06 JEB 2013 -

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1774 of 2005

BETWEEN:

LORNA VANELLA MOORE **PLAINTIFF**

AND

VON WILFRED CALLENDER **DEFENDANT**

Before Dr. the Hon. Madam Justice Sonia Richards, Judge of the High Court.

2012: February 06

February 20 – Written submissions received on behalf of the Plaintiff

February 21 – Written submissions received on behalf of the Defendant

2013: February 06

Mr. Patrick Phillips, Attorney-at-Law for the Plaintiff.

Mr. Edmund King Q.C., Attorney-at-Law for the Defendant.

JUDGMENT

Introduction

[1] By a Writ of Summons filed on 13 September, 2005, Lorna Vanella Moore ("the Purchaser") sought an order for the specific performance of an agreement for the sale to her of a parcel of land. The Purchaser also claimed

damages for breach of contract in lieu of or in addition to specific performance.

The Factual Background

[2] The Purchaser and Von Wilfred Collymore ("the Vendor") executed an agreement for the sale and purchase of land at Lot 14 Cally Drive, Pilgrim Place in the parish of Christ Church. The Purchaser resided in England, and the Vendor resided in the United States of America.

[3] Mr. Carol Fields, Q.C. forwarded the agreement to the Purchaser for signature by a letter dated 14 June, 1996. He also confirmed receipt of the deposit from the Purchaser. The letter stated:

> "Dear Madam:
>
> **Re: Lot 14 Pilgrim Place, Christ Church**
>
> Enclosed please find two (2) Agreements relative to the purchase of the captioned lot.
>
> Kindly sign both Agreements as indicated on page 3 in the presence of a Notary Public who will witness your signature. Please do not date the agreements but return them to me as soon as possible.
>
> I confirm that the deposit has been paid and I take this opportunity to thank you for allowing me to act on your behalf.
>
> I look forward to hearing from you.".

[4] The Purchaser signed the agreement in England before a Notary Public. Mr. Randolph Sealy signed the agreement, on behalf of the Vendor, under a

power of attorney. The agreement is undated, but the parties accept that it was executed on 23 August, 1996.

[5] The relevant sections of the agreement provide as follows:

> "9. Purchase price: $36,060.00
>
> 10. Deposit: $10,060.00
>
> 11. The balance of the purchase money or sum of $26,000.00 together with interest thereon shall be paid by monthly instalments of $863.58 secured by a charge by way of Legal Mortgage from the Purchase[r] to the Vendor executed immediately after the execution of the Conveyance from the Vendor to the Purchaser and the matter completed as provided in paragraph 19 hereon.
>
> 13. The Property Transfer Tax attributable to either Vendor or Purchaser shall be paid by such party. The Purchaser shall not be entitled to any indemnity whatsoever which might arise under Section 9A of the Property Transfer Tax Act Cap. 84A (as amended) and no requisition shall be made in respect of such contingent liability or any indemnity given in respect thereof.
>
> 19. This matter shall be completed within one month after the Vendor has obtained a Certificate of Compliance from the Chief Town Planner in respect of the Permission dated 1989.05.25 re: Application 2497/9/88D and notify the Purchaser accordingly.".

[6] The Purchaser testified that after she signed the agreement she sent lump sums of money to an individual in Barbados. That individual was supposed to pass on these lump sums to Mr. Fields in order to pay off the balance of the purchase price. The Purchaser hoped to complete the payments in just

over a year. According to the Purchaser, it was around 1997 that she discovered that the money was never paid over to Mr. Fields. As a result, she engaged the services of a lawyer, Mr. Alfred Martindale, to recover her misappropriated money.

[7] There appears to have been a period of inactivity until June 2001 when the Purchaser visited Barbados. After this visit, she sent a letter dated 25 January, 2002, to Mr. Fields. She informed him that:

> "I am writing regarding a meeting with Mr. Gooding at his office on 22nd June 2001. He promised that I would hear from [?] concerning the Title Deeds from the purchased land at Pilgrim Place, Christ Church within the next six weeks. It is now well over six months and I am anxious to have this matter finalised.
> Could you please look into it for me and advise whether you will handle it, or would I need another lawyer to do it for me. I am in the process of having plans drawn up to start building on it in August of this year.".

[8] The question mark, inserted in the third line of the letter quoted in paragraph [7], indicates a missing word or words from the text of the letter. The Purchaser omitted to say who was to send her the information about the title deeds. It may have been either Mr. Gooding, or Mr. Fields, or someone else. Mr. Gooding was no stranger to the transaction between the parties. He signed the first letter sent to the Purchaser on 14 June, 1996, on behalf of Mr. Fields.

[9] Gooding also witnessed the signature of the agent who signed the agreement on behalf of the Vendor. The occupation given for him on the agreement is Clerk. His capacity to sign these documents must have been as a clerk to Mr. Fields. And it is in that capacity that he spoke to the Purchaser in Mr. Fields' office on 22 June, 2001. That meeting and the content of the conversation, as alleged in the Purchaser's letter at paragraph [7], have never been denied.

[10] Correspondence in the agreed bundle of documents before the Court indicates that Mr. Fields passed on his file to Mr. Edmund King Q.C. in early 2003, and instructed Mr. King to complete the matter on his behalf. By this time, the Purchaser was represented by Mr. Martindale. Mr. King and Mr. Martindale perused titled deeds and a draft conveyance, and dealt with requisitions on title. Unfortunately, Mr. Martindale died in February 2004, and thereafter Mr. Fozlo Brewster continued the negotiations on behalf of the Purchaser.

[11] In August, 2004, Mr. Brewster forwarded to Mr. King a conveyance signed by the Purchaser, together with a number of other documents. Mr. Brewster anticipated that the Vendor would also sign the conveyance, and that the sale and purchase would be completed by 31 August, 2004. The Vendor refused to complete the transaction.

[12] In his evidence the Vendor referred to a letter dated 25 March, 2004, that he had written to Mr. Fields. It would be useful to quote that document in full.

