

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(Nevis Circuit)**

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

Claim Number: **NEVHCV2018/0136**

Between

**Melissa Swaby
Noel Swaby**

Claimants

-and-

**Colin Parris
Hastings Daniel**

Defendants

Before: His Lordship Justice Ermin Moise

Appearances:

Ms. Kurlyn Merchant of counsel for the claimants
Mr. Ricaldo Caines of counsel for the 1st defendant
Mr. Jeffery Nisbett of counsel for the 2nd defendant

2020: January, 23rd
2020: April, 3rd

JUDGMENT

[1] **Moise, J:** This is a claim for breach of an agreement for the sale of property owned by the 1st defendant. The claimants seek an order for specific performance and also damages for breach of contract, interest on damages and costs. I have determined that the 1st claimant is entitled to an order for specific performance. These are my reasons for doing so.

The facts

[2] The 1st defendant (Mr. Parris) is the owner of a parcel of land with a building thereon, situated in Charlestown, Nevis and registered in Book 55 Folio 190. The claimants are husband and wife, respectively. The 2nd defendant (Mr. Daniel) is a real estate agent who claims to have acted on behalf Mr. Parris in negotiations for the sale of the property. He is

the operator of Hamoron Services and is described as a real estate consultant. The 1st Claimant (Mrs. Swaby) states that in early August, 2018 she approached Mr. Parris with an offer to purchase the property. She states that the intention was for the property to be purchased jointly by herself and her husband. However, there is nothing in the evidence to satisfy me that Mr. Swaby was ever involved in these negotiations sufficient for him to have lodged a claim in his own right. On that basis I would state from the onset that there never was an agreement with the 2nd claimant and would order that his claim be dismissed.

[3] Upon approaching Mr. Parris, Mrs. Swaby was informed that she should speak to Mr. Daniel, the 2nd defendant. Mrs. Swaby goes on to state that Mr. Daniel visited her business place to discuss the proposed sale with her. Her initial offer was rejected. Subsequently, in September, 2018 she made another offer which was accepted and formalized in a letter dated 13th September, 2018. In that letter, written and signed by Mr. Daniel, it states that Mr. Parris agreed that if he were to receive \$1,000,000.00 net of stamp duties and broker's fees he would be prepared to sign a memorandum of transfer in favour of Mrs. Swaby. However, the letter goes on to state that Mrs. Swaby had offered \$950,000.00 in exchange for the property. It was acknowledged that at least two other offers had been made for the purchase of the property at \$1,200,000.00 by other individuals. The letter goes on to state as follows:

“The preferred path is to negotiate with Mrs. Swaby who made the original approach and with whom we have had repeated discussions. The price offered by both the owner and the prospective purchaser is within range and not outrageous. If the purchaser increased her offer by One Hundred Thousand Dollars (\$100,000.00) and the vendor reduces his net price by the self-same One Hundred Thousand Dollars (\$100,000.00) we shall have a deal. That done the property can be set for stamp duty prices at One Million Dollars (\$1,000,000.00) paying 10% at \$100,000.00 with broker fee of Fifty Thousand Dollars (\$50,000.00)”

[4] The letter goes on to state that the proposal is predicated on the payment of the entire sum within fourteen (14) days of the signed agreement and that ***“if the proposals are***

acceptable to each party we are providing a space below to sign.” I note that the letter was signed by Mr. Daniel and Mrs. Swaby but not by Mr. Parris. Mrs. Swaby states that subsequent to that letter Mr. Parris continued to insist that he wanted \$1,000,000.00 net of stamp duties and broker’s fees. She agreed to that and a subsequent letter was signed on 14th September, 2018. This letter was again signed by Mr. Daniel as a real estate consultant. This letter indicated that Mr. Parris was prepared to sign the memorandum of transfer and that the sum of \$1,150,000.00 was to be paid in order to cover all of the fees and to meet Mr. Parris’ expectation.

