

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

CLAIM NO. ANUHCV 2012/0530

[1] GALE CLARKE

Claimant

and

**[1] PETER ANDALL
[2] BAF ENTERPRISES LTD**

Defendants

Appearances:

Dr. David Dorsett of Watt, Dorsett & Co. for the Claimant

Ms E. Ann Henry Q.C. and C. Debra Burnette of Henry & Burnette for the Defendant

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2017: December 7
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JUDGEMENT

[1] HENRY, J. By Fixed Date Claim Form the claimant seeks the following relief:

- 1) Damages for breach of contract;
- 2) Payment by the 1st defendant of the sum of \$7,000,000.00 due as of July 2010 plus \$100,000.00 for each month thereafter;
- 3) An order that the 2nd defendant do yield up possession of the property;
- 4) Mense profit of \$83,644.00 per month from September 2011 until the yielding up of possession by the 2nd defendant;

- 5) Interest;
- 6) Costs.

- [2] The claimant is a businesswoman and the registered proprietor of two adjoining parcels of land (“the property”) described as:

Registration Section	Block	Parcel
Cassada Gardens & New Winthropes	42 1894A	406
Cassada Gardens & New Winthropes	42 1993B	16

On parcel 406 is a three-storey building. On parcel 16 is a two storey building.

The Pleadings

- [3] The claimant alleges that on or about 11 August 2011, she agreed to sell the property to the 1st defendant on terms. The claimant and the 1st defendant agreed on the purchase price of \$9 million payable by means of an initial deposit of \$1 million to be followed by 24 monthly payments of \$100,000.00 beginning in September 2011 and the balance of \$5,600,000.00 due and payable by December 2013. The agreement also provided that the 1st defendant was entitled to possession of the property upon payment of the initial deposit.
- [4] The 1st defendant duly paid the initial deposit in August 2011. The 1st defendant thereafter made payments of \$400,000.00 representing four monthly payments. The claimant alleges that in breach of the agreement the 1st defendant has failed to pay the monthly payments for the period January 2012 to July 2012 totalling \$700,000.00. That he has failed and or neglected to remedy his breach and as a result she has suffered loss and damage.
- [5] Further, in September 2011, the 2nd defendant entered into possession and occupation of 18,000 square feet of the building on parcel 406 and 592 square feet of the building on parcel 16. The claimant asserts that the 2nd defendant has no right to possession or occupation of the property or of either parcel and that the continued possession and occupation of the claimant’s property by the 2nd defendant is unauthorised and constitutes trespass.
- [6] In their Amended Defence and Counterclaim the defendants dispute the claim and assert that the 1st defendant is not in breach of the contract as asserted. They assert that it is the claimant who is in breach of the contract which was made orally and certain terms of which were reduced into writing in a memorandum prepared by the claimant’s Attorney and executed by the parties on the 11th August 2011.
- [7] They assert that the claimant has breached the contract in that she has:
- 1) Failed to put the 1st defendant into vacant possession;

- 2) Permitted one of her tenants who remained in occupation to conduct business in direct competition with the 1st defendant's business;
 - 3) Failed to pay off all amounts due to the Antigua Public Utilities Authority ("APUA") prior to the 1st defendant's taking possession of the property; and
 - 4) Failed to transfer any of the shares in Gale Clarke Enterprises Ltd ("GCE Limited"). to which the 1st defendant was entitled notwithstanding that the 1st defendant has paid for them in accordance with the agreement.
- [8] Further the defendants deny that the 2nd defendant wrongfully entered into possession and occupation of the property and as such has not trespassed. The 2nd defendant, they assert, was properly put in possession by the 1st defendant. According to them the claimant has not suffered any loss and they ask the court to dismiss the claim.
- [9] By their Amended Counterclaim the defendants seek rescission of the contract. They allege that the claimant is in breach of the contract for the same reasons set out in paragraph 9 above. They seek special damages in the amount of \$1,700,000.00 in addition to damages for the breach.
- [10] In the Reply to Defence and Defence to Counterclaim, the claimant joins issue with the defendants in respect of their Amended Defence save in so far as the same consists of admissions.
- [11] The claimant denies that she is in breach of the contract entered into between herself and the 1st defendant. She pleads that the agreement was reduced into writing and agreed to by the parties on 11th August 2011 and by clause 15 it was agreed that the written contract fully and completely expressed the agreement between the parties. Therefore they deny that the terms are as set out by the defendants.
- [12] The claimant further pleads that the 2nd defendant was not properly put into possession by the 1st defendant as the 1st defendant had no lawful authority so to do under the terms of the written contract. There was no agreement or concurrence on the part of the claimant that the 2nd defendant should be put into possession of the claimant's land. She repeats her claim that she has suffered loss on account of the actions of the defendants
- [13] In regard to the Defence to Counterclaim, the claimant repeats the entirety of the Statement of Claim and her Reply to the Defence. Save as before admitted the claimant denies each and every allegation in the Counterclaim.

