

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**GRENADA
GDAHCVAP2021/0011**

BETWEEN:

**DONALD BRIDGEMAN
(also called “Earl Gerald Bridgeman”)**

Appellant

and

HKZ INC

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Gerard St.C. Farara

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Ruggles Ferguson and Mr. Andre Thomas for the Appellant
Ms. Gennilyn E. Ettienne for the Respondent

2021: September 23;
October 22.

Interlocutory appeal – Elements of a valid contract – Offer and invitation to treat – Law applicable to advertisements for sale of a property – Section 4 of the Real and Personal Property (Special Provisions) Act – Requirements for an oral contract for sale of land to be enforceable by action before the courts – Section 24 of the Eastern Caribbean Supreme Court (Grenada) Act – Principles applicable to the grant of interim injunction – Whether there was a serious issue to be tried – Whether oral agreement pleaded by claimant – Whether the letter and receipt created a binding agreement – Whether there was part performance – Balance of convenience – Whether damages is an adequate remedy

HKZ INC (“the respondent”) commenced a claim against Mr. Donald Bridgeman (“the appellant”), seeking a ‘prohibitory injunction’ enjoining the appellant from selling or disposing of seven lots of land numbered 1,2,3,4,7,9 and 11 situate at Conception Village Housing Community at Grand Bras in the Parish of St. Andrew in Grenada (“the lots”), an order for specific performance, damages, interest and costs. The respondent applied without notice on 2nd March 2021 for an interim injunction to restrain the appellant from selling or otherwise

disposing of the lots pending the trial and determination of the claim. The interim injunction application was supported by the affidavit of Mr. Colville Andrew Bain ("Mr. Bain"), the manager of the respondent company.

The judge in the court below did not hear the respondent's interim injunction application *ex parte*. On 30th March 2021 the appellant, filed an affidavit opposing the interim injunction application contending, *inter alia*, that there was no serious issue to be tried between himself and the respondent and no prospect of the claim succeeding. In his affidavit, the appellant gave a very different factual account of what transpired with respect to his dealings with Ms. Ettienne, a lawyer, in relation to the property. He averred that there was never any agreement, written or oral, between himself and the respondent with regard to the sale and purchase of the lots, and that the payment of a 10 percent deposit to his attorneys, Franco Chambers, by Ms. Ettienne of Excelsior Law Firm on behalf of the respondent, which deposit was returned to Ms. Ettienne, did not give rise to a contract for the sale of the lots by him to the respondent coming into existence.

The learned judge granted the interim injunction against the appellant on 31st March 2021. By the order of injunction, the appellant was restrained from selling, conveying or otherwise disposing of the lots pending the trial of the claim.

The appellant, being dissatisfied with the decision of the learned judge, appealed. The appellant seeks to have the interim injunction order set aside. The respondent filed a counter-notice of appeal on 6th May 2021. The issues which arose for this Court's determination were (i) whether the learned judge erred in concluding that there was a serious issue to be tried; (ii) whether learned judge erred in holding that the balance of convenience lies in granting the interim injunction pending trial; (iii) whether the learned judge erred in holding that the appellant would be sufficiently compensated in damages should the claim against him fail at trial and; (iv) whether the judge's exercise of discretion in granting the interim injunction was plainly wrong.

Held: allowing the appeal; dismissing the counter-appeal; setting aside the order of injunction made 31st March 2021; and ordering that the respondent pay the appellant's costs of the appeal and in the court below, the costs in the appeal to be no more than two-thirds of the costs in the court below, and such costs to be assessed by a judge of the High Court if not agreed within 21 days, that:

1. The essential elements of a valid contract are trite. There must be an offer, an unconditional acceptance of that offer by another person, and there must be consideration flowing from the promisor to the promisee. To give rise to a binding agreement, the contracting parties must evince an intention to create legal relations with each other. Accordingly, where there is no intention to create legal relations, a contract does not come into existence.

Keith Garvey v Ricardo Richards [2011] JMCA Civ 16 applied; **Treitel Law of Contract** 8th Ed. 1991 Chapter Two pages 10-11 applied;

2. The law of contract draws an important distinction between an offer and an invitation to treat. The question as to whether a statement made by a person is an offer or an invitation to treat will depend primarily upon the intention with which it was made. An invitation to treat is an invitation for an offer to be made evidenced by an intention to be bound only upon acceptance of such an offer.

Financings Ltd v Stimson [1962] 1 WLR 1184 considered.

3. The law applicable to advertisements for sale of property turns on the intention of the maker of the advertisement. The respondent contends that the appellant's public advertisement of the lots at Conception Village for sale constituted an offer to the world at large, such that the appellant had evinced a clear intention to be bound, with no further bargaining being required, by an acceptance to purchase a lot or lots so advertised giving rise, upon payment of the deposit, to a binding contract for the sale. The respondent's line of argument in reliance upon the advertisement as constituting the offer is misplaced and incorrect as the advertisement was not an offer to the world, in the same way as the advertisement in the **Carlill v Carbolic Smoke Ball Co** case, but rather an invitation to treat. This is made clear from the nature and wording of the advertisement itself.

Carlill v Carbolic Smoke Ball Co [1893] 1 Q. B. 256 applied

4. It is well established so as to be trite law, that Section 4 of the Real and Personal Property (Special Provisions) Act ("the Act") contains two requirements for a contract for sale of land to be enforceable by action before the courts. The first is that there must either be a written contract for the sale of land or some interest in land or, where the contract is oral only, some memorandum or note in writing evidencing the essential terms of the oral agreement. The second is that the memorandum or written note evidencing the essential terms of the oral contract, must be signed either by the party being charged or by someone authorised to sign it on his behalf. Accordingly, where there is no written agreement between the parties for the sale of land, there must first be in existence an oral contract between the parties. The oral contract is the contract for the sale of the land and not the written memorandum evidencing its essential terms. It is that oral contract which, by virtue of section 4 of the Real and Personal Property (Special Provisions) Act, is then enforceable by action in the courts against the person to be charged.

Section 4 of **the Real and Personal Property (Special Provisions) Act** Laws of Grenada applied.

5. In this matter, the respondent did not plead nor does it rely on a written agreement for the sale and purchase of the lots. The respondent also does not plead in its statement of claim nor does it set out in the affidavit of Mr. Bain in support of the interim injunction application, the coming into existence and the terms of any oral agreement between it and the appellant for the sale of the lots. Instead, the respondent relies on its lawyers' letter enclosing payment of a 10 percent deposit on the purchase price for the sale of the lots and the receipt for the payment of the

deposit issued by the appellant's lawyers, as giving rise to a contractual obligation binding on the appellant for the sale and purchase of the lots. In this way, the respondent seeks to rely on these documents, not as constituting a sufficient memorandum or note in writing when read together evidencing the existence of a binding oral agreement for the sale and purchase of the lots, but as contracting documents by which an offer said to be made by the appellant by virtue of the advertisement of the lots for sale, was accepted by the respondent. However, the appellant's advertisement for the sale of the lots at Conception Village did not constitute an offer to the world for the sale of the lots such that the letter and receipt could be said to constitute acceptance of such an offer. This plank of the respondent's case was not pleaded and was not put before the learned judge on the application for interim injunction. This plank is also incongruous to the respondent's pleaded case in the statement of claim that it was it (the respondent) who made an offer to purchase the lots, which offer was accepted by the issuance of the receipt for payment of the deposit. Accordingly, it is unsustainable and not supportive of there being a serious issue to be tried. Moreover, the respondent having not pleaded the existence of an oral contract for the sale and purchase of the lots between it and the appellant, erroneously conflates and relies on the letter and the receipt as satisfying the requirement under section 4 of the Real and Personal Property (Special Provisions) Act for there to be a sufficient memorandum in writing signed by the person to be charged or by someone authorised on his behalf, in order for an oral contract for the sale of the lots to be enforceable by action before the courts.

Section 4 of the **Real and Personal Property (Special Provisions) Act** Laws of Grenada applied; **Nelson Lewis and Another v Dirk Burkhardt** [2007] ECSCJ No. 40, (delivered 28th March 2007) considered; **Barkworth v Young** (1856) 4 Drew 1) considered; **B.B. Inc v Lewis Hamilton** [2017] ECSCJ No. 88, (delivered 7th April 2017) considered; **Elias v George Sahely & Co (Barbados) Ltd** [1982] 3 All ER 801 considered.

6. The court's jurisdiction and power to grant injunctions, including interim injunctions, is provided for in section 24 of the Eastern Caribbean Supreme Court (Grenada) Act. The power is to be exercised in circumstances where it appears to the court or the judge to be just or convenient to do so. An application for an interim remedy must be supported by evidence on affidavit. It is settled law that in determining an application for an interim injunction, the court must first satisfy itself that there is a serious issue to be tried between the parties to the litigation. In determining whether there is a serious issue to be tried, the court or judge must investigate the facts of the matter as set out in the claim and affidavits, but only to the extent of ascertaining whether the applicant for the interim injunction has prospects of success which in substance and reality are shown to exist. If the court or the judge hearing the application concludes that there is no serious issue to be tried on the claim, that is the end of the matter and the application for interim injunction must be refused.