[5] Mrs. Swaby indicates that she instructed her attorney to prepare the memorandum of transfer and was advised that the Inland Revenue Department had to first be engaged in order to ascertain whether the purchase price was acceptable before closing. The memorandum was sent to the Inland Revenue Department on 20th September, 2018 and was approved one week later. Simultaneously, cheques were drawn up as agreed to. On 25th September, 2018 the parties all attended a meeting in order to finalise the sale. Given that the building consists of rental units, Mr. Parris was to have provided copies of all of the lease agreements signed by the existing tenants and proof that all utilities were paid prior to closing the sale. He left the meeting briefly and returned with the various lease agreements. A total of \$6,500.00 was being kept as security deposits and one of the units was vacant.

[6] Mrs. Swaby states that it was agreed that the deal would be closed by 1st October, 2018 and that Mr. Parris would be allowed to collect the rent for September. He agreed to ensure that all utilities would be paid up by the date of closure and that the vacant unit would be kept for Mrs. Swaby’s personal use. Despite this, Mrs. Swaby indicates that subsequent to that meeting she did not hear from Mr. Parris. He would not take any of her phone calls. On 1st October, 2018 she was informed by Mr. Daniel, that Mr. Parris had changed his mind and was no longer interest in selling the property to her. She also observed on that day that persons were moving into the unit which was to have remained vacant for her use upon completion of the agreement. She instructed her attorneys to write Mr. Parris. However, he has remained unwilling to complete the transaction.

[7] For his part, Mr. Parris denies that there was ever an agreement for the sale of his property. He states that Mr. Daniel was never acting on his behalf. He had never given authority for him to act in that capacity. He states that Mr. Daniel was a friend of his for over 30 years and was joint executor of his mother's estate. The property was inherited from his mother. His evidence was that although initially approached by Mrs. Swaby, he indicated to her from the onset that he was not interested in selling his property. She contacted him a number of times and would engage him whenever she saw him on the property. Mr. Parris states that he only asked Mrs. Swaby to speak with Mr. Daniel as a means of getting her to leave him alone. He spoke with Mr. Daniel about the constant attempts being made by Mrs. Swaby, but never engaged him with a view to representing him as an agent for the sale of the property. He states that Mr. Daniel never informed him of his interactions with Mrs. Swaby.

[8] Mr. Parris continued in his evidence to state that he rejected Mrs. Swaby's first offer. However, when Mr. Daniel communicated the second offer to him his response was that he would consider selling the property only if he was paid \$1,000,000.00 with all expenses paid. However, his evidence was that he had to first discuss the matter with his family. He insisted that he was only having discussions with Mr. Daniel as a friend and co-executor in his mother's estate. Whilst he was aware of the second offer made by Mrs. Swaby he was never privy to the content of letter dated 13th September, 2018. As it relates to the letter dated 14th September, 2018 he was also unaware of it until it had been served on him. He however states that he was aware of the land transaction but was awaiting a draft contract between himself and Mrs. Swaby in order to first obtain legal advice on the matter. However, according to him, Mrs. Swaby went straight into preparing a memorandum of transfer for closer. He remained adamant that at no time did a contract exist for the sale of the property.

[9] Mr. Parris acknowledged that the meeting of 25th September, 2018 did take place. He states that he was contacted by Mr. Daniel on that afternoon and was told to walk with his certificate of title. He attended the chambers of the attorneys acting for Mrs. Swaby but was not initially made aware of the purpose of the meeting. He acknowledged leaving the meeting and returning with copies of the various lease agreements. He also acknowledged

that cheques were written which he had inspected. He noticed that his name was spelt incorrectly on one of the cheques. According to his evidence, he did not sign the memorandum of transfer and left without accepting the cheques. He informed the various persons present that he was not ready to proceed to closing.

[10] Whilst admitting that he did indicate to Mrs. Swaby that the deal would be closed in a few days, Mr. Parris states in his evidence that he was of the view that the meeting of 25th September, 2018 was for discussions to take place regarding a possible sale of the property but not an intention for the actual sale to take place on that day. He expressed some apprehension as he had not informed any of his tenants about a possible sale and needed to "inform them about [his] intentions." He goes on further to state that he had to ensure that all the utilities were in place and wanted to obtain legal representation in the matter. Mr. Parris also indicates in his evidence that he did understand that the vacant unit was to remain that way in the event that Mrs. Swaby became the owner of the property. He nonetheless continued to do work on the apartment as he was unsure as to what the outcome of the negotiations would be.

