COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
Action No. 2021/CLE/gen/00197

B E T W E E N:

JULIO E. PAROTTI

First Plaintiff

AND
APRIL N. PAROTTI

Second Plaintiff

AND

KAREN JANET BETHEL

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Date of Hearing:	10 September 2021, 23 September 2021 and 4 November 2021
Appearances:	Alexander P. Maillis II for the Plaintiffs
	V. Alfred Gray for the Defendant

RULING

KLEIN, J.

Contract—Agreement for Exchange of properties—No completion date stated for completion—Unilateral termination of Agreement by Defendant after extended delay—No notice given before termination—Whether time made of the essence—Whether repudiatory breach of Agreement—Conveyancing Practice—Reasonable time for compliance where no time stipulated—Unreasonable delay in providing title documents—Whether delay a breach justifying termination—Delay said to be attributable to Hurricane Dorian and Covid-19—Possession of property prior to completion—Whether Trespass—Damages—Claim for mesne profits—Pleadings—Remedies—Specific performance—Title Documents—Requisitions—Counsel and Attorney-at-Law acting for the same parties—Cancellation of Deed.

INTRODUCTION & BACKGROUND

1. This case concerns the fallout from an aborted agreement for the exchange of properties between the parties. It also illustrates the inherent pitfalls in the practice of a single counsel and attorney acting for both parties to a land transaction.

2. The parties signed an agreement for the exchange of properties ("the exchange agreement or Agreement") in June of 2019, which the defendant unilaterally purported to terminate in February of 2021 on the grounds that the plaintiffs failed to produce the documents evidencing title to their property after a protracted delay. The plaintiffs say that the delay was caused by

extraordinary natural events, in particular Hurricane Dorian of 2019 and the Covid-19 pandemic of early 2020, but that in any event the defendant unlawfully terminated the Agreement without issuing a notice to complete making time of the essence and in circumstances where it was clear that the plaintiffs had good title to the property.

3. As a result, by writ filed 25 February 2021, the plaintiffs claimed for breach of contract and sought specific performance. In response, the defendant counterclaimed for breach of contract and damages for trespass. It was not in dispute that the plaintiffs entered and occupied the defendant's property proposed for the exchange at some point after the Agreement was signed.

4. A short history of the events follows. The properties that are the subject matter of the claims are located in Bahama Palm Shores, Abaco. The plaintiffs, who are husband and wife, own several properties within the subdivision (Lots Nos. 278, 279, 280 and 29) and were seeking to acquire an adjacent lot to expand their homesteading activities. In May of 2019 they contacted the defendant, who owns Lot 281 (which is adjacent to Lot 280), and the parties subsequently agreed to exchange the properties.

5. Perhaps with the idea of saving time and expense, the second plaintiff prepared a simple written agreement for the exchange of the properties which was dated and signed by the parties on 25 June 2019. The terms of the Agreement, which was termed a "Sales Agreement", are set out below (without editing):

> "This serves as an agreement between Karen Janet Bethel of Nassau, New Providence and Julio & April Parotti of Marsh Habour, Abaco for the exchange of two properties in Bahama Palm Shores, Abaco.
>
> Karen Janet Bethel being the current owner with clear title of Bahama Palm Shores, Pinehurst, Block 47, Lot 281 (recorded with the Registrar Generals office in Vol 10721, pages 211 to 222 and dated September 6th, 2008 ALONG with Julio & April Parotti being the current owners with clear title of Bahama Palm Shores, High Banks, Section 4, Block 23, Lot 29 (recorded with the Registrar Generals office in Vol 9901, pages 170 to 175 and dated October 28th, 2002.
>
> Julio & April Parotti agree to pay for a title in order to search to provide a proof of clear title along with legal fees, Government Stamp Taxes & recording fees and appraisals as proof of values.
>
> Both parties agree to deliver unto the other party all supporting documents as chain of ownership.
>
> This agreement represents each party surrendering their full ownership of noted lots above to the other party with no other encumbrances."

6. The Agreement was not a document drafted by an attorney and it contained several omissions that are of some significance to this claim. For example, it did not include a date for

completion, any mechanism for the legal transfer of the estates, nor any procedure for its rescission or termination.

7. Pursuant to the terms of the Agreement, the second plaintiff engaged HG Christie to conduct an appraisal of the lots that were the subject of the exchange. By a report dated 11 July 2019, Lot No. 29 was appraised at $14,000.00, and Lot No. 281 was appraised at $5,000.00. The second plaintiff also engaged CompuTitle Ltd., a legal records search firm, to conduct a title search and produce reports in respect of both lots. Reports were apparently provided for Lot 281 on 3 July 2019 and for Lot 29 on 12 July 2019.