Section 24 of the **Eastern Caribbean Supreme Court (Grenada) Act** Cap. 336 of the Laws of Grenada applied; **American Cyanamid Co. v Ethicon Ltd** [1975] AC

396 applied; **Mungalsingh v Juman** [2015] UKPC 38 considered; **AMEC Properties Ltd v Planning Research Systems Plc** [1992] 1 EGLR 70 at 72 considered.

7. In determining whether there was a serious issue to be tried, the learned judge failed to consider what the respondent's pleaded case was and whether it disclosed a cause of action known to the law or permitted under section 4 of the Real and Personal Property (Special Provisions) Act. The learned judge, having averted to the provisions of section 4 of the Act in her decision, erred in treating the receipt acknowledging payment of the deposit as 'prima facie conclusive of the agreement between the parties' as it 'reasonably identifies the subject matter, that is, the lots of land forming part of the [appellant's] development.' In so reasoning and concluding, the learned judge completely ignored the requirement for a concluded oral agreement, and treated the receipt as a contracting document, when on the respondent's best-case scenario, the receipt could only be a memorandum evidencing some of the essential terms of a contract. Accordingly, in the absence of any pleaded oral agreement for the sale and purchase of the lots, the learned judge fell into grave error in concluding that there was a serious issue to be tried. This conclusion was plainly wrong as a matter of law and principle.

Choo Loi Poi and another v Donald Frederick [2020] ECSCJ No. 310 (delivered 15th September 2020) considered; **American Cyanamid Co. v Ethicon Ltd** [1975] AC 396 applied; **Carlill v Carbolic Smoke Ball Co** [1893] 1 Q. B. 256 considered.

8. In considering the balance of convenience, it is necessary to assess the potential harm to each party if the injunction is granted or not granted. Were the injunction not to be granted, the appellant would proceed to sell the lots and once disposed of, those lots would no longer be available to the respondent were it to succeed in its claim to enforce the alleged contract. Were the injunction to be granted preventing the appellant from disposing by sale or otherwise of the lots prior to the trial and determination of the claim, the appellant would be adequately compensated in damages if the claim were to fail. Furthermore, the judge's conclusion that the lots of land were to be considered as being 'unique' accords with the principle applicable to contracts for the sale of land, whereby it is accepted that damages are not an adequate remedy on the basis that each piece of land is unique. Assuming that there was a serious issue to be tried on the claim, the learned judge did not commit any error in holding that the balance of convenience lies in granting the interim injunction pending trial. Accordingly, the judge was correct in finding that damages would not be an adequate remedy for the respondent if it were to succeed in establishing its claim at trial to specific performance of the alleged agreement for sale of the lots.

Mungalsingh v Juman [2015] UKPC 38 applied; and **AMEC Properties Ltd v Planning Research Systems Plc** [1992] 1 EGLR considered.

9. The principles applicable to appellate restraint when dealing with appeals from the exercise of discretion by a judge of the court below, are trite and have been stated

and restated in several decisions of this Court. Accordingly, an appellate court will rarely interfere with the exercise of judicial discretion, and will do so only where it is shown that the judge erred in principle by failing to take into account relevant factors or gave too much or too little weight to relevant factors or took into account irrelevant factors and considerations or that as a result of the errors of fact or errors of principle his decision was plainly or blatantly wrong, such that it exceeded the generous ambit within which reasonable disagreement is permissible. Furthermore, an appellate court when considering whether the judge got it plainly wrong, must caution itself that it is impermissible to come to such a conclusion on the basis that the appellate judges would, on the evidence in the court below, have come to a different conclusion or would have exercised the discretion differently.

10. In the instant matter, the judge erred in concluding that there was a serious issue to be tried and ought to have concluded that the respondent had not pleaded the coming into existence of a binding oral contract for the sale and purchase of the lots between the appellant and the respondent, such as is necessary to satisfy the first requirement of section 4 of the Real and Personal Property (Special Provisions) Act. Accordingly, the learned judge committed a serious error of principle and misapplied or failed to apply the correct principles of law. It follows that the judge was plainly wrong in the exercise of her discretion in granting the interim injunction as sought by the respondent. This Court is therefore empowered to interfere with the judge's exercise of discretion in all the circumstances, and to set aside the order of injunction made on 31st March 2021.

Michel Dufour v Helenair Corporation et al (1996) 52 WIR 188 considered; **Beryl Isaac and others v The Grenadian Hotel (doing business as the Grenadian by Rex Resorts)** [2017] ECSCJ No. 299, (delivered 15th December 2017) considered; **Brantley and others v Constituency Boundaries Commission** [2015] ECSCJ No. 24, (delivered 5th February 2015) considered; **The Attorney General of Grenada and Another v Sebastian Isaac and Another** GDAHCVAP2015/0028 (delivered 20th June 2016, unreported) considered.

JUDGMENT

- [1] **FARARA JA [AG]:** This is an interlocutory appeal from the exercise of discretion by a judge of the High Court (“the learned judge” or “the judge”) granting an interim injunction against the Mr. Donald Bridgman (“the appellant”) on 31st March 2021 pending trial of the claim. By the order of injunction, the appellant was restrained from selling, conveying or otherwise disposing of seven (7) lots of land numbered 1,2,3,4,7,9 and 11 (“the lots”) owned by him and situate at Conception Village Housing Community (“Conception Village”) at Grand Bras in the Parish of Saint Andrew in Grenada (“the property” or “the lots”), pending the trial of the claim.

Overview

- [2] The claim in this matter was commenced by Fixed Date Claim Form on 22nd February 2021. By its claim, HKZ INC. (“the respondent”) seeks a ‘prohibitory injunction’ enjoining the appellant from selling or disposing of the lots; an order for specific performance ‘that the [appellant] do perform its contractual duty to the [respondent] to perform and complete the sale of the lots of land numbered 1,2,3,4,7,9 and 11 at Conception Village in accordance with the parties’ agreement aforesaid’; and damages, interest and costs. It cannot be gainsaid that by using a Fixed Date Claim Form No. 2, the respondent, incorrectly and in breach of the **Civil Procedure Rules 2000** (“the CPR”) Part 8, commenced the claim. This is not proceedings for possession of land, but a claim for specific performance to enforce the terms of an alleged contract for the sale of land. It is therefore not one of the categories of claims set out in CPR 8.1(5) which can be commenced by Fixed Date Claim Form. This claim ought to have been commenced by Claim Form No. 1 as mandated by CPR 8.1(4). To date no steps have been taken by the respondent to rectify this procedural error, and it would seem that this was not a matter which arose for consideration before the learned judge upon the hearing of the respondent’s application for an interim injunction. However, the respondent did file and serve with its Fixed Date Claim Form, a statement of claim of even date. I shall return to consider the respondent’s pleaded case as set out in its statement of claim and, in particular, the averments at paragraphs III, IV and V thereof.
- [3] Having commenced its claim against the appellant, the respondent applied without notice on 2nd March 2021 for an interim injunction. The injunction application was supported by the affidavit of Mr. Colville Andrew Bain (“Mr. Bain”), the manager of the respondent company. Mr. Bain exhibited to his affidavit in support, seven documents marked exhibits HKZ 1 to 7 inclusive. These included (i) the certificate of incorporation of the respondent company dated 14th May 2019; (ii) a copy of Deed of Conveyance evidencing the appellant’s title to the land at Conception Village; (iii) a copy of the plan from the website showing the seven lots numbered 1,2,3,4,7,9 and 11 as advertised for sale; (iv) a copy of a letter dated 8th December 2020 from

the respondent's lawyer Ms. Ettienne of Excelsior Law Firm to Mr. Andre Thomas of Franco Chambers tendering a cheque in payment of a ten percent deposit (EC\$29,299.50) towards the purchase of the seven lots at Conception Village; (v) a copy of the deposit cheque dated 8th December 2020 drawn on Republic Bank (Grenada) Limited addressed to Franco Chambers; (vi) a copy of a receipt issued by Franco Chambers for the sum of EC\$29,299.50 'for 10% deposit for Lots 1,2,3,4,7,9 and 11 at Conception Village Housing Communities'; and (vii) a copy of a letter dated 22nd December 2020 from Franco Chambers to Excelsior Law Firm.