[11] Mr. Parris also acknowledged that Mrs. Swaby would have expended some money in preparation for closure. He nonetheless remained adamant that there was no agreement for the sale of his property. He continued to insist that he had not given any authority to Mr. Daniel to represent him as his agent. He never signed or verbally agreed to anything of that nature. He wanted to discuss the issue with his family before agreeing to any sale. In the end he decided against transferring his property to Mrs. Swaby.

[12] Mr. Hastings Daniel swore to an affidavit on 21st January, 2019. His evidence is directly contradictory to that of Mr. Parris. He acknowledges being a co-executor to Mr. Parris' mother's estate and as such was well familiar with the property. However, it is clear from the evidence that the property had been fully vested in Mr. Parris and that there was nothing left to administer in his mother's estate. At least not in relation to the property in question. Mr. Daniel states that he received a call from Mr. Parris towards the end of August, 2018 in which he was informed that Mrs. Swaby had made an offer for the purchase of the property. According to Mr. Daniel, Mr. Parris informed him that he wished

to sell the property and that he had told Mrs. Swaby that Mr. Daniel would be the sole “person of contact to sell the property.” He was asked by Mr. Parris to contact Mrs. Swaby in order to negotiate a selling price which was acceptable to all parties. Mr. Daniel thereupon contacted Mrs. Swaby at her business place and held several meetings with her thereafter. Mr. Daniel indicated that he researched properties recently sold in the area to ascertain an acceptable price and made various recommendations in his letter of 13th September, 2018.

[13] He states that Mr. Parris did receive a copy of the letter of 13th September 2018 and that his response was that he wanted \$1,000,000,000 net of all fees. On the basis of these instructions he presented the offer to Mrs. Swaby in letter dated 14th September, 2018. Whilst in the presence of Mrs. Swaby he contacted Mr. Parris who indicated that he was willing to sign the memorandum of transfer if he received the \$1,000,000.00 he requested. Thereupon Mrs. Swaby agreed to the purchase price. He continued to have discussions with Mr. Parris concerning the sale of the property.

[14] Mr. Daniel states that on 20th September, 2018 Mrs. Swaby informed him that she had secured the funding for the sale and was ready to proceed to closure. She indicated that her attorneys would contact Mr. Daniel. He states that he was contacted by the Inland Revenue Department on 21st September, 2018 and accompanied them to the property in order for a valuation to be done for the purpose of calculating the stamp duties payable on the sale. It is Mr. Daniel’s evidence that at all times he kept Mr. Parris apprised of the developments. So much so that on 21st September, 2018 he and Mr. Parris drove around Cane Garden and its environs for two hours discussing the sale. Mr. Parris was apprised of the Inland Revenue’s assessment of the property and was excited about the prospect of the sale.

[15] As it relates to the meeting of 25th September, 2018 Mr. Daniel states that he contacted Mr. Parris and asked that he come to the attorney’s office for closing. Mr. Parris attended at 4:30pm that afternoon. The various cheques were drawn up and presented to Mr. Parris. When asked to present the leases for the various units, Mr. Parris left the meeting and went to his office. He was accompanied by Mr. Daniel and returned with copies of the

lease agreements. Whilst at his office, Mr. Parris asked Mr. Daniel for a letter which he had previously requested for the purpose of informing his tenants of the sale of the property. Mr. Daniel's evidence was that he complied with this request and presented the letter to Mr. Parris. Upon their return to the meeting, Mr. Parris agreed to settle all outstanding utilities and they left the meeting with full expectation that the matter would be closed in a few days. However, he ran into Mr. Parris on 1st October, 2018 at which point he was informed that Mr. Parris had changed his mind about selling the property.

[16] There are therefore three broad issues for consideration in this case. These are:

- (a) Whether there was a valid and enforceable contract for the sale of the property;
- (b) Whether there has been a breach of that contract; and
- (c) Whether the claimants are entitled to specific performance and/or damages for the alleged breach of contract.

Was there a valid and enforceable contract for sale?

[17] Both parties have referred the court to section 4 of the **Conveyancing and Law of Property Act**¹. 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.