8. The report on Lot 29 indicated that it had a chain of title stretching back more than 30 years, commencing with Crown Grants to Pine Beach Ltd. on 17 April 1969 and 15 February 1971, then a conveyance from Pine Beach Ltd. to Gregory Alan Engelbreit on 14 April 1978, and lastly a conveyance from Kimberly K. Engelbreit and Gregory Alan Engelbreit to the plaintiffs on 28 October 2002.

9. The details of the CompuTitle report on Lot 281 only showed the conveyance on 6 September 2008 from Patricia Shaw to Karen Stubbs-Bethel. However, evidence led at trial revealed further steps in the devolution of title and documents as follows: the Crown Grants to Pine Beach Ltd. mentioned in the report on Lot 29 as a common root of title; a conveyance dated 5 April 1981 from Pine Beach Ltd. to Howard and Patricia Shaw, and a copy of a death certificate for Howard Shaw.

10. According to the defendant, on the very same day the Agreement was signed (25 June 2019), she contacted Mr. Vincent Wallace Whitfield to represent her in the transaction. It appears that following the signing of the Agreement, the second plaintiff was also searching for an attorney-at-law to complete the transaction and, according to her, the defendant recommended her attorney, Mr. Wallace Whitfield. Thus, when Mr. Wallace Whitfield contacted the plaintiffs by email on 9 July 2019 with respect to the transaction, the second plaintiff enquired whether he would also be able to prepare the deed of exchange in respect of the plaintiffs' lot and the applicable fees. He agreed to this and later communicated his fees. As will be explained later in this Ruling, Mr. Wallace Whitfield's role in the transaction and these proceedings ended up being of some significance, as he was not only instructed on behalf of both parties but ended up being called as a witness in these proceedings by the defendant.

11. By letter dated 15 August 2019, Mr. Wallace Whitfield ("the joint counsel") transmitted a deed of exchange to the plaintiffs which purported to convey Lot 29 in Bahama Palm Shores from the plaintiffs to the defendant, with instructions for them to sign and VAT stamp the document and return it to him. It appears from the evidence that the plaintiffs signed this deed on 19 August 2019 and forwarded it to the VAT office in Marsh Harbour to ascertain the level of VAT payable.

12. According to the defendant's evidence, at this point she had previously executed a Deed of Exchange for Lot 281 in favour of the plaintiffs, which was apparently witnessed by Mr. Wallace

Whitfield. She also indicated that her original and certified documents in respect of her title were delivered to Mr. Wallace Whitfield on 7 July 2019. I should mention at the outset that neither the Deed purportedly transferring the defendant's property to the plaintiffs nor any of the defendant's documents said to evidence title were ever produced at trial.

13. There was a lengthy delay between the time the plaintiffs received the documents from Mr. Wallace Whitfield and when they returned the executed documents to him. This delay was said to have been caused by two significant natural events. On 1 September 2019, a Category-5 Hurricane ("Dorian") struck Abaco, causing catastrophic damage and disrupting all Governmental services on that island. The plaintiffs stated that in effect they became "refugees" in Nassau for an extended period after the passage of the storm to try to piece together their lives. Then, during March 2020, the Covid-19 pandemic unfolded, and the Government on 18 March 2020 declared a state of emergency, which caused nation-wide disruption of certain services, including access to legal records.

14. According to the plaintiff's evidence, they made numerous attempts of several law firms and of Mr. Wallace Whitfield to obtain certified copies of various documents comprising their chain of title. The main title document in issue was a *certified* copy of the Grant of Resealing of the Estate of Mr. Gregory Engelbreit. The second plaintiff attempted to obtain this document from the law firm which handled the probate, but after initially meeting with no success, requested the assistance of Mr. Whitfield Wallace. Mr. Wallace Whitfield indicated (by email dated 5 May 2020) that he was able to get the copies and have them stamped, although he was unable to do it right then because of the prevailing circumstances.

15. It appears that the second plaintiff continued with her efforts to obtain the certified copy of the Grant of Resealing after joint counsel indicated that they were still outstanding, and eventually obtained and forwarded a copy by email dated 26 August 2020. By email dated 28 October 2020, Mr. Wallace Whitfield acknowledged receiving from the defendant the plaintiffs' original conveyance from Mrs. Engelbreit and requested once again that he be provided with a *certified* copy of the Grant of Resealing of the Estate of Mr. Gregory Engelbreit. Mr. Wallace Whitfield further stated in that email that once the requested document was provided, he would provide a statement of account of his fees and any expenses, and forward the Deed of Exchange signed by the defendant.