[4] The judge, quite correctly, did not proceed to hear the respondent's interim injunction application *ex parte*. On 30th March 2021, the appellant, filed his affidavit opposing the interim injunction application. In that affidavit, the appellant contended, *inter alia*, that there was no serious issue to be tried and no prospect of the claim succeeding. In his affidavit, the appellant gave a very different factual account of what transpired with respect to his dealings with Ms. Ettienne from that which was set out in the affidavit of Mr. Bain. In doing so, the appellant made certain allegations and painted a different picture of the involvement and role of Ms. Ettienne. Learned counsel for the respondent, in this matter made certain serious allegations of misrepresentation by her in her dealings with him with regard to the possibility of her purchasing the lots at Conception Village from him. He averred that there was never any written agreement between himself and the respondent with regard to the sale and purchase of the lots, and that the payment of the 10 percent deposit to his attorneys, which was returned to Excelsior Law Firm, did not give rise to such a contract coming into existence.

[5] No transcript or copy of the judge's notes of the *inter partes* hearing on the interim injunction application has been provided or made a part of the record of appeal in this matter. By his appeal, the appellant seeks to have the interim injunction order dated 31st March 2021 (entered 27th April 2021) set aside. The respondent filed a counter-notice of appeal on 6th May 2021. The grounds set out in the counter-notice are therein stated as the respondent's grounds of objection to the appeal. Broadly

speaking, they constitute the bases upon which the respondent opposes the appeal in its written submissions filed 20th August 2021.

- [6] The judge's written reasons for decision are dated 31st March 2021. The kernel of the judge's reasoning and decision are set out in these terms:

"The court is of the view that there is a serious issue to be tried as to whether there exists an agreement between the parties for the sale of the lots. The court is also of the view that the balance of the convenience lies in granting the injunction as damages would not be an adequate remedy having regard to the uniqueness of [the] land which if disposed would deprive the claimant of ownership. The court also takes into consideration for which the reason given [by] the defendant in not pursuing the sale. The claimant has demonstrated its willingness to conclude the agreement. The court is also of the view that the defendant would be sufficiently compensated should the claim fail (sic). The status quo should be maintained to determine the parties' true intention."

Appeal and Counter-Appeal

- [7] In his notice of appeal, the appellant relies on four grounds of appeal. In ground 1, he challenges the judge's finding that there was a serious issue to be tried as to whether there exists an agreement between the appellant and the respondent. By ground 2, he challenges the judge's holding that the balance of convenience lies in granting the interim injunction, as damages would not be an adequate remedy having regard to what the judge saw as the 'uniqueness' of the land. By ground 3, the appellant contends that the learned judge erred in holding that the appellant would be sufficiently compensated in damages should the claim against him fail at trial; and by ground 4 the appellant challenges the judge's exercise of her undoubted discretion, as being plainly wrong in all the circumstances of the case.

Appeals from the exercise of judicial discretion

- [8] It is common ground between the parties that this appeal concerns the exercise by a judge of judicial discretion. It is unquestionable that an appeal challenging the exercise of judicial discretion gives rise to a high threshold for an appellant to meet. These important principles of appellate judicial restraint are trite and have been stated and restated in several decisions of this Court. Accordingly, an appellate

court will rarely interfere with the exercise of judicial discretion, unless it is shown that the judge erred in principle by failing to take into account relevant factors or gave too much or too little weight to relevant factors or took into account irrelevant factors and considerations or that as a result of the error or errors of principle committed by the judge his decision was plainly or blatantly wrong, such that it exceeded the generous ambit within which reasonable disagreement is permissible.¹ Furthermore, an appellate court when considering whether the judge got it plainly wrong, must caution itself that it is impermissible to come to such a conclusion on the basis that the appellate judges would, on the evidence in the court below, have come to a different conclusion or would have exercised the discretion differently.

- [9] The application of these principles to appeals from the exercise of discretion to grant or to set aside an interim injunction, was considered by this Court in **The Attorney General of Grenada et al v Sebastian Isaac et al**² and **Brantley and others v Constituency Boundaries Commission and others**.³ In **Brantley and others v Constituency Boundaries Commission and others** Baptiste JA opined at para.[2]:

“The question of whether or not to discharge an injunction is one which is concerned with the exercise of a judge’s discretion and necessarily engages the well-known principles upon which the exercise of a judge’s discretion can be assailed by an appellate court. Accordingly, it is incumbent upon the appellants to show that the judge was wrong in law, or she took account of irrelevant matters, or she failed to take account of relevant matters, or she was obviously wrong in the conclusion she arrived at.”

Essentials of a Contract, Invitations to treat and Advertisements

- [10] The essential elements of a valid contract are trite. There must be an offer, an unconditional acceptance of that offer by another person, and there must be

¹ Michel Dufour v Helenair Corporation et al (1996) 52 WIR 188; Beryl Isaac and others v The Grenadian Hotel (doing business as the Grenadian by Rex Resorts) [2017] ECSCJ No. 299, (delivered 15th December 2017).

² GDAHCVAP2015/0028 (delivered 20th June 2016, unreported).

³ [2015] ECSCJ No. 24, (delivered 5th February 2015).

consideration flowing from the promisor to the promisee. The appellant submits that for a contract to be binding and enforceable in law, there must exist an intention to create legal relations between the contracting parties. This requirement is indeed fundamental. To give rise to a binding agreement, the contracting parties must evince an intention to create legal relations and with each other. Thus, if A intended to, or thought he was contracting with B, but is said to have contracted with C, there is no intention between A and C to create legal relations with each other, and no binding and enforceable contract comes into existence between A and C. Accordingly, where there is no intention to create legal relations, a contract does not come into existence. In **Keith Garvey v Ricardo Richards**,⁴ Harris JA (at para. 10) put it this way:

“It is well-settled that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”

- [11] The law of contract draws an important distinction between an offer and an invitation to treat. The question as to whether a statement made by a person is an offer or an invitation to treat will depend primarily upon the intention with which it was made.⁵ The primary distinction between the two is that a statement by a person is not an offer if it negates the maker's intention to be bound on acceptance. An invitation to treat is therefore an invitation for an offer to be made evidenced by an intention to be bound only upon acceptance of such an offer. Thus, where a statement invites persons to respond in a certain or prescribed way and for there not to be a binding agreement until those requirements have been complied with and the parties enter

⁴ [2011] JMCA Civ 16.

⁵ Treitel Law of Contract 8th Ed. 1991 Chapter Two pages 10-11.

into a formal contract, that is an invitation to treat, and no binding contract comes into existence until the formal agreement is signed by the parties.⁶

- [12] In the context of this matter, it is also important to consider the law applicable to advertisements for sale of property. This is because the respondent contends that the appellant's public advertisement of the lots at Conception Village for sale constituted an offer to the world at large, such that the appellant had evinced a clear intention to be bound, with no further bargaining being required, by an acceptance to purchase a lot or lots so advertised, giving rise upon payment of the deposit to a binding contract for the sale. Again, like the distinction between an offer and an invitation to treat, this question turns on the intention of the maker of the advertisement. In **Carlill v Carbolic Smoke Ball Co**,⁷ an advertisement by the company promising to pay 100 pounds to any user of their carbolic smoke ball product who caught influenza, was held by the court to be a unilateral contract such that the advertisement was an offer capable of acceptance without more. This intention to create legal relations was evidenced by the fact that the company had deposited 1,000 pounds into their bank "showing our sincerity." In my view, as will be made clear later in this judgement, the **Carbolic Smoke Ball** case is distinguishable from the facts in this case and the nature and terms of the appellant's advertisement for the sale of lots at Conception Village.

Section 4 of the Real and Personal Property (Special Provisions) Act of Grenada

- [13] In this matter, much emphasis was placed on what was the meaning and effect of Section 4 of the **Real and Personal Property (Special Provisions) Act**⁸ of Grenada ("the Act"). This is the equivalent provision in the Act to the **Statute of Frauds (1677)**. Section 4 of the Act provides –

"No action shall be brought whereby to charge any person upon any contract for sale of lands, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note

⁶ *Financings Ltd v Stimson* [1962] 1 WLR 1184.

⁷ [1893] 1 Q. B. 256.

⁸ Cap 273 of the Laws of Grenada.

thereof, is in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully 13authorized.”

[14] Section 4 of the Act, and similar **Statute of Frauds (1677)** provisions in other territories and states of the Eastern Caribbean, have been considered by the courts in this jurisdiction. It is well established so as to be trite law, that section 4 contains two requirements for a contract for sale of land to be enforceable by action before the courts. The first is that there must either be a written contract for the sale of land or some interest in land or, where the contract is oral only, some memorandum or note in writing evidencing the essential terms of the oral agreement. The second is that the memorandum or written note evidencing the essential terms of the oral contract must be signed either by the party being charged (the defendant) or by someone 13authorized to sign it on his behalf. Accordingly, the memorandum or note is not the contract itself which the parties entered into, but a document which evidences the existence of a binding oral contract for the sale of land between the contending parties. It is now settled law that the memorandum or note need not be one document, but may consist of more than one document in circumstances where the document signed by the person to be charged refers directly or by necessary implication to another document or documents which themselves, individually or collectively, contain the essential terms of the oral contract entered into.