[18] The parties also referred the court to the case of **B.B Inc. v. Lewis Hamilton**² in which Thom JA interpreted legislative provisions similar to those contained in section 4 of the Act. At paragraph 21 of her judgment, Thom JA noted that there were two requirements to be

¹ CAP 10.01 of the Laws of Saint Christopher and Nevis

² GDACVAP2015/0035

satisfied in order for there to be compliance with the provisions. 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.”*** Insofar as that is the case, Thom JA put forward 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.***
- (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.¹⁷***
- (4) The signature need not be at the foot of the document or at any particular place, provided that it authenticates the document.***

[19] Counsel for the claimant seeks to rely on a number of correspondences between the parties in support of the submission that section 4 of the Act has been complied with. In particular the content of letter dated 14th September, 2018. This letter, clearly identified the property in question, indicates Mr. Parris’ intention to sell to Mrs. Swaby and establishes the price at which he is willing to sell. The letter also indicates the various terms under which the sale was to take place; namely the fact that Mrs. Swaby was to cover all expenses and ensure that Mr. Parris would receive no less than \$1,000,000.00 on

completion of the sale. In addition to this, the letter clearly indicated that Mrs. Swaby's mode of acceptance of this offer was to instruct her solicitors to prepare a memorandum of transfer and to forward the funds for the completion of the sale. The letter dated 25th September, 2018 from Mrs. Swaby's attorney indicated that she was prepared to comply with the terms of the letter and was in a position to do so. In addition to all of this, Mr. Daniel prepared a written report on the meeting of 25th September, 2018 which outlines the issues raised during that meeting and what was agreed to by the parties.

[20] Counsel for Mr. Parris makes two broad submissions in response to the claimant's assertions. It is argued that the letter of 14th September, 2018 does not satisfy the provisions of section 4 of the Act, in that it cannot be deemed to be a binding contract. Secondly, it is argued that Mr. Daniel never had the authority to act on behalf of Mr. Parris in the first place and therefore could not bind him to any agreement. I will address the second of these submissions first.

➤ **Was Mr. Daniel acting as agent for Mr. Parris?**

[21] Counsel for Mr. Parris refers the court to Halsbury's Laws of England where it states as follows:

"...the authority of the agent may be derived from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied by conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of the circumstances, and in others be conferred by valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party. There would also, in certain circumstances, appear to be the possibility that the court will imply an equitable agency where no agency exists at common law."

[22] There is no dispute that no written agency agreement exists between the defendants. Counsel argues that Mr. Parris' evidence clearly states that he never gave such authority to Mr. Daniel and that he had never conducted himself in any way indicative of such an appointment. He argues further, that Mr. Daniel acted in such a manner that Mr. Parris was unaware of his day to day communication with Mrs. Swaby. In addition to that, it is argued that the very content of the letter dated 14th September, 2018 indicates that there was no consultation with Mr. Parris. I do not agree with these submissions.

[23] Firstly, the evidence suggests that it was Mr. Parris who indicated to Mrs. Swaby that Mr. Daniel would be contacting her with a view to negotiating this contract. Mr. Daniel corroborates this fact and I found his evidence during the trial to be forthright and reliable. Mr. Daniel's evidence was that he was contacted by Mr. Parris and informed of Mrs. Swaby's desire to purchase the property. He was given verbal instructions to negotiate a price which was amenable to all parties. In cross examination Mr. Daniel stated that he was not familiar Mrs. Swaby prior to this. His only reason for interacting with her was the instructions he received from Mr. Parris. He was adamant that Mr. Parris informed him of his desire to sell the property and that he never mentioned the need to consult his family before making a decision.