The Evidence

- [14] The claimant gave evidence consistent with her pleadings. In addition her evidence in regard to the written contract is that all of the terms of their agreement are in writing, and this is clearly stated in the written contract. She denies that it is the case that some of the terms of the agreement were oral and some were in writing. She admits that the parties did talk prior to the written Contract but the written Contract contains all that was agreed between them. She denies that it is the case that their agreement consists of matters not contained in the written contract.

- [15] Her evidence is that contrary to the contents of the defence, there was no agreement that she would transfer her land into the name of GCE Limited. She states that such a transfer would make no economic sense. She points out that if Mr. Andall were a director of GCE Limited or held more than one-third of the shares, GCE Limited could not lawfully hold land, as to do so would be contrary to section 3 of the Non-Citizens Land Holding Regulation Act, since Mr. Andall is an unlicensed non-citizen. She admits however that it was part of the contract that as he made payments there would be transfer of shares to him in GCE Limited.
- [16] According to her evidence, it is incorrect that it was a term of the contract that she would give notice to the tenants who were in occupation of the property to vacate the property in time for Mr. Andall to take over in August 2011. The sale of the land and Mr. Andall's possession of the property, she asserts, would be subject to the rights of the tenants in actual occupation of the land. She is adamant that it was not a term of the contract for her to give notices to quit to tenants if to do so would be in violation of their tenancy agreements.
- [17] With regard to the utilities, she admits that she is liable to pay APUA for utilities owed with respect to the property up to 31st July 2011. She asserts however, that this is a personal matter between APUA and herself and does not form a part of the agreement.
- [18] She also denies that she agreed to hand over the property to Mr. Andall on the 1st August 2011. Under the contract Mr. Andall would be given possession upon his payment of \$1,000,000.00.

The Written Contract

- [19] For a transaction of this magnitude, the written Contract is quite brief. It consists of three and one half pages. Since the issues concern interpretation of the contract, I have set out the contract below.
- [20] The parties to the contract are listed as Gale Clarke of Potters Village as "the Seller" and Peter Andall of Cassada Gardens as "the Buyer". The contract states:

"The Seller agrees to sell and the Purchaser agrees to purchase, upon the terms and conditions hereinafter set forth, a ninety (90%) interest in the shares of the company Gale Clarke Enterprises Ltd to include All that certain plot, piece or parcel of land, situate, lying and being in Old Parham Road in the Parish of Saint Johns, in Antigua and Barbuda being more particularly described in the Registry of Lands as Registration Section: South Central: Block: 42 1894A; Parcel 406 and Registration Section: South Central: Block 421993B Parcel: 16.

1. PURCHASE PRICE

The purchase price of the shares is NINE MILLION EASTERN CARIBBEAN DOLLARS (EC\$9,000,000.00).

2. PERMITTED EXCEPTIONS

The Premises is sold subject to the following:-

- (a) All present and future building, zoning, subdivision, landmark, historic, wetlands, fire and safety restrictions, regulations, law, ordinances, resolution and orders of any state, municipal or other governmental authorities having jurisdiction over the Premises or the use or improvement thereof.
- (b) The rights of utility companies, if any, to install, maintain and operate lines, poles, pipes, distribution boxes, and other equipment and installations over, under or along the Street next to the Premises or the part of the Premises next to the street, or running to improvements on the premises.
- (c) Real estate taxes and water and sewer charges, subject to adjustment as hereinafter provided.
- (d) Encroachments and projections of walls, foundation, trim, fences or other improvements, installation or appurtenances onto the Premises or from the Premises onto adjoining property; variations between record lines and any tax map; and consents for the erection and maintenances of any structures on, under or above any streets or roads adjoining the Premises.

