval of the lease and purchase of the property in September, 2012. Mr. Warner's letter of 12th December, 2012 appears to have gone into more detail concerning the terms of the lease and offer to purchase. Attached to that letter is a survey plan clearly outlining a description of the property in question. This letter required that the claimant accept the offer no later than 13th March, 2013. By letter dated 18th December, 2012 the offer was accepted. Mr. Boncamper in his evidence accepted that this appeared to him to be a standard letter written to lessees or purchasers of property by the NHLDC. He also accepted that it is standard practice to enter into such agreements and subsequently seek a crown grant for the purpose of carrying out the terms of the agreement. In a further letter written on 17th January, 2013 the purchase price of the property is clearly identifiable. To my mind, there is a valid agreement here, the essential terms of which are clearly outlined in the numerous correspondences between the parties.

Was the defendant entitled to terminate the lease?

[31] Having determined that there was a valid contract between the parties for the lease of the premises with an option to purchase, the court can find very little in the evidence to justify the defendant's termination of the lease agreement. In fact, the series of events which took place between

December, 2012 and July, 2013 has left much to be desired and is not the manner in which one would expect a quasi-public institution like the NHLDC to conduct its affairs.

[32] Mr. Nisbett's evidence, which was uncontroverted, was that in early 2013 he realized that his own tenant was no longer paying the rent to him. Upon enquiries, he was informed that Minister Alexis Jeffers had in fact instructed the tenant to cease any payments to the claimant. It is also uncontroverted that at that time, the Board of Directors of the NHLDC had made no decision to terminate the claimant's lease. By Mr. Boncamper's own admission, it was not until the claimant made direct enquiries to him were the issues placed before the Board of Directors. By which time the property had already been purportedly leased to Mr. Garvin Clarke of Yuko Construction. Mr. Boncamper claimed to have had very little knowledge of the issue but was only acting on the instructions of the Cabinet of Ministers. On 29th April, 2013 the then General Manager of the NHLDC wrote to Mr. Garvin Clarke offering the property for lease to him. Yet it was not until 12th July, 2013, that Mr. Dexter Boncamper, in his capacity as General Manager, wrote to the claimant informing him that the NHLDC was *"cancelling this agreement, based on the fact that Cabinet has approved lease for said area to Yuko Construction."* It is somewhat ironic that Mr. Boncamper could have referenced the cancelation of the agreement while the NHLDC continues to deny that there was a valid agreement in the first place. In addition, there was nothing in the letter to indicate that a decision to terminate the lease was made by the Board of Directors of the NHLDC. Having now obtained legal title to the premises I do not understand the NHLDC to be under any obligation to breach the terms of such an agreement at the behest of the Cabinet of Ministers.

[33] There is therefore nothing here to justify the cancellation of this lease. Without so much as any evidence of any decision made by the Cabinet, I am not prepared to find, on a balance of probabilities, that the Cabinet had ever made such a decision. In addition, regardless of the Cabinet's alleged decision, the NHLDC had a valid lease agreement with the claimant. Any decision to terminate the lease, whether by the Cabinet or the Board of Directors, would certainly amount to a breach of the lease agreement unless it could be shown that the lease was terminated for some valid cause or in keeping with the terms of the lease. I am satisfied that the defendant has presented no valid reason for the termination of the lease agreement and therefore stands in breach thereof.

Is the Claimant entitled to damages and/or specific performance?

[34] In the case of ***Ramsbury Properties Limited v Ocean View Construction Limited***⁶ Baptiste JA outlined the general nature of specific performance at paragraph 12 of his judgment. He stated as follows:

“With respect to specific performance, the following observations are pertinent. An order for specific performance is an order that an obligation in a contract be enforced by means of a mandatory injunction to that effect. Specific performance is a discretionary remedy; its grant or refusal remains a matter for the judge. The power to award specific performance is part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the common law remedies are inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy: Lord Hoffman in Co-operative Insurance Society Ltd v Argyll Stores Holdings Ltd. Specific performance is not a cause of action; it is an equitable remedy to a cause of action for breach of contract. Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right.”