[24] On the other hand, I don't find Mr. Parris to be a forthright and honest witness. He remained adamant that he never gave Mr. Daniel the authority to act on his behalf. However, with the exception of Mr. Parris' insistence that he needed to speak with his family prior to concluding the sale, every aspect of the propositions put forward by Mr. Daniel to Mrs. Swaby appear to be a clear reflection of Mr. Parris' instructions. For example, he does not deny that he wished to have \$1,000,000.00 in his possession net of all expenses and fees. This is clearly what was contained in Mr. Daniel's letter of 14th September 2018. He stated in cross examination that it was Mr. Daniel who came up with that figure and that he indicated that he was prepared to consider a sale on these terms. Even if that were the case it would clearly show that he was not as disengaged from the process as he claims to have been. Further to that, Mr. Parris appeared at a meeting on 25th September, 2018 and made no effort whatsoever to communicate any other intention

than what had already been put forward by Mr. Daniel. Nothing about that meeting seemed to surprise him in anyway.

[25] Counsel for the claimant refers the court to the dictum of St. Rose Albertini J³ where she stated that ***“the authority of the agent may be derived expressly from an instrument ... or may be conferred orally. Authority may also be implied from conduct of the parties or conferred by a valid ratification subsequent to actual performance. In addition, a person may appear to have given authority to another, and any acts within such apparent authority may effectively bind him to the third party.”*** To my mind, with the exception of an expressly documented instrument, all of the circumstances referred to by St. Rose-Albertini J may apply to the facts of the present case.

[26] Firstly, I find as a matter of fact, that Mr. Parris did give oral authority to Mr. Daniel to act on his behalf; at least insofar as it relates to negotiating the terms of the contract. He communicated this to Mrs. Swaby and to Mr. Daniel and I accept their evidence in that regard. However, even if that were not the case I find that Mr. Parris' conduct would be enough to at least imply the existence of an agency into the present circumstances. He clearly indicated to Mr. Daniel that he was prepared to accept a certain price net of all expenses. He subsequently appeared at a meeting on 25th September, 2018 and by all accounts ratified what had been communicated in the letter of 14th September, 2018. That would have certainly been an opportunity for him to make it clear that Mr. Daniel was not acting on his behalf and that he was not prepared to sell his property. Certainly, by his conduct at that meeting, he is estopped from denying that this agency exists and that the terms of the letter dated 14th September, 2018 were not based on his instructions. I find that an agency did exist between the defendants as asserted by Mrs. Swaby and Mr. Daniel.

³ Cyril Dornelly Construction Company Limited v. The Harbour Club Limited – SLUHCM2018/0069

➤ **Was there a valid and enforceable contract?**

[27] I turn now to the question of whether the letter of 14th September, 2018 satisfies the requirements of section 4 of the Act. Counsel for the 1st defendant refers the court to paragraph 37 of the judgment of Thom JA in **B.B Inc. v. Lewis Hamilton** which states that:

“... the authorities show that in order to satisfy section 4, it is not necessary that every term agreed by the parties must be included in the note or memorandum. What is to be included are all of the essential terms of the agreement except terms implied by law. Where essential terms agreed are omitted from the memorandum or note, the requirement of the section would not have been satisfied as the contract evidenced by the memorandum or note would not be the contract the parties entered into.”

[28] Essentially, Mr. Caines for the 1st defendant argues that the letter of 14th September, 2018 does contain all of the essential terms of the agreement and therefore does not comply with section 4 of the Act. In particular, he points to paragraph 2 of the letter which states that “... we have to revise the offer and advise that the way forward is to provide an amount of One Million, One Hundred and Fifty Thousand (\$1,150,000.00) for completion of the transaction.” Counsel submits that this letter also omits some key elements of the agreement as alleged by the claimant. These are:

- (a) The closing date;
- (b) The fact that Mr. Parris was to provide the lease agreements; and
- (c) The fact that Mr. Parris was supposed to pay all outstanding utility bills prior to closing.

[29] The submission is that the failure to reduce these elements of the agreement into writing offends the provisions of the legislation and therefore makes the contract unenforceable. Further to that, Mr. Caines submits that the content of the letter is not a binding contract in the first place. At best it can be classified as an offer letter. He argues that the letter merely served the purpose of updating Mrs. Swaby on his discussions with Mr. Parris and

indicating the circumstances under which he was prepared to sign a memorandum of transfer. Given that the final paragraph indicates that the defendants were “pleased to discuss the dynamics of this purchase”, it cannot be said that the letter is a reflection of the contract itself. For that proposition counsel also relies on the authority of ***Vincent Buckley v. Eldora Hodge***⁴ where it was stated that ***“to constitute a binding contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. In order for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately.”***