> "<u>Re: Lot #14 Cally Drive</u>
>
> Dear Mr. Fields,
>
> This is to reiterate previous conversations and correspondence detailing information concerning Lot #14, located at Cally Drive, Pilgrim Road, Christ Church. It is my understanding that ten (10) years ago, ten thousand dollars ($10,000.00) was made as an initial deposit on this Lot, however no other monies was forthcoming after that deposit, thus leading to correspondence being sent to the party involved, who resided in England, informing her that if the remainder of the cost of the lot was not forthcoming within a certain period of time, the initial deposit would be forfeited.
>
> Since there was no response to any of the correspondence sent to the party involved, the money was indeed forfeited. After careful consideration, you, Mr. Fields, informed me that I should return the money involved after the Lot is sold. This I planned to do, but have not sold said Lot.
>
> I will not accept now, the rate from ten (10) years ago for Lot #14 that has since increased in value. Should the original party be still interested in Lot #14, then he/she will have to pay the going rate for that Lot. As far as I knew it was concluded that since there has been no response from the party involved, this matter was resolved and I am prepared to return said party's initial deposit.".

[13] The Vendor believed that the protracted delay of the Purchaser had effectively discharged him from any performance of the agreement for sale. Therefore, he counterclaimed for a declaration that the Purchaser was in breach of the agreement; and that as Vendor he was entitled to retain the deposit as liquidated damages.

The Role Of Counsel For The Vendor

(1) Acting for Both Parties

[14] The Vendor in paragraph 3 of his witness statement, filed on 29 November, 2010, stated that he retained the services of Mr. Fields to perform legal services on his behalf. Indeed, Clause 3 of the agreement identifies Mr. Fields as the Vendor's attorney-at-law, with his place of business at Fields House, Spry Street, Bridgetown.

[15] At Clause 6 of the agreement, the space for entering the name of the attorney-at-law acting for the Purchaser was left blank. However, Mr. Fields in his correspondence of 14 June, 1996, thanked the Purchaser for allowing him to act on her behalf. This letter was written after the payment of the deposit but before the execution of the agreement. It was not until the Purchaser's correspondence to Mr. Fields of 25 January, 2002, that she queried whether he would look into the matter of the title deeds, and the completion of the matter. The Purchaser also enquired of Mr. Fields whether she needed to engage another lawyer to act on her behalf.

[16] A number of conclusions may be drawn from the correspondence that passed between Mr. Fields and the Purchaser. He received the deposit from her prior to the execution of the agreement. The deposit was received on behalf

of the Vendor, whose legal interests he represented in the transaction. Mr. Fields was also permitted by the Purchaser to act on her behalf.

[17] The evidence of the Purchaser was that she did not have a lawyer when she paid the deposit. She further testified that she engaged a lawyer in Barbados when she discovered that the money she sent to pay the balance of the purchase price had been misappropriated. This is when Mr. Martindale became involved. But between 1996 and January 2002 when she wrote to Mr. Fields, there is no evidence that the Purchaser had independent legal representation in Barbados.

[18] It is against this background that Mr. Fields' correspondence of June 1996 is to be understood. There must have been some discussion between them about Mr. Fields acting for her in the transaction. How else can his thanks to her for allowing him to act on her behalf be explained? He did not limit his role to that of a mere stakeholder. Six years on the Purchaser is inquiring about the title deeds, and whether Mr. Fields will "handle it". It was Mr. Gooding, the clerk to Mr. Fields, who promised that she would hear about the title deeds in another six weeks. The Court is of the view that there was an understanding between the Purchaser and Mr. Fields that he would also be acting on her behalf.

[19] In 1994, a former Chief Justice of Barbados, ***Sir William Douglas***, issued a caution about the dangers of a solicitor acting for a vendor and purchaser in the same transaction. In ***Straker v. Maraj*** ((1984) 39 WIR 22, 25 e-g), he said this:

> "In regard to the defendant acting for purchasers of (condominium) units, the author of ***Emmet on Title*** (18th Edn) page 5, cites a number of decisions critricising the practice of one attorney acting for both vendor and purchaser in the same transaction. In ***Apthorp v. Niblock*** (1976) 28 WIR 23 reference was made to the judgment of Scrutton LJ in ***Moody v. Cox and Hatt*** [1917] 2 Ch 71 and to the observation of Danckwerts J in ***Goody v. Baring*** [1956] 2 All ER 11 at page 12 where he said:
>
> > "It seems to me to be practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser."."

[20] Sir William observed that, at the time of his judgment, the Law Society of England and Wales prohibited a solicitor from acting for both parties except under specifically prescribed circumstances. (See pages 25h to 26c of judgment). However, the learned Chief Justice was of the view that although:

> "There is no such rule binding on the profession in Barbados, ... it seems to me that ordinary prudence would have prevented the defendant from acting for both parties in the sale of the condominium units involved in this case because the terms of the condominium declaration covered such a wide range of covenants, conditions and restrictions that dispute and litigation between the parties could reasonably be foreseen." (page 26 c-d)

[21] Shortly after these cautionary words from the then Chief Justice, Parliament enacted the ***Legal Profession Code of Ethics, 1988*** (S.I. 1988 No. 113). This Code does not expressly prohibit an attorney-at-law from acting on behalf of both a vendor and purchaser in the same transaction. Rule 29 provides that:

> "(1) An attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation.
>
> (2) In all situations where a possible conflict of interest arises, an attorney-at-law shall resolve all conflicts by leaning against multiple representation.".

[22] There was no complaint from the Purchaser that Mr. Fields did not make full disclosure to her, or that she did not consent to him acting on her behalf while he looked after the interests of the Vendor. And by the time a conflict arose between the parties, the Purchaser had separate representation in the matter, and Mr. Fields had passed on his file to Mr. King.

(2) Scope Of Authority

[23] The exact date when Mr. Fields passed on his file to Mr. King is not known. By letter dated 30 June, 2003, Mr. King informed Mr. Martindale that he had received the file from Mr. Fields. The Vendor in his witness statement, confirmed that:

> "Sometime in or about the year 2004, I received a letter from Mr. Edmund R. King informing me that he was assisting Mr. Carol Fields in winding up his legal practice and that my matter was among those passed to him for his attention and that the [Purchaser] was now requesting completion of the sale and purchase."

[24] The Vendor has not challenged the account of the dealings between the various players in this matter, as contained in Mr. Fozlo Brewster's letter to Mr. King dated 07 June, 2004. This letter is part of the agreed bundle of documents. It speaks to Mr. Martindale informing Mr. Fields by letter of 23 June, 2003, that contrary to Mr. Fields' directions to him, Mr. Anthony Reece, attorney-at-law, had not received the relevant file in this matter from Mr. Fields. Three days later, on 30 June, 2003, Mr. King informed Mr. Martindale that he was in receipt of the file. The Court finds that Mr. King was seized of the matter, and received the file, no later than 30 June, 2003.