3. OBJECTIONS TO TITLE

Seller agrees to cause title to the Premises to be searched and examined. Seller agrees to deliver to Buyer, copies of the results of the title search and any title report, tax search, departmental searches, survey and survey reading, within not more than fifteen days after the deposit has been paid.

4. THE CLOSING

The "*Closing*" means the settlement of the obligations of Seller and Purchaser to each other under this contract, including the payment of the Purchase price to Seller, and the delivery to Purchaser of a bargain and sale deed with covenant against grantor's acts, in proper form for recording, so as to transfer full ownership (fee simple title) of the Premises, free of all encumbrances except as herein stated vesting of all interest in premises in the name of the company.

5. THE CLOSING DATE

The closing shall be held at a place mutually agreed to between both parties, at a date to be mutually agreed on between the parties on or before 31st December 2013.

6. ALLOWANCES FOR UNPAID TAXES

The amount of any unpaid taxes or assessments, which Seller is obligated hereunder to discharge or satisfy, with any interest or penalties will be borne by the Seller.

7. USE OF PURCHASE PRICE TO PAY ENCUMBRANCES

If there is any lien against the Premises of anything else affecting the sale which Seller is obligated to pay and discharge at the Closing, the Purchaser has undertaken and agrees to provide separate certified cheques as reasonably requested to assist in discharging these matters.

8. STAMP DUTY AND LEGAL FEES

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9. INABILITY TO CONVEY

If Seller shall be unable to convey good and marketable title in accordance with this contract, or fails to deliver such title for any reason other than his wilful default, or is unable to comply with any term, covenant or condition of this contract, the sole obligation of Seller shall be refunded, without interest, any payments made by Purchaser on account of the purchase price, whereupon this contract shall terminate and neither party shall have any further claim against the other by reason of this contract, and the lien, if any, of the Purchaser against the Premises shall cease. Seller shall be obligated to bring whatsoever action or proceeding or otherwise incur any expense to remove any objection to title, as Seller is able to convey, without any reduction of or credit against the purchase price.

10. POSSESSION

The Purchaser shall be given possession of the Premises immediately upon payment of the deposit of \$1,000,000.00.

11. BROKERAGE

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12. NOTICES

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13. PURCHASER'S LIEN

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14. ASSIGNMENT

Purchaser may not assign this contract without the prior written consent of Seller.

15. MISCELLANEOUS

All oral or written statements, representations, and agreements of the parties are superseded by this contract, which alone fully and completely expresses their agreement. This contract may not be amended, waived or modified in any respect except by a writing signed by the party sought to be bound.

This contract shall be governed and construed in accordance with the laws of the State of Antigua and Barbuda. If any provision of this contract shall be unenforceable or valid, such

unenforceability or invalidity shall not effect any other provision of this contract. The captions in this contract are for convenience only and are not to be considered in construing this contract.

Claimant's Submissions

- [21] The claimant states from the onset that the written contract is to a large extent both incongruent and incomprehensible. The contract, it is submitted, at its core is a contract for the sale of land and tangentially an arrangement where the shares of GCE Ltd. are acquired by the claimant and Mr. Andall upon payment by Mr. Andall for the claimant's land. The contract is a vehicle that makes possible for Mr. Andall to acquire a 90% interest in the shares of GCE Ltd. Acquisition of the shares is not obtained directly by purchase of the shares from a shareholder but indirectly through purchase of the claimant's land. It is the purchase of the land by means of instalment payments that serves as the trigger for the issuance of the shares by GCE Ltd. and bringing into being Mr. Andall's 90% interest in the said shares.
- [22] The claimant submits that the evidence clearly points to a breach by Mr. Andall. There is no effective denial to the allegation that Mr. Andall failed to pay to the claimant as prescribed by the terms of the contract. The substance of Mr. Andall's case is that he decided not to make any further payments because of the claimant's breach of contract. In the circumstances of his evidence in his witness statement denying that he was in breach of the contract because he only acted in accordance with the terms of the contract is incoherent and inconsistent with what is readily and unmistakeably apparent.
- [23] Further, clause 14 of the contract provides that Mr. Andall may not assign the contract without the prior consent of the claimant. The effect of this clause is that Mr. Andall could not assign his right under the contract without the claimant's consent. In breach of clause 14 Mr. Andall purported to assign and permit BAF to be in possession of the premises. Mr. Andall's contention that this was done with the concurrence of the claimant is vehemently denied. Assignment of the right to possession was to be by consent. The parties would have to mutually agree to the assignment and the terms of the assignment. This simply was not done. BAF having no contractual or other right to be in possession of the premises, is a trespasser.
- [24] Mr. Andall's right to possession commenced with his payment of the deposit. His right to possession ceased when he failed to pay as required under the terms of the contract. Upon failure to pay as required, the right to possession reverted to the claimant as of 1st May 2012. Therefore, from that date, the claimant was entitled to make a claim in trespass against BAF.
- [25] BAF has been unjustly enriched and the claimant is entitled to mesne profits based on the value of the property as it would fairly be calculated in accordance with the user principle. BAF gave up possession in April 2015 and therefore was a trespasser for 36 months. The claimant therefore claims mesne profits for that period.