[15] In **Nelson Lewis and Another v Dirk Burkhardt**⁹ approving **Barkworth v Young**,¹⁰ Gordan JA stated:

“[13] The memorandum is required only as evidence of a contract. Put another way, the contract exists independently of the writing or memorandum but cannot be proved in court without the memorandum or writing. It has been consistently held in England that no special form of memorandum in writing is required provided only that it contains the essential terms of the contract and is signed by the party to be charged, or by someone on his behalf. It has further been held that where the memorandum in writing consists of more than one document, but only one document is signed by the defendant or on his behalf, then if that one document contains some implied or specific reference to another

⁹ [2007] ECSCJ No. 40, (delivered 28th March 2007).

¹⁰ 1856 4 Drew 1.

document, then oral evidence is admissible to identify the other document and the two may be read together.”

[16] In **B.B. Inc v Lewis Hamilton**,¹¹ another decision of this Court, it was held at 1 and 4 (inter alia) –

“1. Section 4 of the Real and Personal Property (Special Provisions) Act Cap 153 (“the Act”) of Grenada contains two requirements which must be satisfied in order to maintain an action in relation to the sale of land or an interest in land. 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 contract must be signed by the party against whom the action is brought. Thus, contracts for the sale of land are unenforceable unless there is some written evidence of a contract which is signed by the person against whom enforcement is sought.

4. Although section 4 requires a memorandum or note in writing, it is not necessary that every term agreed by the parties be included in the note or memorandum. It is imperative however that all the essential terms of the agreement except terms implied by law be included. The contents of the memorandum or note must show that a binding contract was concluded. Where essential terms agreed are omitted from the memorandum or note, the requirement of section 4 would not have been satisfied as the contract evidenced by the memorandum or note would not be the contract the parties entered into. The case at bar involved the sale of a plot of land and the construction of a villa within a communal property which placed additional obligations (such as conclusion of agreements with third parties) and restrictions on property owners. In those circumstances, the minimum terms of parties, property and price, as drawn from the emails, would not be sufficient to establish a binding contract. The language of both parties shows that they were still in negotiation. These were still several matters to be agreed and these matters cannot be classified as merely some minor details to be worked out. Therefore, the emails on which the appellant relied do not satisfy the requirement of section 4. It was open to the learned master to grant summary judgment on this basis.”

[17] It is fundamental that an oral contract which is not evinced by a written memorandum or note setting out the essential terms of the contract, is not, in law, void but merely unenforceable by action before the courts. This underscores the critical importance to the operation of section 4 of the Act that, in the absence of a written contract between the parties for the sale of land or an interest in land, there must be in

¹¹ [2017] ECSCJ No. 88, (delivered 7th April 2017).

existence, firstly, an oral contract between the parties and, secondly, some memorandum or note in writing signed by the person to be charged or their agent evidencing the essential terms of the oral contract. Once these two requirements are present, the oral contract is then rendered enforceable by action before the courts for, *inter alia*, specific performance.

[18] In **Elias v George Sahely & Co (Barbados) Ltd**,¹² a decision of Her Majesty's Privy Council, the Board was concerned with the existence of an oral contract for the sale of land and whether such a contract, if it existed, was evidenced by a memorandum or note in writing signed on behalf of the vendor. It was held that:

- "1. An oral contract for the sale of land which was not evidenced by writing or partly performed was not void but merely unenforceable. Accordingly, the parties had concluded a contract for the sale since there was, on the facts, an oral contract concluded by the telephone conversation in which the terms of sale were agreed and there was nothing further to negotiate or agree on. Further the letter from the purchaser's lawyer could not be read as indicating that there was to be no binding contract prior to formal contract being drawn up and signed.
2. On the issue of enforceability or otherwise of the contract made between the parties, if a document signed by the party to be charged referred to some other document or transaction then parol evidence was admissible both to explain the reference and to identify any other document relating to the transaction, and if such other document and the document signed by the party to be charged when read together contained all the terms of a concluded contract then there was a sufficient note or memorandum for the purposes of the Statute of Frauds. Accordingly, the judge at first instance had been right to admit the oral evidence of the purchaser's lawyer to explain the transaction to which the receipt from the vendor's lawyer referred and to identify his own letter as a document relating to the transaction. Since that letter set out the terms of a concluded bargain between the parties, the receipt and the letter together constituted a sufficient memorandum of sale for the purposes of the Statute of Frauds.
3. It did not follow from the fact that a person accepted a deposit as a stakeholder that he was not authorized to sign as agent a note or memorandum evidencing the existence of a contract. On the facts, the vendor's lawyer had the authority to sign a note or memorandum of the sale on behalf of the vendor and was therefore not prevented from

¹² [1982] 3 All ER 801.

doing so because he happened to receive the deposit as a stakeholder.”

[19] From these and other authoritative decisions of the courts, the following principles may be distilled:

- (i) it is axiomatic that a written agreement signed by the parties for the sale of land or an interest in land in Grenada is enforceable under the laws of Grenada with an action for specific performance, unless the said contract is rendered void or voidable by the operation of some other principles of law.
- (ii) an oral contract for the sale of land or some interest in land without more is wholly unenforceable under the laws of Grenada. The only exception to this being where there has been part performance of such a contract.
- (iii) the requirement under section 4 of the Act for some memorandum or note in writing only applies to the enforceability of oral agreements for the sale of land or real property.
- (iv) the requirement under the Act for the existence of a written memorandum or note is predicated upon the existence and proof of an oral agreement for the sale of land.
- (v) in such circumstances, the contract which is to be enforced by action before the courts is the oral agreement for the sale of land and not the memorandum or note evincing its existence.
- (vi) the written memorandum or note must be signed by the seller or by someone authorized on his or her behalf.
- (vii) the written memorandum or note evidencing the existence of the oral agreement can be found in more than one document.

- (viii) the written memorandum or note cannot be relied upon by a claimant as the agreement for the sale of land or an interest in land. The oral agreement must have existed or come into effect independent of the memorandum or note.
- (ix) an oral agreement to sell land is a valid and subsisting contract in law. However, by virtue of section 4 no such contract can be sued on or enforced unless there is in existence the written memorandum or note evincing the essential terms of the oral agreement.
- (x) absent such a memorandum or note, proof of the existence of an oral contract plus part performance thereof by one or more of the parties thereto, is sufficient to render such an oral contract enforceable in law.
- (xi) parol evidence is admissible at trial to establish the existence of a transaction to which the memorandum or note or some other document evincing the existence of such an agreed transaction or contract relates.

Principles Applicable to grant of an interim injunction

- [20] The jurisdiction and power of the High Court or a judge to grant injunctions, including interim injunctions, is provided for in section 24 of the **Eastern Caribbean Supreme Court (Grenada) Act**.¹³ The power is to be exercised in circumstances where it appears to the court or the judge to be just or convenient to do so. By Part 17 of the CPR a court may grant a range of interim remedies, including an interim injunction, and may do so at any stage of the proceedings. Including after judgment has been given in the matter. An application for interim remedy must be supported by evidence on affidavit. It is settled law that in determining an application for an interim injunction, the court must first satisfy itself that there is a serious issue to be tried between the parties to the litigation. This means that the claim is not frivolous or vexatious, but there exists a serious question to be tried. **American Cyanamid Co.**

¹³ Cap. 336 of the Laws of Grenada.

v Ethicon Ltd.¹⁴ In considering this first question, it is impermissible for the court or judge to try to resolve conflicts of evidence in the affidavits or difficult questions of law which call for detailed argument and mature consideration. The reason for this is that affidavit evidence is usually not the fullest of evidence by the parties and, usually, has not been tested under the probing and searching light of forensic cross-examination. These are matters reserved for the trial of the claim.

[21] In determining whether there is a serious issue to be tried, the court or judge must investigate the facts of the matter as set out in the claim and in the affidavits, but only to the extent of ascertaining whether the applicant for the interim injunction has prospects of success which in substance and reality are shown to exist. In this regard, where odds exist against success of the claim, these do not lead to a dismissal of the application. It must be shown that those odds are so long or hopeless, such that the claimant/applicant can have no chance of success. If the court or the judge hearing the application concludes that there is no serious issue to be tried on the claim, that is the end of the matter and the application for interim injunction must be refused. It is only after a finding or conclusion of a serious issue to be tried, that the court or the judge must go on to consider where the balance of convenience lies between the parties and whether damages is an adequate remedy. As regards the latter, in relation to a contract for the sale of land, it is an accepted principle stated in **Mungalsingh v Juman**¹⁵ per Lord Neuberger at para. 33, applying **AMEC Properties Ltd v Planning Research Systems Plc**¹⁶ that “damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique.” In the instant matter, the learned judge correctly relied upon this principle when determining whether damages would be an adequate remedy for the respondent, if the application for an interim injunction restraining the sale or disposal of the lots, pending the trial and determination of the claim, was not granted.