[25] The Vendor claims that he became aware of Mr. King's involvement several months later in 2004. He gained this knowledge prior to 25 March, 2004, when he wrote the letter at paragraph [12] of this judgment. Curiously, neither the Vendor nor Mr. King produced a copy of the correspondence that the Vendor claimed he received from Mr. King in 2004. No reasons were offered, in the evidence before the Court, for the absence of this document.

[26] Not only was the Vendor aware that Mr. King had taken over the matter from Mr. Fields; he also conceded in his testimony that "In 2004 Mr. King

was acting for me and authorised to represent my interest in this matter". The Vendor further testified that despite his representation by Mr. King, he had no knowledge of certain events. He told the Court that:

> "I am not aware that Mr. King submitted a draft conveyance to Mr. Brewster. ... I am not aware that in 2004 a statement of completion was sent to Mr. Brewster. Mr. King and I had discussions. I was not aware that he was discussing it with Mr. Brewster at the time. I am not aware that a signed conveyance was returned to Mr. King's office. I have never seen the signed conveyance. I never saw [the completion statement]."

[27] Mr. King, who appeared in this matter as counsel for the Vendor, contended that he had no authorisation from the Vendor to forward the engrossed conveyance to the Purchaser's attorney-at-law. Mr. King also submitted that he acted as a sub-agent to Mr. Fields, and that the Vendor did not ratify his actions.

[28] Mr. King's written submissions were filed on 21 February, 2012, and contain statements about his role in the transaction. He submitted that:

> "34. There is no evidence that the [Vendor] authorised the forwarding of the engrossed conveyance as alleged either by direct instructions or by ratification. The evidence indicates to the contrary
>
> 35. The evidence indicates that the [Vendor] appointed Mr. Carol Fields Q.C. to conduct the sale of the land for him. I made it clear to Mr. Martindale who was acting for the [Purchaser] that I was instructed by Mr. Fields Q.C. to complete the matter for him. (See letter to Mr. Martindale in the bundle dated June 30, 2003).

> 36. The general rule is that the agent must perform his undertaking personally. The relationship of principal and agent is a confidential one; the principal imposes trust in the agent of his choice. Hence the obligation of the agent is to act personally, in conformity with the maxim *delegatus non potest delegare*.
>
> 37. The employment therefore of a sub-agent by the agent Carol Fields, is a breach of the agent's obligations to his principal and therefore any action of the sub agent in forwarding the engrossed conveyance to the Purchaser's Attorney-at-Law cannot bind the principal unless he ratifies the action.
>
> 38. The evidence shows that on learning of an engrossed conveyance being tendered the [Vendor] made it clear to his Attorney-at-Law Mr. Carol Fields Q.C. what his position was and copied that letter to the sub agent dealing with the matter ... .".

[29] The Court finds these submissions by Mr. King to be most unusual for a number of reasons. The Vendor's defence was drawn and prepared by Mr. King, and filed on 15 November, 2006. Nowhere in that defence is there a pleading by the Vendor that Mr. King either had no authority to act on his behalf, or that he exceeded his authority to so do.

[30] This matter was commenced under the ***Rules of the Supreme Court, 1982.*** the relevant portions of Order 18 of these Rules provide as follows:

> "8. (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter ....
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or

> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleadings.
>
> 12. (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded ... .
>
> (3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleadings, or in any affidavit of his ordered to stand as pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just."

[31] Speaking to similar provisions in the United Kingdom Rules, The Supreme Court Practice (1999 Vol. 1) explains Order 18 Rule 8 as follows:

> "Wherever a party has a special ground of defence, as the case may be, he must specifically plead the matter on which he relies for such purpose. "The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove" (per Buckley L.J. in ***Re Robinson's Settlement, Grant v. Hobbs*** [1912] 1 Ch. 717 at 728): but the rule does not prevent the Court from giving effect in proper cases to defences which are not peaded (... ***Price v. Richardson*** [1927]1 K.B. 448 at 453)." (paragraph 18/8/2)

[32] The Vendor's defence as pleaded contains no specific allegation of a breach of the contract of agency by Mr. Fields. There is no specific allegation that a contract of agency did not exist between the Vendor and Mr. King. Also lacking is a pleading that the Vendor did not ratify Mr. King's forwarding of

the engrossed conveyance to Mr. Brewster. And at no time was an application made to the Court for an amendment to the defence in order to include these pleadings.

[33] The Purchaser was not made aware by the Vendor's defence, that there was such a fundamental challenge to her claim for specific performance. Therefore, the Purchaser could not respond, by way of her reply, to allege the existence of a valid contract of agency, and that Mr. King acted within the scope of his authority. Before the filing of her reply, the Purchaser did not have pertinent information on which to base a request for further and better particulars from the Vendor.

[34] The Court cannot allow the Vendor to bypass the basic requirements of pleadings and particulars, and then to challenge the Purchaser's case with a defence encapsulated within his witness statement, within his oral evidence, and within Mr. King's closing submissions. To concur with this manoeuvre would be for this Court to assist in the ambushing of the Purchaser, and the foisting of a gross injustice upon her.

[35] Closing submissions cannot take the place of specific pleadings and particulars. All that Mr. King may have achieved by the revelations contained in paragraphs 34 to 38 of his closing submissions, is the exposure of himself and Mr. Fields to possible actions against them by the Vendor

and/or the Purchaser. For these reasons the Court declines to consider any argument that Mr. Fields breached his obligations as the Vendor's agent; or any suggestion that Mr. King had no authority to act for the Vendor or to forward an engrossed conveyance to the Purchaser's attorney-at-law.

[36] According to the Vendor, by 25 March, 2004, he knew that Mr. King had taken over the file from Mr. Fields. The exact wording of the correspondence sent to him by Mr. King is unknown; it was not shared with this Court. Although the Vendor had "discussions" with Mr. King, he never alleged that he questioned Mr. King's authority to act on his behalf, or that he withdrew Mr. King's remit to represent him in the matter. The available evidence strongly suggests otherwise. It was the Vendor who told the Court that Mr. King was acting for him in 2004, and authorised to represent the Vendor's interest in the matter. And it was well within Mr. King's scope of authority to negotiate the completion of the sale of the property with Mr. Brewster.

Forfeiture Of The Deposit

(1) The Vendor's Letter To Mr. Fields

[37] Although the Vendor knew that Mr. King had taken over the matter from Mr. Fields, he directed his letter of 25 March, 2004 to Mr. Fields. The letter alleged that the Purchaser's deposit was forfeited after her failure to respond

to "any of the correspondence sent to [her]". That correspondence informed the Purchaser that she should pay the balance of the purchase price "within a certain period of time", and that failure to do so would result in the forfeiture of her deposit. If the Court accepts the content of this letter, it would provide proof that time was made of the essence; proof that the Purchaser repudiated the agreement; proof that the Vendor accepted the repudiation; and proof that the deposit was forfeited.