Defendants' Submissions

- [26] The defendants submit that the claimant gave contradictory testimony therefore her evidence is unreliable. The claimant asks that the court accepts the claimant's evidence only if it is corroborated by documentary evidence or a concession by Mr. Andall.
- [27] Further, they submit that it was the claimant's conduct which amounted to a breach of the contract which precipitated the non-payment and further that it was her conduct which entitled Mr. Andall to treat the contract as at an end.
- [28] The contention is that the contract was at an end when Mr. Andall made no further payments. In other words performance of the contract was, on the evidence before the court, rendered impossible by the conduct of the claimant.
- [29] On this basis the defendants ask the court to find that they are entitled to be compensated for their loss by way of reimbursement of the monies paid under the contract, as set out in their counterclaim. While the contract does not speak to precisely the set of circumstances which occurred, the defendants draw the court's attention to clause 9 of the contract which provides that if the claimant, as Seller, is unable to convey title, then the Seller would be obliged to refund the monies paid on account of the purchase price.
- [30] The defendants further submit that if the court finds that the claimant is in breach, as alleged, then the claimant ought to repay to Mr. Andall all the monies paid by him under the contract in the sum of \$1,700,000.00. On the other hand, if the court finds that the defendants are in breach, then clause 1 (c) of the Agreement would apply and the claimant would be entitled to keep 10% of the monies paid or \$170,000.00 as compensation.

Issues to be Determined by the Court

- [31] The 2nd defendant having given up possession of the premises in 2015, the following are the issues before the court:
- (a) What constitutes the terms and conditions of the contract between the parties?
 - (b) Was there a breach of the contract? If so by whom?
 - (c) What are the damages payable by the party in breach
 - (d) Did the 2nd defendant commit a trespass, if so, what is the measure of damages?

Nature of the Contract

- [32] The claimant and defendants differ as to what constitutes the terms of the contract between them. The claimant's position is that the written contract contains all the terms agreed. The defendants on the other hand, plead that the Contract was made orally and only certain of the terms were reduced into writing. They have pleaded several terms which they say constitute part of the agreement which are not contained in the written Contract. The court accepts that the evidence reveals that there were

discussions and negotiations between the parties for some time before the written Contract was executed. However, Clause 15 of the Contract made on the 11th August 2011 and signed by the parties provides the definitive answer. It unequivocally expresses the intention of the parties that the terms set out in the written Agreement fully and completely expresses their agreement. It specifically provides that any oral or written statements, representations and agreements of the parties are superseded by the written contract. Further, the Contract may not be amended, waived or modified in any respect except by a writing signed by the party sought to be bound. Therefore the court is tasked with interpreting the various provisions contained in the written contract.

[33] Where the language of a document is clear and applies without difficulty to the facts of the case, extrinsic evidence is not admissible to affect its interpretation; but where the language is peculiar, or its application to the facts is ambiguous or inaccurate, extrinsic evidence may, subject to certain qualification be given in explanation¹. “Interpretation” includes ascertaining the meaning of the language of a document or its application to the facts of the case or the sense in which words have been used.

[34] Lord Neuberger in **Arnold v Britton**² gives valuable guidance on interpretation of contractual provisions. In that case the issue was the interpretation of a service charge clause in a lease. He noted:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd** [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”

[35] When it comes to considering the centrally relevant words to be interpreted, Lord Neuberger accepted “that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning”. He emphasized however “that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning”.