¹⁴ [1975] AC 396.

¹⁵ [2015] UKPC 38.

¹⁶ [1992] 1 EGLR 70 at 72.

Ground No 1 – Serious Issue to be Tried
(a) Appellant's Submissions

- [22] Mr. Ferguson, learned counsel for the appellant, stressed that the critical issue for the Court to determine in this appeal is whether the respondent had properly pleaded a case that a contract existed in law on 8th December 2020 between it and the appellant, for the sale to the respondent company of the seven lots at Conception Village, such as could give rise to a claim for specific performance of that contract. The fundamental contention of the appellant, is that no such agreement has been pleaded by the respondent in its statement of claim, and none is to be found in the affidavit evidence of Mr. Bain in support of the respondent's application for the interim injunction. In those circumstances, the appellant submits, the respondent has not pleaded a cause of action known to the law and, therefore, there could be no serious issue to be tried. Accordingly, the judge erred as a matter of principle in holding that there was a serious issue to be tried, which is a fundamental pre-condition to the granting of interim relief. If this point is correct, then the judge wrongly exercised her discretion to grant the injunction and this Court ought to set it aside.
- [23] Counsel for the appellant argued that the respondent did not plead in its statement of claim any written agreement between itself and the appellant for the sale and purchase of the lots. Accordingly, the respondent could only be relying on the existence of an oral agreement, albeit no such oral agreement was pleaded. It cannot be gainsaid that the respondent does not assert the existence of a written contract between it and the appellant for the sale of the lots, and its claim in the court below is not based upon the existence of such a written agreement. Thus, that limb of the first essential requirement of section 4 is not being relied on by the respondent. Accordingly, the respondent must by its pleadings bring its case for specific performance within the second limb of the first essential requirement (oral contract) and within the second essential requirement (memorandum or note in writing signed by the appellant or someone authorized on his behalf) in order to properly plead a cause of action known to law, and for its claim for specific

performance to succeed. This requires the respondent to plead and rely on an oral contract for the sale of the lots between it and the appellant, and some written memorandum or note evincing the essential terms of the pleaded oral agreement.

[24] Counsel for the appellant scrutinised the respondent's pleaded case at paragraphs III, IV and V of the statement of claim. He submitted that the respondent has not therein pleaded the existence of an oral agreement for the sale of the lots to it as required under section 4 and has come to the court in reliance upon two documents, namely, the letter dated 8th December 2020 from Excelsior Law Firm to Franco Chambers enclosing the cheque for the 10 percent deposit, and the receipt issued by Franco Chambers for the said deposit. Counsel submitted that the respondent's pleaded case is that these two documents constitute a contract between the appellant and the respondent regarding the sale and purchase of the seven lots. He submitted that these two documents cannot in law constitute an existing and enforceable contract for the sale of the lands under section 4 of the Act.

[25] Importantly, learned counsel for the appellant stressed that no oral agreement, such as would be necessary under the provisions of section 4 of the Act, has been pleaded and, this failure, he submitted, is fatal to the respondent's case and, it follows that there is properly pleaded cause of action and hence no serious issue to be tried. He argued that the averments at paragraph III of the statement of claim do not plead the existence of an oral agreement between the appellant and the respondent and, accordingly, an essential requirement of section 4 of the Act giving rise to claim in law for a claim for specific performance of a contract for the sale of land, has not been met.

[26] Paragraph III of the statement of claim states:

"III. In or about the 8th day of December 2021, the defendant accepted an offer made by the claimant to purchase various lots of lands belonging to him located at the Conception Village Housing Community through his attorney the Partners of Franco Chambers in the City of Grenville aforesaid more properly described as lots 1,2,3,4,7,9 and 11."

[27] Counsel for the appellant submits that while paragraph III simply states that the appellant accepted the respondent's offer to purchase the said lots, there is no properly pleaded case, in discharge of the mandatory obligation of a claimant under Rule 8.7 of the CPR to plead 'all facts' on which he relies. The respondent does not plead the existence of or reliance upon the existence of an oral contract entered into between the appellant and the respondent, how such a contract came into existence, what were the terms of the 'offer' alleged made by the respondent to the appellant, how it was made and communicated to the appellant, and the manner in which it was accepted by the appellant.

[28] Likewise, the appellant submits, paragraph IV of the statement of claim, does not plead the existence of an oral contract between the appellant and the respondent for the sale of the lots. Paragraph IV states:

"IV. In pursuance of their said mutual agreement the claimant paid the deposit of 10(sic) per cent of the purchase price and a receipt in respect of the said deposit was issued to the claimant dated the said 8th day of December 2020. A true copy of the said receipt is attached hereto and marked with the letters 'HKZ4'."

[29] Paragraph V of the statement of claim, while not germane to the issue of a pleaded oral agreement, states-

"V. The defendant is liable to the claimant to perform with specificity the terms of the contract made between the parties to complete the sale of the lots of land in paragraph 2 above to the claimant in exchange for the payment of the remainder of the purchase price of the lots being the sum of two hundred and sixty -three thousand six hundred and ninety-one dollars East Caribbean Currency."

[30] In addition to the averments in the statement of claim, the respondent relied on the matters attested to in the affidavit of Mr. Bain. Paragraphs 4,5 and 6 of the Bain affidavit state as follows:

"4. My attorney Ms. Gennilyn E. Ettienne contacted Mr. Bridgeman to enquire about the availability of certain lots at the Conception Village Housing Park on behalf of the claimant. The lands were generally available for sale on the website for the Conception Village Housing Park and therefore the claimant expressed an interest to purchase lots 1,2,3,4,5,7,9

and 11. A true copy of the said plan is now produced and shown to me and exhibited hereto and marked “**HKZ 3**”.’

5. I am advised by my attorney Ms. Ettienne aforesaid that the defendant directed my attorney to contact Franco Chambers who would be able to act as his agents and attorneys in Grenada. I am advised by my attorney and verily believe that the defendant explained to her if she was not able to reach the attorneys themselves that Ms. Purcell who worked at the firm was very capable of handling the transaction on his behalf.

6. On the 8th day of December 2020, arrangements were made to pay the deposit to the defendant through the said Franco Chambers and Co. for the claimant HKZ Inc. to purchase lots 1,2,3,4,5,7,9 and 11. The said clerk confirmed that she was authorized to accept deposits for lots on behalf of the defendant which were available however that she had that very day accepted a deposit for lot 5 and therefore that same was not available. She was able to give details of all the lots which were available for the purchase by the claimant and stated the amount of the requisite deposit which was to be paid in respect of same. She agreed that deposits could be made in respect of lots 1,2,3,4,7,9 and 11 after 4:00pm from HKZ Inc. on that date.”

[31] Mr. Ferguson submits that the Bain affidavit does not assert the existence of an oral agreement or contract between the appellant and the respondent for the sale of lots 1,2,3,4,7,9 and 11. Accordingly, Mr. Bain’s evidence does not take the respondent’s pleaded case as to offer and acceptance any further, and does not amount to evidence of the existence or possible existence of an oral contract as a pre-condition to satisfying the requirements under section 4 to bringing proceedings to charge the appellant upon such a contract.

[32] I pause here to observe, that Mr. Bain’s account of what transpired is not of matters within his personal knowledge. He makes averments based solely upon information given to him by his attorney-at-law, Ms. Ettienne. This evidence from Mr. Bain, coupled with the allegations of improper conduct and misrepresentations made against Ms. Ettienne in Mr. Bridgeman’s affidavit in opposition to the application for the interim injunction, in which he gives his account of what conversations and communications he had with Ms. Ettienne concerning the availability for sale of his lots, are troubling. In my view, (as was expressed to Ms. Ettienne during her oral argument before us) these allegations, albeit unsubstantiated at this stage of the

proceedings, place her, as counsel to the respondent, in a most invidious position which, at minimum, makes her a potential witness at the trial of the claim in the court below. They also raise issues of a serious professional nature. Accordingly, these are matters to which she ought to give serious consideration going forward. I will say no more about this aspect of the matter.

[33] Mr. Ferguson pointed out in argument that the receipt issued 8th December 2020 by Franco Chambers, does not refer to the respondent company. In my view, the omission of the name of the respondent from the receipt is not fatal. I say this, in part, because the cover letter from Excelsior Law Firm (of same day) by which the deposit cheque was proffered, specifically identified that the firm was acting for the respondent company in tendering payment of the deposit.

[34] However, Mr. Ferguson also submits that the respondent's entire case is based upon two documents: the letter from Excelsior Law Firm and the receipt. It is the appellant's submission that these two documents do not amount to a contract. The pleading of an oral contract is fundamental to relying upon these two documents as evidencing the existence and terms of an oral agreement.