[38] The Court has had to undertake a very careful assessment of the Vendor's letter to Mr. Fields, because it contains statements of alleged facts that are crucial to the determination of this case. In cross examination by counsel for the Purchaser, the Vendor said that:

> "The letter was written to Mr. Fields on 25 March, 2004. I did not send a letter to [the Purchaser]. To my knowledge Mr. Fields sent two letters to [the Purchaser] forfeiting the deposit. I have no evidence that the two letters were actually sent to [the Purchaser] ... . My wife typed the letter for me. It is my letter. I am not sure if a copy was sent to Mr. King.".

[39] The Vendor's references to the time of the payment of the deposit and the actual amount of the deposit, are not quite accurate. The deposit was paid in 1996, eight years prior to March, 2004, and not ten years prior to March 2004. The amount of the deposit paid was $10,060.00, and not $10,000.00. In addition to these errors, the letter omits certain crucial details. There is no indication as to when the notices to complete were sent to the Purchaser.

And, more fundamentally, there is no mention of the time frames given to the Purchaser for completion of the sale and purchase of the property.

[40] There is no evidence that Mr. King received a copy of the Vendor's letter to Mr. Fields, or evidence as to when Mr. King became aware of the content of that letter. Therefore, the Court cannot conclude that by late March or April 2004 Mr. King knew that the Vendor had serious concerns about the sale of the property to the Purchaser. Additionally, there is no evidence of a response from Mr. Fields to the allegations and assertions contained in the Vendor's letter.

[41] The Purchaser denied ever receiving the various pieces of correspondence requesting completion and threatening forfeiture of her deposit. Copies of these essential documents were not made available to the Court. There is no confirmatory evidence from Mr. Fields. Also absent is any proof that this alleged correspondence was received by the Purchaser. Instead, the Vendor is relying solely on his assertions about this correspondence in his letter to Mr. Fields. Therefore, the Court is not persuaded that reliance can be placed on the content of this letter, and does not accept it as evidence of a valid forfeiture of the deposit. It follows also that there is no reliable evidence either that time was made of the essence, or that the Vendor accepted the Purchaser's alleged repudiation of the agreement.

(2) Conveyance And Mortgage

[42] The Purchaser's deposit was more than 25 percent of the purchase price, and just under one third of the purchase price. Clause 11 of the agreement provided for the balance of the purchase price to be secured by a deed of charge by way of legal mortgage in favour of the Vendor. According to the agreement, the charge was to be executed immediately after the execution of a conveyance by the parties.

[43] The Purchaser, in her defence to the Vendor's counterclaim, alleged that the Vendor did not tender a deed of charge for her execution. Paragraph 2(c) of her reply and defence to counterclaim, filed on 05 July, 2007, asserted that:

> "The [Purchaser] was always ready and willing to pay the monthly instalments to the [Vendor] in accordance with the agreement, but the [Vendor] despite tendering an engrossed Conveyance for execution by the [Purchaser] and reply to Requisition, did not tender to the [Purchaser] the Deed of Charge by way of Legal Mortgage for her execution as obligated under clause 11 of the Agreement.".

[44] In paragraph 6 of his witness statement filed on 29 November, 2010, the Vendor stated that "Under the terms of that Agreement the [Purchaser] was at liberty to take an immediate conveyance of the land in which case the balance of the purchase price would be secured by a mortgage.". With respect, the wording of Clause 11 did not give the Purchaser an option either to execute the conveyance and mortgage, or to pay the balance of the

purchase price prior to receiving a conveyance. The Purchaser was entitled to an immediate conveyance, with a contemporaneous execution of the mortgage in favour of the Vendor.

[45] With the execution of the mortgage, the Vendor would not have had an equitable lien on the land for the balance of the purchase price. His right to the balance of the purchase price would have been secured in the mortgage document. (See ***Capital Finance Co. Ltd. v. Stokes*** [1969] 1 Ch 261; ***Burston Finance Ltd. v. Speirway Ltd.*** [1974] 3 All ER 735; ***Nationwide Anglia Building Society v. Ahmed*** (1995) 70 P & CR 381; ***Barnsley's Conveyancing Law and Practice*** 4th ed. 1996 at p. 438).

[46] Having paid the deposit, the Purchaser never received a conveyance, and no mortgage document was tendered for her execution. Neither party offered any evidence that explained why there was no strict adherence to the requirements of Clause 11. The unchallenged evidence of the Purchaser is that after payment of the deposit, and the execution of the agreement, she sent lump sums to Barbados to pay off the balance of the purchase price.

[47] Although the Purchaser's subsequent payments never reached either Mr. Fields or the Vendor, the actions of the parties suggest a variation of the terms of Clause 11 of the agreement. What is not known are the circumstances under which the Purchaser deferred her receipt of the

conveyance until she had paid the entire purchase price. What is certain is that negotiations on her behalf, by Messrs. Martindale and Brewster, were conducted on the basis of completion after payment of all sums due to the Vendor. There is no evidence that either of these lawyers requested the tender of a conveyance and a deed by way of legal charge.

[48] There was, therefore, a variation of one of the fundamental terms of the agreement. The Purchaser apparently gave up her right to an immediate conveyance. Her right to the conveyance must have been directly related to the size of her deposit. Therefore, any alleged correspondence sent to the Purchaser by Mr. Fields, demanding completion and threatening forfeiture of her deposit, should have referred to the circumstances in which Clause 11 was varied, and to her agreement to defer the conveyance and avoid the mortgage by paying off the balance of the purchase price.

[49] Section 47(1) of the ***Property Act, Cap. 231***, enacts that:

> "No action may be brought upon any contract for the sale or other disposition of land 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 lawfully authorised.".

This provision is a replica of section 40(1) of the United Kingdom ***Law of Property Act, 1925***.

[50] Section 40(1) of the 1925 U.K. Act was considered by the U.K. Court of Appeal in ***Morrall v. Krause*** ([1994] E.G.C.S. 177). In that case it was held that an oral variation of a written contract was of no effect unless there was evidence of part performance of that variation. Where there was no part performance, the variation to the contract also had to be in writing. (See too ***Chitty On Contracts***, 30th ed., Vol. 1, at parag. 4-015).