[30] On the other hand, Ms. Merchant for the claimants argues that in fact the letter, taken together with other documentation tendered into evidence, reflects all the essential elements of the contract. The property to be sold is clearly identified. The price which the vendor is willing to accept is identified and so are the terms on which he is prepared to sign the memorandum of transfer. Very importantly, the letter indicates the method by which the offer is to be accepted; and that is by Mrs. Swaby instructing solicitors to prepare the memorandum on her behalf. In addition to that, by way of letter dated 25th September, 2018, attorneys acting for Mrs. Swaby communicated this acceptance and the readiness to complete the transaction. It was in this correspondence that the claimants first requested copies of the lease agreements and payment of the utilities. Subsequent to the meeting Mr. Daniel prepared, in writing, a report of what was agreed to at the meeting, which included all of the issues referred to by Mr. Caines.

[31] I agree with the submission of counsel for the claimants. Considering all of these correspondences together and having found that Mr. Daniel was acting as agent for Mr. Parris, I am of the view that the essential terms of the agreement are all reduced into writing and signed and acknowledged by Mr. Parris through his agent. Mr. Parris’ oral evidence corroborates, to some extent, what was contained in the report and I have little doubt that he agreed to the essential terms of the contract. By the end of the meeting of

⁴ SKBHCV2012/0339

25th September, 2018 there was a clear agreement and a date set for closure. Although he speaks to a desire to have legal representation he does not go into much detail as to how this would have affected his decision. This was a rather straight forward transaction and without more I am not prepared to conclude that the lack of legal representation was a valid reason for Mr. Parris reneging on his agreement. Mr. Parris clearly changed his mind and, insofar as that is the case, he stands in breach of the agreement between himself and Mrs. Swaby. The question for determination therefore is whether she is entitled to the remedies which she seeks.

Specific Performance

[32] Before granting an order for specific performance, the court must consider a number of issues. These are outlined in the case of ***British Virgin Islands Electricity Corporation v Delta Petroleum LTD***⁵ where 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”***

[33] Essentially, specific performance is an equitable remedy to which a claimant is not entitled as a matter of right. The question is whether, in all the circumstances of the case, it would be just to grant such a remedy as opposed to damages for breach of contract. The issue was also addressed in the case of ***Ramsbury Properties Limited v Ocean View Construction Limited***⁶ where Baptiste JA stated the following at paragraph 12 of his judgment:

⁵ BVIHCV2015/158

⁶ SKBHCVAP2011/0020

“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.”

[34] Notwithstanding this, it has been observed that where the contract is for the sale of land the court would normally grant such an order. However, that does not necessarily undermine the court’s discretion; as it is still incumbent on the court to consider the circumstances of the transaction and whether it is equitable to order specific performance, despite the fact that there has been a breach of a contract for the sale of land. In the case of ***Geddes Meyer v Kehvin Dickinson***⁷ Blenman JA noted the following:

“Specific performance is an equitable remedy to a cause of action for breach of contract. In cases involving a sale of land, the remedy is normally available in appropriate circumstances. As a general rule, each parcel of land is considered to have unique features and an award for damages would not be a sufficient remedy for the purchaser and thus the law considers that the purchaser cannot obtain a satisfactory substitute. However, the limitations on

⁷ ANUHC VAP2014/0005

the grant of specific performance are clear. Indeed, there are numerous circumstances in which specific performance would not be granted.”

[35] The court very often considers the extent to which the purchaser may have altered his position prior to the vendor’s breach. He may, for example, have negotiated with a bank for a loan to facilitate the sale or made a deposit towards the purchase price in anticipation of closing the deal. This has at times been considered as part performance of the contract, sufficient to demand of the vendor that he fulfill his end of the bargain. Counsel for the claimant referred the court to the case of ***RPL (1991) Limited v. Texco (Trinidad) Limited***⁸ where the doctrine of part performance was discussed. In particular, the following was stated at paragraph 23 of that judgment:

“For the doctrine to be applicable, the act of part performance relied on must be that of the party seeking to enforce the contract and not the party sought to be charged. The act must then be clothed with the following characteristics:- (a) it must be unequivocally referable to the contract as alleged; (b) it must be such as an act as would render non-performance a fraud; and (c) the contract must be one that can be enforced by the Court.”