[36] He further noted that “While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision

¹ Phipson on Evidence section 43-01 citing *Kelantan v Duff Development Co* [1923] A.C. 395

² [2015] AC 1619

as correct simply because it appears to be a very imprudent term for one of the parties to have agreed even ignoring the benefit of wisdom of hindsight”.

- [37] Applying these principles, the court accepts that only those terms which form a part of the written contract or which can properly be implied can be held as constituting the agreement between the parties.
- [38] Mr. Andall pleads that it was a term of the agreement that the claimant would incorporate the company to be known as GCE Limited and would cause the Property to be transferred into the name of GCE Limited. That it was a further term that as Mr. Andall made payments to the claimant, the claimant would transfer shares to him for the value of the money paid by him.
- [39] The written Contract states that the Seller (the claimant) agrees to sell and the Purchaser (Mr. Andall) agrees to purchase “a 90% interest in the shares of the company Gale Clarke Enterprises Ltd to include all the plot, piece or parcel of land on Old Parham Road as described. It then sets out the purchase price and method of payment and then provides that “(d) Shares in the company will be issued commensurate with payment at the rate of 1 share for every \$1,000.00 paid.”
- [40] At trial although the claimant initially denied that the property was to be transferred to GCE Ltd, when confronted by clause 4 she admitted that under the written Contract, at closing title was to be transferred into the name of the company.
- [41] In the courts view, the Contract is one for the purchase of the property by Mr. Andall to be transferred into the name of GCE Ltd at closing. At the time of closing GCE Ltd would be owned 90% by Mr. Andall and 10% by the claimant, the shares having been issued as payments were made by Mr. Andall. This construction would give efficacy to the agreement as made and would not contradict any express term of the contract. The fact that Mr. Andall was not the holder of the appropriate non-citizen license would not make any transfer under the provision void but voidable at the instant of the government.
- [42] The law is well settled. “The Aliens Landholding Licence legislation does not affect the contractual and other relationships between vendor and purchaser and lessor and lessee. The rights, powers and privileges to forfeit land held by the unlicensed alien vests in the State, and not in the individual citizen”.³
- [43] Unfortunately, the Contract does not place the responsibility on any person to cause the shares to be issued. The evidence shows that GCE Ltd. was incorporated by the claimant and 1st defendant on 4th August 2011 approximately one week before the Contract was signed. From the evidence, no further action has been taken. It appears that no organisational meeting in accordance with section 65 (1) of the Companies Act (the Act) was ever held. Section 65 (2) of the Act provides that an incorporator or director may call the meeting. Accordingly, either the claimant or Mr. Andall could

³ Edwin Hughes v La Baia Limited

have called the organisational meeting at which the issuance of shares could have been authorized. Under these circumstances, the court cannot say that it was a term of the agreement for the claimant to cause the shares to be issued or that the failure of the claimant to cause shares to be issued to Mr. Andall constitutes a breach of the Contract.

- [44] Mr. Andall pleads that it was a term of the Contract that the claimant would give notice to the tenants who were in occupation of the Property to vacate the Property in time for him to take over in August, 2011. Further, that the claimant would hand over the property to him on the 1st August 2011 and put him into vacant possession of the same.
- [45] Under clause 10 of the Contract Mr. Andall was to be given possession of the premises immediately upon payment of the deposit. The claimant submits that there is no right either expressly under the contract or by implication that Mr. Andall was entitled to vacant possession upon the payment of the deposit.
- [46] The written Contract contains no physical description of the premises other than the Registration Section, Block and Parcel particulars. There is no mention of the existing buildings on the land. She states that there are two parcels – parcel 406 and 16. On parcel 406 is a three-storey building and on parcel 16 is a two-storey building. It is not disputed that prior to and during the time that the parties engaged in discussions, the claimant had operated on the premises the business of a supermarket, maintained a warehouse and other facilities which supported the supermarket and also rented other portions of the commercial buildings which were part of the property. In August 2011 there were three tenants on the premises.
- [47] Admittedly, the Contract is devoid of any provision in respect of the existing tenants of the premises. In fact the claimant in her Reply to the Defence pleads that Mr. Andall's possession of the land would be contingent of the rights of tenants who were in actual occupation of the land.
- [48] Mr. Andall's interpretation of the contract would require the court to interpret clause 10 to mean "vacant possession". While the claimant's interpretation would require the court to find clause 10 to mean possession "subject to the existing tenants' rights". The rule requires that a vendor make the property available at the due date of completion in a state in which the purchaser can both physically and lawfully occupy it⁴. The question is whether the agreement provides for the contrary by inference.
- [49] The claimant admits that discussions with Mr. Andall started in early 2010. She wanted to retire and Mr. Andall wanted to expand his business interest into Antigua. The claimant had operated a supermarket and Mr. Andall's business was wholesale and retail sales of dry and perishable goods. She agreed that the two had developed a good business relationship. So that it was known to the parties that Mr. Andall would be conducting a business on the premises. The parties agreed to Mr. Andall's possession of the premises before closing. The argument is that the parties must have