[51] In this case, there is no evidence that a variation to Clause 11 of the agreement was ever reduced to writing. And so there should be evidence of a part performance of the varied term on the part of the Purchaser. She did attempt to pay the balance of the purchase price, but that money never reached either the Vendor or Mr. Fields. In any event it would appear that in June 2001 the Purchaser was at Mr. Fields' office enquiring about the conveyance. At that time there was still no part performance of any oral agreement to vary Clause 11.

[52] In January 2002, the Purchaser was writing to Mr. Fields enquiring about the title deeds to the "purchased land", even though she became aware in 1997 that the remainder of the purchase price had not reached Mr. Fields. Significantly, there is no primary documentary evidence of a response to her from Mr. Fields indicating either the non receipt of the balance of the purchase price, or the possible forfeiture of her deposit. The Court is of the

view that there was no part performance of an oral variation by the Purchaser. And applying the persuasive authority of the ***Morrall*** case (supra), the Court holds that there was no lawful variation of Clause 11, because that variation was not reduced to writing.

[53] The Court also finds that Messrs. Martindale and Brewster acted on behalf of the Purchaser in an attempt to complete the sale of the property. From 2003, the Purchaser had independent legal counsel acting on her behalf, and the matter was continued on the basis of a variation to Clause 11 of the agreement. The Purchaser's lawyers expected completion and a conveyance when the balance of the purchase price was made available by the Purchaser. It is in these circumstances that the Court finds that, in 2003, the Purchaser would have effectively waived her right to receive a conveyance before her payment of the balance of the purchase price. And when the balance of the purchase price was paid to Mr. Brewster by the Purchaser, the Vendor was not obliged to tender a deed by way of legal charge to the Purchaser for execution.

[54] Up to 2003, when Mr. Martindale came on the scene, the Vendor, having not received the balance of the purchase price, could have demanded completion in accordance with the strict terms of Clause 11. It was then open to the Vendor to tender a conveyance to the Purchaser for execution; and to insist

on the execution of the mortgage so as to secure the payment of the balance of the purchase price. Forfeiture of the deposit only became a possibility for the Vendor, if the Purchaser had failed to execute the tendered conveyance or mortgage documents; or, if there was a valid variation of Clause 11 of the agreement, followed by a failure to pay the balance of the purchase price.

(3) <u>The Vendor's Counterclaim</u>

[55] In his counterclaim, the Vendor requested a declaration that he is entitled to retain the deposit as liquidated damages. The agreement is silent on the matter of forfeiture of the deposit by the Vendor. M.P. Thompson in ***"Barnsley's Conveyancing Law and Practice",*** (1996, 4th ed.) states that:

> "The vendor is entitled to forfeit the deposit if the purchaser is in breach of the contract and that breach is of such a nature as to discharge the vendor from the contract. This right does not depend on any express contractual stipulation. It can be exercised notwithstanding that the vendor suffers no loss because e.g. he resells the property at a higher price." (See page 239 para. 4; ***Hall v Burnell*** [1911] 2 Ch 551).

[56] Having declined to accept the factual matrix as alleged in the Vendor's correspondence to Mr. Fields, the Court has to ascertain whether there is any other evidence that the Purchaser repudiated the contract. But before considering the issue of repudiation, the Court must determine whether the agreement made time of the essence.

(i) Was time of the essence?

[57] Clause 19 of the agreement required completion within one month of the Vendor obtaining a certificate of compliance from the Chief Town Planner. It is not disputed that when the parties executed the agreement on 23 August, 1996, the Vendor had already received the relevant certificate. There is no evidence that this information was ever communicated to the Purchaser. Further, there is no evidence, that when the agreement was executed, the parties contemplated that the time stated for completion was viable.

[58] The Court finds that the Purchaser was never put into a position where she could determine a stipulated date for completion. She could not rely on the wording of the agreement, and there really was no established, discernable or realistic date for completion. Time was not of the essence of the agreement, and there was, in effect, an open contract for the sale and purchase of the land. (See ***Hope v. Rodney And Portfolio Investments Limited*** (BB 2009 CCJ 7).

[59] In the Privy Council case of ***Graham v Pitkin*** ([1992] 2All E.R. 235), Lord Templeman restated the law as follows:

> "It is common ground that time is not of the essence of a contract for the sale of land in the absence of an express term to that effect or in circumstances which imply that time is of the essence; see ***Stickney v. Keeble and Another [1915] A.C. 386.*** If a vendor serves a valid notice requiring completion within a reasonable time and the purchaser fails to complete in

accordance with the notice, the failure can be treated by the vendor as a repudiatory breach which the vendor is entitled to accept by rescission: ***United Scientific Holdings Ltd. v. Burnley B.C [1978] A.C. 904*** per Lord Simon of Glaisdale at page 946. In the absence of a valid notice to complete a purchaser is entitled to specific performance unless his conduct is such as to render it inequitable for specific performance to be granted." (Page 237 f – h).

[60] More recently in ***Chaitlal v Chanderlal Ramlal*** ((2003) 62 WIR 449), Sir Martin Nourse opined on behalf of the Judicial Committee that:

> "In the case of an open contract, where it is implied that completion or the performance of any intermediate obligation will take place within a reasonable time, it is only after the passage of such a time that a notice can be given because, until then, there has been no default in the performance of the contract. Thus in ***Green v. Sevin (1879) 13 Ch D*** 589 at 599, Fry J said:
>
> > 'It is to be observed that the contract for purchase had limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which he had to do. What right then has one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not taken immediately to complete, the person giving the notice should be relieved from this contract.' "
>
> (Page 459 b-e)

[61] As time was not made of the essence in the executed agreement, the parties had a reasonable time within which to complete the sale and purchase of the

property. The Vendor can avoid an order against him for specific performance, if he is able to establish that he served a valid notice on the Purchaser to complete within a reasonable time; that the Purchaser failed to complete within a reasonable time; and that he accepted the Purchaser's repudiation of the agreement.

(ii) A valid notice to complete

[62] In the ***Chaitlal*** case (supra), Sir Martin Nourse stated that:

> "... the party serving the notice purporting to make time of the essence must himself be ready, able and willing to complete at the date when the notice is served. This is an express requirement of the conditions commonly incorporated in contracts for the sale of land in this country, but it does no more than express what would in any event be implied by law; see 42 (1999 reissue) ***Halsbury's Laws Of England*** (4th Edn) para 121, note 7, and the cases there cited." (See (2003) 62 WIR 449, 459 f – g).