[36] Counsel goes on to submit the following as acts of part performance on the part of the claimants:

- (a) Instructing their solicitors to prepare the memorandum of transfer;
- (b) Completing the preparation of the memorandum of transfer;
- (c) Obtaining approval by the Nevis Island Administration for stamp duty; and
- (d) Preparing cheques (bank drafts) for payment of the purchase price and all fees and expenses in relation to the matter.

⁸ H.C.A No. 807 of 2003

[37] Counsel makes further reference to the decision of Alexander J where he states that the claimant's "***delivery of RPL's cheque to Texaco was an act of part performance. This act was performed by RPL, the party seeking to enforce the contract. There is no doubt that the delivery and amount of the cheque refers to the alleged contract; this act is such as would render non-performance a fraud in that Texaco would be able to resile unscathed from its obligation to perform its side of the contract to the detriment of RPL...***" In my view, there are a number of distinguishing elements between that case and the one at bar. I doubt that the evidence suggests that the cheques had been delivered to Mr. Parris. They were certainly available for inspection at the meeting of 25th September, 2018. However, certain demands were made of Mr. Parris, which he agreed to fulfill and the parties set another date for completion of the contract. However, that is not enough to detract from the general question of whether it would be equitable to grant an order for specific performance in the circumstances of the present case.

[38] What is important is that the parties would have left the meeting of 25th September, 2018 with the firm view that the sale of the property would have been closed by 1st October, 2018. Mrs. Swaby would have placed herself in the firm position to enable her to perform her end of the bargain. Cheques/bank drafts had been drawn up. The Inland Revenue was engaged. Attorneys were engaged in order to draft the memorandum of transfer. Yet, without any plausible explanation Mr. Parris simply did not avail himself to fulfill his own end of the bargain. In the exercise of the court's discretion to do what is equitable, I am mindful of the fact that the 1st defendant has provided no explanation for his breach of the agreement for sale. He simply denies that there was ever an agreement in the first place. I appreciate that at no point in these proceedings does the burden of proof be shifted to him. However, as has been noted by Blenman JA, the court normally exercises its discretion to award specific performance of a contract for the sale of land once certain criteria is met. Therefore, having met those criteria, I can find no reason to weigh the principles of fairness and equity away from Mrs. Swaby in these proceedings. Damages would certainly not be an adequate remedy given the nature of this agreement, being the sale of commercial

property where rental income was at stake. I would therefore grant Mrs. Swaby the order for specific performance as prayed for.

Damages

[39] Regarding the issue of damages, I note that the claimants have pleaded a request for damages in addition to or in lieu of an order for specific performance. However, there is not much by way of evidence as to what these damages ought to be. Counsel in her closing submissions seems to have suggested that damages should be awarded if the court is not minded to make an order for specific performance. Given that specific performance has been ordered I am not of the view that any further damages should be awarded given the state of the evidence on that issue.

[40] In the circumstances I make the following declarations and orders:

- (a) The claim of the 2nd claimant is dismissed with no order as to costs;
- (b) The 1st claimant's case is established;
- (c) Subject to Mrs. Swaby's capacity to fulfill her duties under the contract, the 1st defendant is ordered to complete the sale of the property to Mrs. Swaby by performing the following tasks:
 - (i) All utilities are to be paid within one month from the date of this judgment;
 - (ii) The memorandum of transfer is to be signed within 7 days from the date of the clearance of all utilities as provided for in this order.
- (d) The 1st defendant will pay prescribed costs to Mrs. Swaby and to Mr. Hastings Daniel, given that they have both sought and obtained legal representation. Mr. Daniel has had to represent himself in this matter and is entitled to his costs. Given that the matter

was primarily one of specific performance and no value had been placed on this case prior to judgment, the costs are assessed at the default value of \$50,000.00. Therefore the 1st defendant will pay \$7,500 in costs to Mrs. Swaby and Mr. Daniel.

**Ermin Moise
High Court Judge**

By the Court

Registrar