⁴ Topfell Ltd v Galley Properties Ltd [1979] 1 W.L.R. 447

intended vacant possession, since possession would not make business sense in these circumstances unless it was vacant possession.

[50] The claimant points to section 28(g) of the Registered Land Act which provides:

28. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed.

[51] The claimant also refers the court to the case of **Strand Securities Ltd v Caswell**⁵ where Lord Denning considered section 70(1)(g) of the U.K. Land Registration Act, which is equivalent to section 28(g) of our Registered Land Act. He stated:

“Section 70(1)(g) is an important provision. Fundamentally its object is to protect a person in actual occupation of land from having his rights lost in the welter of registration. He can stay there and do nothing. Yet he will be protected. No one can buy the land over his head and thereby take away or diminish his rights. It is up to every purchaser before he buys to make inquiry on the premises. If he fails to do so, it is at his own risk. He must take subject to whatever rights the occupier may have.”

[52] The contract makes no provision for negotiation or settlement of the rights of the tenants in occupation. Notwithstanding the fact that vacant possession would make business sense, the absence of the crucial provision as to the treatment of the tenants in occupation would prevent the court from inferring a term for vacant possession into the contract. To make such an inference would be to create a contract capable of violation the provisions of the law. The court must give the contract a construction that would be legally effective and would not violate the provisions of the law. The contract having not provided for vacant possession by Mr. Andall, the court is unable to so interpret the contract as to infer vacant possession. It follows that failure of the claimant to provide such vacant possession could not amount to breach of the contract so as to give rise to repudiation by Mr. Andall.

Electricity

[53] Another of the breaches relied on by Mr. Andall is the claimant's “failure to pay off all amounts due to APUA prior to his taking possession of the property. The claimant admits that she was responsible for electricity consumed on the premises through July 2011. Upon the payment of the deposit the 1st defendant was entitled to possession. The claimant admits that at that time her indebtedness to APUA had not been paid off. She does not deny that APUA had disconnected the power. Her

⁵ [1965] 1Ch 958 at 979F- 980C

response is simply that the payment of her debt to APUA was not a term of the agreement and a supply of electricity to the premises was not a condition of possession. Therefore the absence of electricity at the time the Mr. Andall was entitled to possession cannot be considered a breach on the claimant's part.

- [54] Mr. Andall's evidence is that the electricity remained off until in or about January 2012. But he did not repudiate the contract then. As a result of Mr. Andall making an arrangement for the payment of the arrears, APUA reconnected the electricity to the premises. At the end of March 2012, his evidence is that he decided not to make any further payments because of the claimant's default.
- [55] It is common ground that it was not a term of the written agreement that the claimant pay off the debt to APUA prior to possession by Mr. Andall. It is pleaded as an oral representation. The court has already ruled that the agreement between the parties was not partly oral and partly in writing as alleged by Mr. Andall. By virtue of clause 15 the written agreement superseded all oral representation of the parties. Therefore unless it could be inferred as a part of the provisions of the written contract, the absence of electricity could not be relied upon as a breach giving rise to repudiation of the contract. The clause granting possession to Mr. Andall is quite stark. It merely says that he is to be given possession immediately upon payment of the deposit. Utilities are not addressed in the contract and the court can find no other clause upon which to hang such an inference.
- [56] In any event, given that the contract did not provide for vacant possession and is silent as to when Mr. Andall would commence his business operations, there is no evidence that it was intended that the actual business commenced before closing. The court is of the view that even with electricity, Mr Andall could not have occupied the entire premises. Therefore, the absence of electricity to parts of the premises, by itself, could not amount to a breach that goes to the heart of the contract so that Mr. Andall would be entitled to treat the agreement as at an end.
- [57] In the court's view, none of the four items listed in Mr. Andall's particulars of breach were either expressly or by inference a part of the agreement between the parties, although it would have been prudent to include each of them in the contract. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. It is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice⁶. Mr. Andall describes himself as an experienced businessman with business interest regionally. No unequal bargaining position is alleged.
- [58] The court finds that at the end of March 2012 when Mr. Andall repudiated the agreement and demanded the refund of the instalments made, the claimant was not in breach of the agreement. Accordingly, Mr. Andall was not entitled to treat the contract as at an end and he is therefore himself in breach. His defence therefore fails.