[63] Quite apart from the Vendor's letter to Mr. Fields, which the Court has not accepted, there is no primary documentary or other evidence to prove that the Vendor gave the Purchaser notice to complete. Even assuming that the Purchaser received such a notice, the Court must inquire whether the Vendor was in a position to issue a valid notice to the Purchaser to complete.

[64] The Vendor's letter does not say when notice to complete was given to the Purchaser. And, as noted earlier, prior to 2003 the Purchaser was entitled to a conveyance before she paid the balance of the purchase price. Therefore,

the Vendor could not give a valid notice until he had tendered, to the Purchaser, an executed conveyance and a deed of charge. This was never done, thus the Vendor did not demonstrate that he was ready, able and willing to complete within the time frames set by the notices allegedly sent to the Purchaser by Mr. Fields.

[65] It was in 2003 that the Purchaser waived her right to a conveyance with a mortgage. And a reasonable time for completion would have run from 2003. Thereafter, the attorneys-at-law acting for the parties were actively engaged in negotiating the completion of the sale and purchase. Neither before nor after 2003 is there evidence of a valid notice being sent to the Purchaser requesting completion. Therefore, issues of repudiation by the Purchaser, or of acceptance of a repudiation by the Vendor, do not arise on the facts of this case. It follows that forfeiture of the Purchaser's deposit, by the Vendor, was not possible in these circumstances.

(iii) Liquidated damages

[66] As noted previously, the agreement says nothing about forfeiture of the Purchaser's deposit. It is silent about any remedies for breach of the agreement by either party. Although a vendor may be entitled to forfeit a deposit when the purchaser breaches the agreement for sale, forfeiture does not always follow the breach of a contract by the purchaser.

[67] In ***Workers Trust and Merchant Bank Ltd v. Dojap Investments Ltd.*** ([1993] 2 All ER 370), the Privy Council considered a case from Jamaica where a contract for the sale of land provided for a deposit of 25 per cent of the contract price. Clause 13 of the contract provided for forfeiture of the deposit if the purchaser failed to observe or comply with any of the contractual stipulations. The purchaser paid the deposit, but failed to complete within the stipulated time. The vendor forfeited the deposit.

[68] The Judicial Committee held that a deposit could be validly forfeited, even though the amount of the deposit bore no reference to the anticipated loss to the vendor flowing from the breach of contract. However, the amount of the deposit had to be reasonable. The court ordered the repayment of the deposit in full to the purchaser because it was a penalty, and not a true deposit.

[69] Speaking for the Judicial Committee, Lord Browne-Wilkinson considered the position of a deposit where the contract contains no forfeiture clause.

> "Ever since the decision in ***Howe v. Smith*** [(1884) 27 Ch D 89] the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture." (Page 373 d – e).

[70] Lord Browne-Wilkinson cited a Privy Council decision in support of the proposition that parties to a contract cannot enforce the general rule for forfeiture of a deposit by labelling as a deposit that which was clearly a penalty. In ***Linggi Plantations Ltd v. Jagatheasan*** ([1972] 1MLJ 89 at 94), Lord Hailsham LC commented that:

> "It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. ... . But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage."

[71] In the ***Workers Trust*** case the Judicial Committee also referred to a passing observation by Denning L.J. in ***Stockloser v. Johnson*** ([1954] 1 All ER 630 at 638. Denning L.J. said obiter:

> "Again, suppose that a vendor of property, in lieu of the usual ten per cent deposit, stipulates for an initial payment of fifty per cent of the price as a deposit and part payment, and later, when the purchaser fails to complete, the vendor re-sells the property at a profit and, in addition, claims to forfeit the fifty per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages."

(See [1993] 2 All ER 370 at 373e – 374a).

[72] The Board in ***Workers Trust*** was of the view that the central question was whether in that case a deposit of 25 percent was reasonable "as being in line with the traditional concept of earnest money or was in truth a penalty intended to act in terrorem.". (See page 375 a-b). The Board took judicial notice of the fact that "by long continued usage both in the United Kingdom and formerly in Jamaica, the customary deposit has been 10%.". Therefore, "A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit.". (See page 374 e-f).

[73] The Board found that the deposit in the ***Workers Trust*** case was not "fixed upon a reasonable amount of earnest", but "was substantially influenced by fiscal considerations having nothing to do with encouragement to perform the contract.". (Page 375 c-d). The deposit was far in excess of the maximum out of pocket expenses associated with completion. (Page 375e). There was insufficient evidence to justify a deposit of 25 percent as being a true deposit. (Page 375g). The Board ordered that the amount forfeited by the vendor should be repaid to the purchaser in full, because it was an unreasonable sum by way of deposit, and not a true deposit. (Page 376e). The Vendor was permitted to deduct a small amount as damages to be quantified by the court below. (Page 376 g-j).

[74] This Court has already drawn attention to the fact that in this case the deposit paid by the Purchaser was more than the usual 10 percent deposit. It was pointed out that the deposit was more than 25 percent of the purchase price, and a little short of one third of the purchase price. Applying the principles enunciated by the Privy Council in the ***Workers Trust*** case, the Court finds that even if the Vendor had satisfied the Court that he was entitled to damages for breach of contract, there is no evidence on which the Court can determine that the deposit in this case was reasonable.

[75] This deposit appears to have been influenced by the fact that the Purchaser was entitled to an immediate conveyance which she never received. Clause 11 of the agreement also anticipated that a charge by way of legal mortgage would have been executed by the parties, in favour of the Vendor, in order to secure payment of the balance of the purchase price. This was not a true deposit, but a much enhanced payment to secure a conveyance. Therefore, had the Court accepted that the Purchaser was in breach of contract, the Vendor would not have been entitled to retain the deposit. His only entitlement in those circumstances was to such damages, if any, as were proved by him.

[76] The Guyana Court of Appeal interpreted the ***Workers Trust*** case as applying to agreements that contain a forfeiture clause. The ***Workers Trust*** case was

distinguished from cases where the agreement for sale did not contain a forfeiture clause. In ***Pompey v. Rajmattie Mahadeo*** ((2002) 61 WIR 293) the deposit was approximately 17 percent of the purchase price. That court permitted forfeiture of an amount that equated to 10 percent of the purchase price, in the absence of a forfeiture clause, and in view of the fact that the vendor had offered to repay whatever sum was repayable to the purchaser.