[35] During the hearing of the appeal, counsel for the parties made reference to email exchanges between the appellant and Ms. Ettienne on the one hand, and between the appellant and Franco Chambers on the other. The defence was filed on 22nd April 2021 sometime after the learned judge had given her decision on the respondent's application for the interim injunction. Accordingly, the defence could not have been taken into account in arriving at her said decision. However, we were taken by counsel for the parties to certain statements in the defence. Notably, the appellant in his defence denies paragraphs III, IV and V of the statement of claim and gives a different factual account of what transpired from 1st December 2020 when he was contacted by telephone by Ms. Ettienne about purchasing certain lots at Conception Village, of which he was the developer. It is pleaded therein that Ms. Ettienne represented to the appellant that she and her brother (Radford Ettienne) in

their personal capacities, were interested in purchasing the said lots.¹⁷ At paragraph 2 (iv) of the defence, reference is made to certain email exchanges between the appellant and Ms. Ettienne between 1st and 11th December 2020 that ‘completing and submitting the “Client(s) Offer to Purchase Real Estate” forms constituted a pre-condition for the purchase of lots in Conception Village. Ms. Ettienne filled out no such form either on behalf of the claimant, or herself and her brother, or anyone else.

[36] None of the referenced emails were exhibited in the interim injunction application proceedings before the court below nor were they annexed to and served with the defence. Accordingly, they did not form part of the evidence before the learned judge for her evaluation in determining whether to grant the application for the interim injunction, and did not feature in her reasoning and conclusion to do so.

[37] However, extracts from eight such emails are set out in some detail at paragraph 6 of the defence. These include emails from the appellant separately to Ms. Ettienne and Attorney-at-Law Mr. Andre Thomas of Franco Chambers. If proven to be authentic, they reference Ms. Ettienne’s initial contact with the appellant on 1st December 2020 expressing an interest on behalf of herself and her brother in purchasing the lots 1,2,3,4,7,9 and 11; the unavailability of those lots at the time as they were on ‘hold’ for other prospective purchasers ahead of Ms. Ettienne and her brother, but requesting a down payment from Ms. Ettienne and her brother to hold the lots if the perspective purchasers defaulted on their down payments and purchase of the said lots. Next is an email from the appellant instructing Mr. Thomas on 7th December that Ms. Ettienne and her brother (Radford Ettienne) are offering to purchase the said lots and to make a down payment on them, and noting that he (the appellant) was willing “to do Ms. Ettienne the special favour by offering her seven (7) Contiguous Lots... on condition that she pay the ten percent (10%) down payment by December 10th, and offer a reasonable full-payment time plan.” This exchange, as set out in the defence, also includes on 9th December the appellant

¹⁷ See paragraphs 1(i) and (ii) of the defence.

attaching to his email to Ms. Ettienne, the Conception Village Housing Communities “Client(s) Offer to Purchase Real Estate” form, “which we require from persons interested in purchasing property to complete and submit to Developer Donald E Bridgeman for acceptance.” Reference is also made to an email of 9th December from the appellant to Mr. Thomas which stated, in part, “I understand that she [Ms. Ettienne] left money at your office that was not requested or authorized by me”; and suggesting to Attorney Thomas that the deposit be returned to Ms. Ettienne as “... money which I did not and will not request or accept.”

[38] The significance of these emails, to which counsel for both parties alluded during the course of their submissions before us, is that, if proven to be authentic, none of them evinces an oral or other agreement between the appellant and the respondent for the sale of the said lots. In fact, they are supportive or more supportive of the appellant’s version of the facts, that he never intended to and did not enter into any contract with the respondent for the sale to it of the said lots. Indeed, entirely absent from this pleading regarding the extracts from the seven emails is any reference to the name of the respondent as a potential purchaser or potential contracting party. In summary, if the defence were to be considered, these pleaded communications do not, in my judgment, support a finding of a serious issue to be tried.

[39] Reference was also made by counsel for the appellant, to the respondent’s reliance in submissions before this Court on the advertisement of the sale of lots by the appellant at the Conception Village Housing Community. In fact, learned counsel Ms. Ettienne for the respondent, relied on the fact of the said advertisement as an offer to the whole world, which offer was accepted by the respondent when he paid the deposit through her law firm to Franco Chambers – the cover letter and deposit cheque being delivered to a clerk there. A copy of this advertisement was in evidence before the learned judge. Counsel for the appellant submitted that the advertisement was clearly not an offer to the world but an invitation to treat, and the tenor and wording of the advertisement did not disclose an intention to be bound by payment of a deposit for the purchase of lots. In this regard, learned counsel

distinguished the instant matter from the decision in the **Carbolic Smoke Ball Co** case. However, in the judge's reasons for decision, no reference is made to the said advertisement, and there is no analysis of this document as to whether it constitutes an offer or an invitation to treat when considering the issue of whether, in applying the principles in **American Cyanamid Co**, there is a serious issue to be tried. In my judgment, in failing to do so the learned judge (to the extent that any reliance was placed on the advertisement as an offer by the appellant to the world as a main plank of the respondent's case for a serious issue to be tried) omitted relevant evidence and erred in her approach to and evaluation of whether there was a serious issue to be tried.

[40] Counsel for the appellant also addressed in his submissions the question of whether the doctrine of part-performance can be relied upon by the respondent in this case. In this regard, he referred to the learning in the well-known case of **Steadman v Steadman**¹⁸ in which it was held that even where there is no memorandum or note in writing evidencing the essential terms of an oral contract for the sale of land, the said contract may nevertheless be enforceable if the claimant can demonstrate that there has been part performance of the said contract. This principle was also upheld by this Court in **Choo Loi Poi and another v Donald Frederick**¹⁹ (per Webster JA at paragraph 27) in which it was held that acceptance of a settlement payment did not amount to part performance. In arguing that the doctrine of part performance is not available to the respondent in this case, Mr. Ferguson submitted that part performance is dependent upon the existence of an oral contract, and the terms of the oral contract itself cannot constitute part performance. Having considered the submissions by Ms. Ettienne for the respondent on this issue, I agree with the submissions of Mr. Ferguson that the letter and the receipt cannot constitute part performance. It follows that, on this issue, I do not accept the submissions of Ms. Ettienne to the contrary.

¹⁸ [1976] AC 536.

¹⁹ [2020] ECSCJ No. 310 (delivered 15th September 2020).

Respondent's Submissions

- [41] On the critical issue of whether the learned judge was correct in finding that there was a serious issue to be tried, the respondent accepts, in its written submissions, that section 4 of the Act sets out two requirements which must be satisfied in order to maintain an action upon any contract for the sale of land or any interest in land. In this respect, the respondent and the appellant do not differ on the interpretation of section 4 and the applicable law. The respondent also accepts that the written memorandum or note required under section 4 must evidence all the essential terms of the oral contract, including identifying the parties thereto, and must be signed by the party to be charged or someone duly authorized to do so on his or her behalf.²⁰ The respondent also submits that –‘The question therefore becomes where exists the contract which the memorandum in writing illustrates.’²¹ In my view, this amounts to an acceptance by the respondent of what is obvious from a correct reading of section 4 – where there is no written contract, there must first be an oral contract, the existence of which is evidenced by the written memorandum or note.
- [42] As to the requirement for the memorandum or note to be signed by the person to be charged or by someone authorized on his or her behalf, the respondent submits that acceptance of an offer to purchase land can be given by an agent of the person to be charged, acting within his or her authority. Ms. Ettienne, learned counsel for the respondent, submitted that on the respondent's version of the facts as given in the Bain affidavit, Franco Chambers was the agent of the appellant for the purposes of accepting deposits and issuing receipts, giving rise to a binding contract in law between the appellant and the respondent with regard to the sale of the lots. Ms. Ettienne submits further, that any issue as to whether Franco Chambers exceeded its authority, is a matter for determination at trial and does not lead to a conclusion that there was no serious issue to be tried as to the existence of such a contract between these two parties. Ms. Ettienne also submits that section 4 ‘is concerned to suppress fraud and not evidence’, and in seeking to ascertain whether there is a

²⁰ See respondent's Submissions, para 2 (viii).

²¹ See respondent's Submissions, para. 2(ix).

sufficient memorandum 'it is not necessary to shoulder the burden of searching for a written contract.' In support of these submissions, learned counsel relied on the cases of **Henthorn v Frazer**²² and the decision of the Privy Council in **Elias v George Sahely & Co. Ltd.**

- [43] Counsel for the respondent also relied on this extract from the judgment of Russell J in **Stokes v Whicher**²³ which states:

"If you can spell out of the document (memorandum) a reference in it to some other transaction you are at liberty to give evidence as to what that other transaction is, and if that other transaction contains all the terms and writing, then you get a sufficient memorandum within the statute by reading the two together."