[35] Further, in the case of ***British Virgin Islands Electricity Corporation v Delta Petroleum LTD***⁷ Ellis J noted the following:

“case law makes it clear that any case concerning specific performance will inevitably require a consideration of these issues which may be subsumed under three main categories:

- 1. Whether damages would be an adequate remedy***
- 2. Judicial discretion***
- 3. Nature of the Agreement”***

⁶ SKBHCVAP2011/0020

⁷ BVIHCV2015/158

[36] To my mind, although the claimant is entitled to some measure of damages, for the specific losses he has suffered as a result of the breach of this agreement, I am satisfied that an order for specific performance ought to be made to prohibit the defendant from reneging on the bargain it had lawfully entered into with the claimant. There are valid equitable reasons for coming to this conclusion.

[37] Firstly, the main issue which arises is the breach of the lease agreement itself. I am not satisfied that damages would be adequate to compensate the claimant as a result of this breach. The property had been leased to the claimant's family for over 30 years. It was his evidence that he desired to continue in his father's tradition in managing the furniture shop which remained on the premises for all that time. It was not denied that there was equipment on the premises; some of which were specialized equipment which could not easily be sold to mitigate against the loss suffered as a result of this breach. In addition to this, as I have also stated, the defendant's attempt to lease the property to the very person who had sub-let part of the premises from the claimant was rather unconscionable and inequitable. It was not that the property was desired for some measure of public use. But rather a decision had simply been taken to breach the agreement with no thought spared as to the effect of this breach. Not only am I satisfied that damages would not be adequate to compensate the claimant, but that judicial discretion should be exercised in a manner so as to rectify this unjust breach of the bargain between the parties. The nature of the agreement and the historical relationship warrants such an equitable intervention by the court.

[38] I am also satisfied that this would not have as great an adverse effect on the current occupier of the premises as he had already agreed to sub-let the property from the claimant prior to the defendant's breach, save for one issue. Mr. Nisbett states that he had agreed to a sub-lease of the premises to Mr. Clarke for \$2,000.00 monthly for a period of two years. He did not provide any documentation to show that this was the price of the lease. However, on balance I am satisfied this sub-lease was negotiated and agreed to. The lease agreement entered into by Mr. Clarke with the NHLDC demands a monthly payment of \$490.00. To my mind, Mr. Clarke has been paying this reduced amount for more than 7 years now. Given that the order for specific performance is one made on the basis of the court's equitable powers, consideration must be given to the effect this would have on a third party. Mr. Nisbett must therefore be entitled to specific performance subject

to the terms of the current lease with Mr. Clarke, who should revert to the status of a sub-lessee as was originally agreed.

[39] In addition, as it relates to the issue of specific performance, I will now turn to consider the effect that the decision of the court in case number **NEVHCV2018/0099** would have on the current proceedings. That case involved the very same parties to the current litigation. There the claimant brought an action seeking to enforce a contract between himself and the NHLDC for the sale of property belonging to his father's estate. He represented in that case that he was the registered proprietor of the property, when in fact he was not. It was established that the claimant was only one of two administrators in his father's estate. The court found that the claimant therefore had no standing to bring an action for the enforcement of the agreement in his personal capacity. To that end the case was decided on the issue of standing. Given some of the facts which emerged in that case, the court left open the question of whether the contract can be enforced by the estate, given some of the representations made by the then chairman of the NHLDC.

[40] The relevance of the court's findings in that case to the present, is that the claimant has argued that he has invoked his option to purchase the property by making a deposit of \$20,000.00 towards the purchase price. This was on the basis of an internal transfer of funds which at the time was thought to be owed to him by the NHLDC. Mr. Byron for the defendant argues that, based on the court's findings in **NEVHCV2018/0099**, the claimant's exercise of the option must surely fail. Despite the fact that this was not pleaded in the defence, I do find some merit in that argument; especially given the fact that the decision had only been handed down subsequent to the filing of the defence. On balance, the decision would mean that the \$20,000.00 transfer as a deposit towards the purchase of the property in the present case may now be called into question as an invalid transfer. I make no firm finding of fact in that regard. However, that is not the end of the matter.

[41] In examining the nature of the lease agreement, the court observes that the property was to be leased to Mr. Nisbett for a period of twenty years. The option to purchase is available to him throughout the entirety of the life of the lease. Therefore, even if his previous attempt to exercise the option may now be frustrated by the decision of the court in **NEVHCV2018/0099**, that option remains available to him as long as the lease subsists. I would therefore decline the invitation by the claimant to order specific performance to the extent of demanding that the property be

conveyed to him at this point. However, I would note that once he endeavours to exercise that option during the subsistence of the lease, then there is an obligation on the part of the NHLDC to fulfill its end of the bargain. After all, that was the very purpose of obtaining the crown grant in the first place.