[77] With respect, this Court is not persuaded that the ***Workers Trust*** decision should be restricted to cases where there is no forfeiture clause in the agreement for sale. As a decision of the Privy Council it is a highly persuasive authority. Furthermore, in ***Stocklaser v. Johnson*** (supra para. [71]), Denning LJ used the example of a deposit that is higher than the usual 10 percent. In his opinion, relief against forfeiture was permissible in the face of a deposit that was "an extravagant sum". A deposit of $10,060.00, when the purchase price is $36,060.00, is an extravagant sum. A true deposit would have been $3,606. And on the special facts of this case, well over 6 thousand dollars more than the usual 10 percent deposit was paid in anticipation of an immediate conveyance.

Delay

[78] At paragraph 5 of his defence, the Vendor claimed that his failure to complete the transaction was justified "by the protracted default on the [Purchaser's] part in performing [her] main duties under the contract which deprived [him] of substantially the whole benefit which it was intended he should obtain from the contract.". The Vendor considered himself to have been discharged from completion of the contract, because of the Purchaser's delay.

[79] In **Lindsay Petroleum Co. v. Hurd** ((1874) L.R. 5 P.C. 221), Lord Selbourne opined that:

> "... the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it could be practically unjust to give a remedy, either because the party has, by his conduct, done what might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time or delay are most material." (p. 239 – 240).

This statement of law from the Privy Council was approved by the U.K Court of Appeal in **P & O Nedlloyd BV v. Arab Metals Co. (The "UB Tiger" (No. 2))** ([2007] 2 Lloyd's L.R. 231 at 246 para. 61).

[80] The law is also stated in Spry's "The Principles of Equitable Remedies", (7th ed. 2007) as follows:

> "... in order to establish that the delay ... has been excessive it must appear that, in all the material circumstances, a reasonably assiduous person would have proceeded with substantially greater speed or diligence. All the acts of the parties and all the circumstances of the particular case, must, accordingly, be examined in order to establish whether this condition is satisfied.". (p. 227-228).

[81] Approximately 8 years passed between the execution of the agreement for sale in August 1996, and the tendering of the executed conveyance on behalf of the Purchaser in August 2004. Therefore, the Court must determine whether the Purchaser was responsible for this delay to a degree that would undermine her request for specific performance of the contract.

[82] It cannot be denied that the Purchaser did not pay the balance of the purchase price after executing the agreement for sale. Neither can it be denied that the Purchaser did not receive the conveyance to which she was entitled after payment of the deposit. The evidence is that between 2001 and 2002 the Purchaser was making enquiries about the conveyance. And there is no credible documentary evidence that she was warned that her delay could lead to forfeiture of her deposit, and to the rescinding of the contract. Therefore, she cannot be fixed with the sole responsibility for the delay between 1996 and 2002, when the obligation was on the Vendor to provide her with a conveyance and a mortgage document.

[83] It was in 2003 that negotiation for the completion of the sale of the property resumed in earnest. Both parties were represented by separate attorneys-at-law. There is no satisfactory evidence of a forfeiture of the deposit; and no evidence of anything done or said by the Purchaser to cause the Vendor to believe that she would not enforce her rights under the agreement. Both Messrs. King and Brewster appear to have conducted themselves expeditiously during their negotiations. There is no evidence of accusations of delay passing between them.

[84] When Mr. Brewster forwarded the conveyance to Mr. King for execution by the Vendor, a completion date of 31 August, 2004, was anticipated. The letter enclosing this conveyance is dated 26 August, 2004, and it makes a passing reference to "this somewhat unfortunately delayed matter". But no blame for the delay was apportioned to either party by Mr. Brewster.

[85] This Court has not seen a written response to Mr. Brewster's letter from either Mr. King or the Vendor. What followed in the sequence of events before this Court, is the Writ of Summons filed by the Purchaser on 13 September, 2005, in which she applied for specific performance of the agreement for sale. In paragraph 8 of the Statement of Claim annexed to the Writ, the Purchaser alleged that "In breach of the Agreement and notwithstanding requests made by the [Purchaser's] attorney-at-Law on her

behalf, the [Vendor] wrongfully failed and refused and continues to neglect and refuse to complete the sale or take any steps towards such completion.". The Court finds that it was not unreasonable for the Purchaser to attempt, through her lawyer, to persuade the Vendor to complete, before filing her Writ in September, 2005. There was no unreasonable delay on her part in that regard.

[86] The Court cannot ignore the fact that since the Purchaser filed her Writ in 2005, it has taken 6 years for the matter to come to trial in 2012. Neither party has accused the other of using dilatory tactics to prevent an expeditious trial. And the Court has nothing before it to suggest that the parties in any way contributed to the prolonged and inordinate delay associated with getting this matter to trial. The actions of the parties, and the circumstances of this case, do not persuade the Court that the Purchaser should be denied the remedy of specific performance because of delay.

A Discretionary Remedy

[87] Before the Purchaser can be granted a decree of specific performance, the law requires her to:

> "... establish two basic requirements. First, there must be a concluded contract, the terms of which are sufficiently certain for the court to order their performance ... secondly, the [Purchaser must be] able and willing to perform [her] own part of the contract, and it is standard practice for [her] statement of claim to contain an allegation

to this effect.". (See "Barnsley's Conveyancing Law and Practice", 1996, 4th ed., p. 615).

[88] The parties agree that the agreement for the sale and purchase of the land was executed on 23 August, 1996. That agreement contained two areas of uncertainty that were canvassed before the Court. One area of uncertainty relates to the date of completion. Clause 19 of the agreement stipulated completion within one month of the Vendor's receipt of a certificate of compliance. When the agreement was executed, the Purchaser was unaware that the certificate was already in the possession of the Vendor since 28 July, 1993. Under the terms of Clause 19, the parties were faced with the impossible task of completion before execution of the agreement.

[89] The Court found that although a realistic and exact date of completion could not be determined using Clause 19, the parties were obliged to perform their obligations under the agreement within a reasonable time. Therefore, Clause 19 as drafted does not compromise the ability of the Court to order specific performance of the contract.

[90] Another area of uncertainty is the computation of interest under Clause 11 of the agreement. There is no mention of a rate of interest. The Purchaser said in her evidence "There was no interest rate that I can remember. The rate of interest was 10 or 12 percent, but I can't remember.". She further clarified her evidence on re-examination, saying that "At the time I signed the

agreement, a rate of interest was not agreed. Interest discussions only came about as a result of settling this matter.".