⁶ Arnold v Britton, supra at page 1628

- [59] It follows that Mr. Andall's counterclaim for recession of the contract based on the same alleged breaches by the claimant must also fail.

Damages for Breach

- [60] In her closing submissions, the claimant asserts that she is entitled to retain 10% of the instalments and in addition, she is also entitled to retain the deposit of \$1million for total damages of \$1,070,000.00. The court accepts that upon breach, the rights of the parties to a contract for the purchase of land, depend on the terms of the contract having regard to what the contract says about the deposit and the instalments. Under clause 1 (c) the claimant is entitled to retain 10% of the monies paid. There is no separate provision for retention of the deposit upon breach. Mr. Andall has paid \$1,700,000.00. The claimant is therefore entitled to retain \$170,000.00. The balance is to be refunded to Mr Andall.

The Claim Against the Second Defendant

- [61] The claimant pleads that the 2nd defendant entered into possession and occupation of 1800 square feet of the building on parcel 406 and also 592 square feet of a building on parcel 16. The 2nd defendant has no right to possession or occupation of the property or of either parcel and the unauthorised occupation constitutes a trespass. The claimant therefore claims damages at the rate of \$4.50 per square foot or \$83,664.00 per month for the period of the alleged occupation.
- [62] The 2nd defendant (BAF Enterprises Ltd.) is a company incorporated under the Laws of Antigua and Barbuda on the 2nd February 2011. Mr. Andall's evidence is that BAF was incorporated in pursuance of his agreement to purchase the property from the claimant and to operate his business. Having paid the deposit under the agreement he took possession of the property in the name of the 2nd defendant, which was done with the concurrence of the claimant.
- [63] Mr. Andall ceased paying the instalments and treated the contract as at an end as of 31st March 2012. The instalment due at the end of April 2012 was not paid. Yet BAF remained in possession until April 2015. BAF paid no rent during this period. When Mr. Andall ceased payment of the instalments, the defendants' right to possession under the contract terminated. The claimant is therefore entitled to mesne profits for the period of May 2012 to April 2015.
- [64] Based on a report by Edwards Management Group Ltd, Property Appraisers, the claimant puts the cost per square foot at \$4.50⁷. The report indicates that the cost per square foot for rental space on Old Parham Road area ranges from \$3.00 to \$6.00 per square foot. Mr. Edwards recommended \$4.50 as the cost per square foot for the space occupied by BAF.
- [65] As to the square footage occupied by BAF, Mr. Andall's evidence is that BAF occupied the top floor of the Annex as offices, then the ground floor of the main building as a warehouse, and sometime

⁷ Paragraph [34] of the 1st defendant's witness statement, page 54 of the Trial Bundle

later some stock was moved to a portion of the middle floor. But he was unable to say how much square footage BAF occupied.

[66] The report which is very brief makes no mention of the difference between warehouse space and office space, or whether the absence of electricity would impact the cost. There is no evidence that these circumstance were taken into consideration in arriving at the cost per square foot. The court is therefore not satisfied with the contents of the report and will therefore order that the mesne profits payable to the claimant for the period is to be assessed.

[67] Accordingly, judgment is entered for the claimant Gail Clark as follows:

- 1) Against the 1st defendant Peter Andall, a declaration that the claimant is entitled to retain the sum of \$170,000.00 as damages for breach of the Contract. The balance of the sums paid to the claimant by the 1st defendant shall be refunded to him;
- 2) Against the 2nd defendant BAF Ltd, for a sum to be assessed as mesne profits for the square footage occupied by the 2nd defendant during the period May 2012 to April 2015;
- 3) The Counterclaim of the defendants is dismissed;
- 4) Prescribed costs are awarded to the claimant on the sums awarded against both defendants;

Clare Henry
High Court Judge

By the Court

Registrar