[42] As it relates to damages, I am satisfied that the claimant is entitled to damages in addition to the order for specific performance. In his Claim Form he claims for Loss of Earnings/Commercial Profit as well as loss and damage to stock and machinery. However, the statement of claim does not particularize the stock which he claims to have had on the premises. It does however, plead that there was damage to his stock. At paragraph 22 of his witness statement he lists the items as a generator, mill saw blades, an assortment of building supplies and materials, completed carpentry and carpentry in progress, a large compressor machine and spraying equipment as well as a mill saw and other tools. He states that he was forced to sell the tools but the mill saw remained because it was a specialized tool. The woodwork which was downstairs the building was damaged due to termite infestation.

[43] Apart from this, the claimant does not present any further evidence in order to assist the court in determining what measure of damages ought to be awarded as a result of the items he claims to have lost as a result of the defendant's breach. In written submissions, counsel for the claimant conceded that there were no receipts available. He however, provides a list of the items together with a cost associated with each item. In total he claims that the claimant should be compensated the sum of \$25,000.00. However, to my mind, the claimant is not entitled to make up the evidence in closing submissions. Whilst the court appreciates the fact that a claimant may not always be in a position to provide invoices or receipts to prove the value of the items lost, there must at least be some basis upon which the court can assess the extent of the loss. That may very well be proven by providing some indication of the general value of an item of this nature discounted for its age and use. Nothing like this had been provided. I add also, that whilst the court is entitled to make a nominal award, this must be based on some premise. This is not a case in which the claimant is unable to provide some measure of evidence of the value of some of the items so that the court is not acting in a vacuum. It is the duty of the claimant to prove his case. I would decline to order special damages of this nature, even on a nominal basis, as the claimant has not sufficiently particularized this loss.

[44] However, I am satisfied that the claimant is entitled to loss and damages which arose as a result of his loss of earnings or commercial profit from the rental of the premises. The evidence suggests that he had already agreed to sub-lease the property to Mr. Clarke and that the NHLDC undertook not only to breach the agreement but to offer a lease directly to Mr. Clarke. It was Mr. Nisbett's evidence that Mr. Clarke had agreed to pay a rental sum of \$2,000.00 monthly for a period of two years, given that the area which he was renting at the time attracted a monthly rate of \$2,500.00. That evidence was not controverted in any way. I would therefore award the claimant the sum of \$48,000.00 in damages for the consequential loss of this contract which was caused directly by the defendant's breach. He also claims damages for other lost opportunities. I would decline to make such an award as this appears to me to be too remote in the circumstances.

[45] I note that the claimant also claims exemplary and aggravated damages. However, it is rather trite law that such damages are not available in claims for breach of contract, save in certain circumstances. As was noted in the case of *JASDIP Ltd v Cap Estate (St. Lucia) Limited*⁸ **"...it is a general rule that damages are not available for mental distress when a contract is breached. However, where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."** I am not of the view that the circumstances of the present case fall within the category of cases for which such damages may be awarded. I do appreciate that the claimant has pleaded that the property which was subject to the lease was occupied by his father for over three decades. There must have been some sentimental attachment to these premises. But that is not enough to place this case in one of the few categories of cases for which damages may be awarded for mental and emotional distress occasioned by a breach of contract. In any event, the court has now made an order for specific performance. This should be sufficient to address the clear wrong which was done to the claimant as a result of the defendant's breach.

[46] I therefore make the following orders:

⁸ SLUHCV2013/0066

- (a) That the claimant is entitled to the specific performance of the lease agreement for the parcel of land;
- (b) That the claimant is entitled to invoke the option to purchase in the manner prescribed by the lease agreement;
- (c) The defendant will pay damages to the claimant in the sum of \$48,000.00EC representing the losses suffered as a result of the breach of contract;
- (d) The defendant will pay interest on damages at the statutory rate from the date of judgment until the debt is paid in full;
- (e) The defendant will pay prescribed costs in accordance with the CPR.

**Ermin Moise
High Court Judge**

By the Court

Registrar