[91] When the Purchaser's lawyer wrote to Mr. King on 7 June 2004, he proposed an interest rate of 10 percent on the balance of the purchase price. Mr. Brewster informed Mr. King that "The balance of the purchase price is $26,000.00. I have calculated the interest at the rate of 10% per annum at $22,808.77 from August 23, 1996 to May 31, 2004, making a total sum of $48,808.77.". The proposed completion statement forwarded to Mr. King by Mr. Brewster, which was enclosed in the correspondence dated 26 August, 2004, included interest calculated at the rate of 10 percent per annum "from 23 August, 1996 to 31st July, 2004 - $23,243.29".

[92] Clause 11 of the agreement provides for the payment of the balance of the purchase price and interest by monthly instalments of $863.58. There is no reference to an interest rate, or to the period over which the instalments were to be paid. Therefore, it is impossible from the face of the document to calculate the interest rate.

[93] The Purchaser denied any agreement about an interest rate when the contract was executed. And she was never asked, nor did she volunteer in her evidence, how long she was expected to pay the monthly instalments of $863.58. She told the Court that:

> "I was to send back money for instalments as soon as I got back to England. I can't recall when I went back, but I started paying immediately after I signed the agreement. I sent it back in lump sums. I expected to complete payments just over a year ... I sent back more than $863.58 per month. I don't know how the figure of $863.58 was arrived at.".

There is nothing here to establish the total amount of money that the Purchaser expected to send back to Barbados, in order to complete payment of the outstanding balance of the purchase price, inclusive of interest.

[94] The Vendor testified that the rate of interest was 12 percent. However, other than this statement, he provided no evidence to support his contention of a 12 percent interest rate. He offered no assistance as to the period of time it would have taken for the Purchaser to pay off the balance, with interest, at $863.58 per month. Paragraph 5 of his Witness Statement, filed on 29 November, 2010, says that:

> "I am informed and verily believe that the [Purchaser] contracted to purchase Lot 14 in the development for the sum of $36,060.00 on terms that she pay a deposit of $10,060.00 and the balance or sum of $26,000.00 together with interest thereon at the rate of 12% per annum to be paid by equal monthly instalments of $868.00.".

[95] The instalment figure quoted in the Vendor's Witness Statement is not the same as the figure in Clause 11 of the agreement. There was no explanation for the variation, which may be a typographical error, and the Court accepts the figure of $863.58 found in Clause 11 of the agreement.

[96] Counsel for the Vendor urged the Court to accept that the instalment figure of $863.58 per month was calculated based on an interest rate of 12 percent per annum over a 3 year period. According to Mr. King, $863.58 is the monthly payment necessary to amortize a loan of $26,000 over 3 years at an interest rate of 12 percent. In support of his argument, he referred the Court to the "Monthly Payment Amortisation Tables for Real Estate Loans", computed and published by the Financial Publishing Company of Boston, Massachusetts.

[97] Mr. King wishes the Court to imply an interest rate of 12 percent per annum into an awkwardly drafted agreement. It may be that the deed of charge, contemplated by Clause 11 of the agreement, might have contained additional terms such as the rate of interest, and/or the time frame within which the instalments of $863.58 per month were to be paid. However, this document does not exist.

[98] According to the Vendor, the lot to be sold to the Purchaser was one of several lots in the development. All the other lots were sold, but there was no evidence as to the interest rate, if any, paid by other Purchasers in the development. The Court would have been greatly assisted by expert evidence with respect to the rate of interest payable in similar land transactions in 1996 when the agreement was executed.

[99] What is certain is that, if specific performance is ordered by this Court, the Purchaser has to pay interest on the balance of the purchase price. The Court accepts Mr. King's invitation to read a rate of interest into Clause 11 of the agreement. But it will not be a rate of 12 percent per annum because there is no evidence before the Court that this was the interest rate agreed between the parties, or that it is a reasonable interest rate.

[100] Mr. Brewster proposed an interest rate of 10 percent in his correspondence of 7 June 2004. And by 26 August, 2004, when he forwarded the completion statement, there is no evidence before this Court that either Mr. King or the Vendor objected to this proposal. There is no evidence of a request for 12 percent interest. The Court will fix an interest rate of 10 percent per annum on the outstanding balance of the purchase price. The interest will be calculated from 23 August, 1996, to 13 September, 2005, when the Purchaser filed her Writ. The Court will hear further submissions from counsel for the parties with respect to any payment of interest after 13 September, 2005.

[101] Having dealt with the areas of uncertainty surrounding the date of completion and the rate of interest, the Court turns its attention to a determination of whether the Purchaser is able and willing to perform her part of the contract. Since 26 August, 2004, Mr. Brewster was in a position

to complete. He had in hand the balance of the purchase price and interest calculated at 10 percent per annum. Mr. King was so informed.

[102] In paragraph 7 of her Statement of Claim, the Purchaser pleaded that she "has at all material times been and is now ready and willing to fulfil and perform all her obligations under the Agreement." She made a similar pronouncement in paragraph 10 of her Witness Statement filed on 28 March, 2011. And her evidence before this Court is that she is still willing to complete the purchase. The Purchaser has shown the ability and the willingness to complete the purchase of the land.

Hardship

[103] The Vendor told the Court that he has paid the land tax since the agreement was executed in 1996. Had the Purchaser received the Conveyance as contemplated by Clause 11 of the Agreement, she would have been responsible for the land tax. According to the land tax bill for 2011 – 12, the value of the land increased to $132,200. Therefore, the Vendor is of the view that it would be unfair to force him to sell the land at a price far below its current value, and for which he has paid taxes over the years.

[104] The Vendor' liability for land tax is directly connected to his failure to provide the Purchaser with an executed conveyance and deed of charge, as envisaged by Clause 11 of the agreement. Any hardship here is of his own

making. The value of the land has almost quadrupled since 1996, but the Purchaser has also been prejudiced. In her letter of 25 January, 2002, she indicated to Mr. Fields that she was anxious to receive the title deeds because she was "in the process of having plans drawn up to start building on [the land] in August of this year". The Court takes judicial notice that as the value of land has escalated, so too have building costs. The Purchaser cannot build now at the price that obtained in 2002. The hardship and prejudice have cut both ways.

Disposal

[105] The land remains vacant and unsold, and the Court has not found a valid reason against an order for specific performance. Accordingly, the Court grants the Purchaser an order for specific performance with costs to the Purchaser to be assessed. The Court will hear further submissions from counsel with respect to the appropriate ancillary orders, including interest, costs and property transfer tax.

DR. SONIA RICHARDS
Judge of the High Court

Postscript: Upheld by the Court of Appeal in Civ. App. No.2 of 2013 Von Wilfred Callender v. Lorna Vanella Moore (31 July 2018).