- [44] In my view, what is clear on the highest authority of **Elias v George Sahely & Co**, is that first there must be an oral contract concluded between the parties by which all the essential terms of the sale have been agreed. This means that no important term is left undecided or to be negotiated and agreed subsequently. Secondly, the requirement for something in writing signed by the person to be charged or their authorized agent evidencing the essential terms of that oral contract in order to found an action upon it, may be satisfied by reference to more than one document. This arises in circumstances where the document signed by the person to be charged or their agent, does not contain all of the essential terms of the oral contract, but it directly or indirectly refers to some other document which, upon further inquiry, is found to contain either all or the other essential terms of the oral contract not found in the document signed by the party to be charged or their duly authorized agent. In this scenario, parol evidence is admissible both to explain the reference in the first document and to identify the second or other documents relating to the transaction. It is the combined effect of the document signed by the party to be charged or his agent and the other referenced document or documents, when read together, which may contain all the essential terms of the oral contract, and satisfy the requirement for a sufficient memorandum or note in writing under section 4.

²² [1892] 2 Ch 27.

²³ (1920) 1 Ch 411.

- [45] Specifically with regard to the legal effect of and reliance by the respondent on the advertisement by the appellant of the sale of the lots at Conception Village, while accepting that such advertisements ‘may’ in certain circumstances constitute an ‘offer’ which can then be accepted by payment of a deposit for the purchase of lots, the respondent submits that the answer to that question turns on the intention of the maker of the advertisement. The respondent submits that the advertisement in this matter clearly evinces the appellant’s intention to create legal relations.²⁴ On this issue, reliance was placed on the decisions in **Harvey v Facey**²⁵ and **Carlill v Carbolic Smoke Ball Co.** I have already intimated my conclusion on this issue that, as a matter of law and fact, the advertisement is not an offer, but an invitation to treat.
- [46] The respondent also submits that the instant case is ‘unique’ in that the learned judge took into account in determining there was a serious issue to be tried, the evidence in the Bain affidavit of steps which the respondent took. These are: (i) responding to the appellant’s online advertisement; (ii) contacting the appellant and his agent Franco Chambers; (iii) sending correspondence to the agent identifying the lots its was interested in purchasing; (iv) paying the deposit on the sale of the lots; (v) issuing a letter outlining the deposit and identifying the lots; (vi) the receipt issued by Franco Chambers (the alleged agent) with respect to the deposit and the lots thereby accepting the offer; and (vii) prior to the transaction, the appellant had directed the respondent’s agent and solicitor to his agent (Franco Chambers) ‘to have the transaction carried out.’
- [47] The respondent also relies on the doctrine of part performance. Counsel for the respondent submits that the correct approach by the court is not to ‘first postulate the contract pleaded and then ask if the alleged acts were a part performance of it’, but to first ‘seek to find such a performance as must imply a contract, and then

²⁴ See respondent’s submissions, para. 2(xix).

²⁵ [1893] AC 552.

proceed to ascertain the general nature of such a contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded.’²⁶ I would merely observe that from this statement, there must be a contract pleaded by the claimant upon which considerations of what acts performed, in whole or in part, might constitute part performance thereof, can be found.

[48] Learned counsel for the respondent relied heavily on the decision of the Board in **Elias v George Sahely & Co** which she contends supports the judge’s analysis of and reliance upon the letter dated 8th February 2021 from Ms. Etienne of Excelsior Law Firm as the respondent’s lawyer, enclosing the cheque in payment of the deposit, and the receipt for the deposit issued by Franco Chambers on the said date, ‘to determine whether there exists a memorandum which points to the existence of [an] agreement for sale of land between the parties.’²⁷ Accordingly, it is submitted by the respondent that the judge did not err in considering the letter and receipt to determine that an agreement was in existence.

[49] In my view, the judge was clearly entitled to consider all of the evidence proffered in the competing affidavits in determining, not whether the existence of a contract for the sale of land was in existence as this is a matter for determination at trial, but whether there was a serious issue to be tried as to the existence of a contract for the sale of the lots. This included both the letter and the receipt. However, the difficulty with the respondent’s submission, and its reliance on the decision in **Elias v George Sahely & Co**, is that the starting point in such an exercise is the pleaded case of the claimant. The existence of such a contract must be clearly pleaded, and where reliance is not placed by a claimant on an existing written agreement, the claimant must plead the existence of an oral agreement between the parties and reliance upon a written memorandum or documents evidencing the essential terms of such an agreement signed by the defendant or some person with his authority.

²⁶ See respondent’s submissions, para. 2(xvii).

²⁷ See respondent’s submissions para 2(xxv).

[50] In **Elias v George Sahely & Co** such an oral contract was clearly pleaded and relied on by the claimant as having come into existence by virtue of a telephone conversation on 10th February 1975, whereby the vendor agreed to sell certain premises in Barbados to the purchaser at an agreed price. This was followed, on the same day, by a letter from the purchaser's lawyers to the vendor's lawyers confirming the oral agreement and enclosing a cheque in payment of the deposit, which was to be held by the vendor's lawyers 'pending completion of the contract for sale.' In response to this letter, the vendor's lawyers sent a receipt acknowledging payment of the deposit. The trial judge found that there was an oral contract between the parties and that the letter and receipt, when read together, constituted a sufficient memorandum in writing under the applicable Statute of Frauds legislation in Barbados. This finding of an oral contract was upheld by the Court of Appeal. Accordingly, there were concurrent findings of fact on this issue, which finding were accepted by the Privy Council as there had been no terms left to be negotiated or agreed on. On the second issue of whether the oral contract is evidenced by a note or memorandum in writing signed on behalf of the vendor, which question the Board considered to be the more difficult one, the Board upheld the first instance judge's finding (overturning the decision of the Court of appeal) that the receipt and the letter when read together constituted a sufficient memorandum for the purposes of the Statute of Frauds.

[51] It is notable that the letter from the purchaser's lawyers in the **Elias v George Sahely & Co** case enclosing the deposit cheque, expressly referred to 'our conversation this morning', a clear reference to the telephone conversation between the vendor and the purchaser during which the oral agreement was concluded. In the instant matter, there is no reference in either the statement of claim or in the letter dated 8th December 2020 from Excelsior Law Firm to Mr. Thomas of Franco Chambers to any conversation between the appellant and a representative of the respondent, or to a conversation between Ms. Etienne, on behalf of the respondent, and the appellant or anyone at Franco Chambers, which is said to have given rise to a binding agreement for the sale of the lots to the respondent. In the said letter,

reference is merely made to “the agreement of the captioned vendor”, without stating when or how such an agreement was concluded, whether it is in writing or oral or partly in writing and oral and what are its essential terms.

- [52] During oral argument before this Court, Ms. Ettienne, when pressed, reluctantly accepted that there is no oral contract for sale pleaded in paragraph III of the statement of claim. She argued instead, that the formation of the contract is not just in paragraph III, “but in the fullness of time will be made out on the evidence.” She submitted further that what is required of a party when pleading an (oral) contract for the sale of land is to “indicate the parameters and legal principles”, and then the party must lead evidence; but there is no requirement to set out the terms of an oral contract in the statement of claim. In this vein, learned counsel argued that the purpose of pleadings is to inform the other party of the case which they are to meet, and this requirement has been met by the respondent in its statement of claim since, she emphasized, the appellant has not had any difficulty pleading to it in his defence, in which he admitted that he had spoken with Ms. Ettienne. The respondent also contends that, in any event, any failure by the learned judge to refer to and to consider, in reasoning to her conclusion that there is a serious issue to be tried, the respondent’s pleaded case at paragraph III of the statement of claim, is not fatal.

Ground 1 - Conclusions on Serious issue to be tried

- [53] In my view, the apparent admission by counsel for the respondent that an oral contract between the appellant and respondent has not been pleaded in the statement of claim, in circumstances where such a contract coming into existence has not been addressed either in the Bain affidavit or in the 8th December 2020 letter from Ms. Ettienne to Mr. Thomas, or in any of the other documents put before the judge below, severely undermines any finding by the judge that there was a serious issue to be tried. The requirements of section 4 for there to be an oral agreement concluded and some memorandum or note in writing evidencing such an oral agreement, were clearly not pleaded by the respondent in its statement of claim. Furthermore, the defence was filed after the judge’s decision on the interim

injunction application and, in any event, the pleading in the defence does not assist the respondent on the issue of how the alleged contract, upon which the claim has been brought, came into existence.

[54] The respondent also relies on the letter and receipt as giving rise to or as creating a binding agreement. In this way, the respondent seeks to rely on these documents, not as constituting a sufficient memorandum or note in writing when read together, but as contracting documents in and of themselves by which an offer, made by the appellant by virtue of the advertisement, was accepted by the respondent. In this respect, the respondent seeks, erroneously, to conflate the significance of both the letter and the receipt with the requirements of section 4. Furthermore, by running this line of argument, the respondent is relying on a case which was not pleaded. To the contrary, paragraph III pleads that it was the respondent who made an 'offer' to the appellant, which was then accepted. These two conflicting planks relied on by the respondent to say that a contract was concluded, are therefore incongruous and unsustainable in law.

[55] Further, the respondent's line of argument in reliance upon the advertisement as constituting the offer, is a plank which the learned judge was not asked to nor was she required to consider in determining whether there was a serious issue to be tried. The serious flaw in the respondent's pleaded case, which was not addressed or considered by the learned judge in reasoning to her conclusion of a serious issue to be tried, cannot be plugged by any admission in the defence by the appellant that he spoke with Ms. Ettienne. The appellant's pleaded case and affidavit evidence gives a very different account of what transpired and does not assist the respondent in sustaining the judge's finding that there was a serious issue to be tried. This is clear because the respondent does not, in its statement of claim or affidavit evidence, refer to nor does it rely on that conversation between Ms. Ettienne and the appellant as evidencing an oral contract having been concluded between it and

the appellant. Moreover, on the respondent's own version of that conversation, no such agreement was either discussed or concluded at that point in the factual matrix.

[56] In my judgment, the respondent cannot rely on the letter and or the receipt as the act of contracting (acceptance by payment of the deposit) and at the same time rely on the payment of the deposit as part performance of the same alleged contract for sale of the lots as settled in **Choo Loi Poi and another**.

[57] In my respectful judgment, the learned judge failed to avert her mind to and to consider what was the respondent's pleaded case and whether it disclosed a cause of action known to the law or permitted under section 4 of the Act, such as could give rise to a serious issue to be tried as to whether there exists an agreement between the appellant and the respondent for the sale of the lots. In fact, there is no reference in the judge's written reasons to any part of the statement of claim in this matter, except for noting that the claim was for specific performance. Had the judge done so, this would have led her to consider paragraph III of the statement of claim, and to conclude that no oral contract between these parties was pleaded, and the reference there to some unspecified offer and unspecified acceptance was wholly insufficient as a pleading to bring the case within the requirements and parameters of section 4. The learned judge, having averted to the provisions of section 4 in her decision, erred in treating the receipt acknowledging payment of the deposit as 'prima facie conclusive of the agreement between the parties', as it 'reasonably identifies the subject matter that is, the lots of land forming part of the [appellant's] development.' In so reasoning and concluding, the learned judge completely ignored the requirement for a concluded oral agreement, and treated the receipt as a contracting document, when on the respondent's best-case scenario, the receipt could only be a memorandum evidencing some of the essential terms of a contract. Notably, the receipt does not actually identify the parties, but this was clearly set out in the letter from Excelsior Law Firm dated 8th December 2020.

[58] Accordingly, I am satisfied that the learned judge fell into grave error in concluding that there was a serious issue to be tried. This conclusion was plainly wrong as a matter of law and principle. For this reason, I would set aside the order made by the judge on 31st March 2021 granting an interim injunction against the appellant restraining him from selling or otherwise disposing of his property, the seven lots numbers 1,2,3,4,7,9 and 11 at Conception Village Housing Community. I would therefore uphold Ground 1 of the appeal.

[59] I have already intimated that in my judgment that the advertisement was not an offer to the world, in the same way as the advertisement in the **Carlill v Carbolic Smoke Ball Co** case. In my view, the advertisement is nothing more than an invitation to treat. This is clear from the nature of the advertisement itself and, in particular, from these words at the end thereof-

“Choose your Building Lot today. Select your Model Home tomorrow. Then Call or Email us to Secure Your choice. Complete an Application to reserve your building Lot and Housing Model, forward application by Email or Post mail to Conception Village Donald Bridgeman, or RE/MAX Grenada Kayla Matthew. “Many Thanks,” and welcome to Grenada. Donald E Bridgeman.” (emphasis added)

[60] Of great significance, in my view, is the respondent’s reliance on this advertisement before us to submit that it was an offer to the world, and by payment of the deposit by the respondent to Franco Chambers for the appellant, and the issuance by Franco Chambers of the receipt therefor, a binding contract was concluded between the appellant and the respondent. This assertion or plank of the respondent’s case is not pleaded. However, in any event it is completely contrary and antithetical to the respondent’s pleaded case in the statement of claim, and not supportive of the existence of a serious issue to be tried. In particular, the case pleaded by the respondent at paragraph III of the statement of claim is that its (the respondent’s) offer was accepted by the appellant on 8th December 2020, not that the appellant’s offer to the world in advertising his sale of lots was accepted by the respondent. This completely undermines the respondent’s pleaded case of a contract being

formed or coming into existence between it and the appellant for the sale to it of the lots, and fundamentally undermines its case for an interim injunction.

[61] Furthermore, if it was the respondent's case before the learned judge that the contract upon which it relied came into existence by virtue of the advertisement being an offer to the world by the appellant to sell his lots at Conception Village, which offer was accepted by the respondent resulting in a binding agreement when it paid the deposit through Ms. Ettienne's law firm to Franco Chambers and received a receipt therefor from them, the judge erred in failing to evaluate the respondent's case in the light of this assertion and, in doing so, committed a serious error of principle. Alternatively, if the respondent did not run that case before the judge on the hearing of the application for interim injunction, in not doing so they failed to disclose to the judge a material plank of their case causing the judge to fall into error, which omission can only be said to have been deliberate, leading to the setting aside of the injunction order itself.

[62] My conclusion on ground 1 in favour of the appellant, would be dispositive of the appeal. If there is no serious issue to be tried then, in accordance with the principles in **American Cyanamid** (as applied in a plethora of other authorities), a court is not required to consider issues such as the balance of convenience and whether damages would be an adequate remedy. However, for completeness, I will go on to consider grounds 2 and 3 together.

Grounds 2 and 3 – Balance of Convenience and whether damages are an Adequate Remedy

[63] On the assumption that a serious issue to be tried on the claim had been made out, I do not accept the appellant's submission under ground 2 that the learned judge erred in holding that the balance of convenience lies in granting the interim injunction pending trial. In reaching this conclusion, I accept the judge's finding that damages would not be an adequate remedy for the respondent if it were to succeed in establishing its claim at trial to specific performance of the alleged agreement for

sale of the lots. In my judgment, it would be wrong in principle at this stage of the proceedings to conclude otherwise. In my assessment, the balance of convenience would then clearly lie in maintaining the status quo, whereby the lots would remain in the ownership of the appellant until such time as the respondent succeeds in its claim

[64] In coming to this conclusion, I do accept as sound, the reason which the learned judge gave for reaching the conclusion that damages would not be an adequate remedy for the respondent, that is, the 'uniqueness of the land which if disposed of would deprive the [respondent] of ownership'. This conclusion accords with the principle applicable generally in relation to contracts for the sale of land, whereby it is accepted that damages are not to be regarded as an adequate remedy on the basis that each piece of land is 'unique'. The important consideration, in my view, is that were the injunction not to be granted (on the presumption that a serious issue to be tried had been made out), the appellant, who is in the business of selling the lots at Conception Village, will proceed to sell lots 1,2,3,4,7,9 and 11, as he has been advertising and intending to do, and once disposed of, those lots would no longer be available to the respondent were it to succeed in its claim to enforce the alleged contract. On the contrary scenario, were the injunction to be granted preventing the appellant from disposing by sale or otherwise of the lots prior to the trial of the claim, in my judgment the appellant could be adequately compensated in damages were the claim to fail. He will still have the lots for sale and any recoverable losses suffered as a result of the interim injunction and the delay in the sale of the lots in the interregnum period, could be adequately compensated in damages.

[65] For the reasons set out above, grounds 2 and 3 are, in my judgement, not made out and therefore fail.

Ground 4 – Whether the judge's exercise of discretion was plainly wrong

[66] For the reasons set out above, in particular in relation to ground 1 and the conclusion that no cause of action known to the law was pleaded and no oral contract such as

is necessary to satisfy section 4 of the Act was pleaded by the respondent in its statement of claim, I find that the learned judge committed a serious error of principle and misapplied or failed to apply the correct principles of law. Accordingly, it follows that the judge was plainly wrong in the exercise of her discretion in granting the interim injunction as sought by the respondent. This Court is therefore empowered to interfere with the exercise of discretion in all the circumstances, and to set aside the order of injunction made on 31st March 2021.

Disposition

- [67] In the premises, for the reasons set out above, the appeal by the appellant Donald Bridgeman ought to succeed and the counter-appeal of the respondent HKZ INC. (which in effect was its opposition to the appeal) fails, with costs to the appellant at no more than two-thirds of the costs in the court below, to be assessed by a judge of the High Court in Grenada unless agreed by the parties within 21 days.

Order

- [68] I would make the following orders:-
- (i) the appeal is allowed;
 - (ii) the counter-appeal is dismissed;
 - (iii) the order of injunction made 31st March 2021 is set aside; and
 - (iv) the respondent shall pay the appellant's costs of the appeal and in the court below, the costs in the appeal to be no more than two-thirds

of the costs in the court below, such cost to be assessed by a judge of the High Court if not agreed within 21 days.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

By the Court

Chief Registrar