16. As matters turned out, it was not until 8 February 2021, that the plaintiffs returned the executed VAT-stamped Deed of Exchange to Nassau, which the defendant apparently collected on 9 February 2021 from the law office of Maillis and Maillis.

17. On several occasions in the period between the signing of the Sales Agreement and the rescission letter, the defendant expressed misgivings about proceeding with the transaction. For example, on 26 April 2020, the defendant wrote the second plaintiff indicating that "*It would be in our best interest that we cancel this transaction*" as a lot of "*life changes*" had occurred between the parties and there needed to be some closure to the transaction. She indicated that she would

be requesting her documents from Mr. Wallace Whitfield. The second plaintiff entreated her not to do so, indicating that "*the papers are ready*" but citing difficulties with Hurricane Dorian and Covid-19 in getting them to the lawyer.

18. Then, on the morning of 10 February 2021, the defendant sent a message on WhatsApp to the plaintiffs suggesting that they "reconsider" the exchange. This was followed by a letter later that same day ("the termination letter") stating in part that "*after much contemplation, I am no longer interested in making an exchange of my property…".* It further stated that the decision "was final" and invited the plaintiffs to refrain from trespassing on her property. To give context to the remark about trespassing, it appears that in the aftermath of Hurricane Dorian the plaintiffs entered into possession of Lot 281 and constructed on it a dwelling structure, parked a trailer home, and fenced in a portion of the lot.

19. The termination letter provided no reasons, but by follow-up email dated the 11 February 2021, the defendant explained that the decision to cancel was because "…*All documents to provide proof of title for your property to date are not in place and the overall process for this matter took much too long*…".

20. The plaintiffs, who by this time had engaged independent counsel (Maillis and Maillis), wrote on 12 February 2021 to the then counsel for the defendant (also an independent counsel) rejecting the rescission, stating that there was a written agreement for which consideration had been given and which had been partly performed and the defendant could not simply "*change her mind*". On 15 February 2021, Mr. Wallace Whitfield wrote in indelible marker on the front page of the VAT-stamped Deed "Transaction Cancelled Except as to refund of Value Added Tax", which he also signed and returned to Maillis and Maillis.

Procedural History

21. On 25 February 2021 the plaintiffs filed a generally indorsed Writ of Summons followed by a Statement of Claim filed on 26 March 2021. The plaintiffs claim the following relief:

> 1. "A Declaration that the Defendant's purported rescission of the exchange agreement is unlawful and that the agreement subsists and is binding upon the parties;
>
> 2. Specific Performance of the exchange agreement;
>
> 3. An injunction from this Honourable Court restraining the Defendant personally and/or by her servants, agents or workers from selling transferring or otherwise encumbering the title her lot and/or interfering with the Plaintiffs' construction improvements fixtures or equipment situate upon the said lot and/or from harassing, threatening, molesting, disturbing or annoying the Plaintiffs pending further Order of the Honourable Court;

4. Damages for the delay and or loss occasioned by the Defendant's actions in addition to specific performance;

5. Interest on any sum found due to the Plaintiffs pursuant to the Civil Procedure (Award of Interest) Act;

6. Costs;

7. Further or other relief."

22. The Defendant filed a Defence and Counterclaim on 7 April 2021, in which she seeks the following reliefs against the plaintiffs:

1. Damages occasioned by their several Breaches of contract.

2. Damages for illegal trespass and wrongful possession of the Defendant's Property.

3. Mesne Profits for wrongful possession and unlawful trespass on the Defendant's Property and for constructing and occupying a structure built on the Defendant's Land without the Defendant's permission and without paying any Rents to the Defendant for such occupation of her land.

4. A Declaration/Order condemning the Plaintiffs for their brazen breaches of their "self-drawn" contract and for their boldly seeking the Court's Assistance in curing the breaches made by them.

5. Damages occasioned by the Plaintiffs' unlawful fencing of the Defendant's Property, thereby preventing the Defendant from the lawful use and enjoyment of her Property.

6. Interest on any sum due to the Defendant, pursuant to the Civil Procedure Award of Interest Act

7. Cost

8. Any further or other relief which the Court deems just."

23. The defendant applied for an "*emergency*" injunction on 29 April 2021 to restrain the plaintiffs from further trespassing and carrying out any construction on the defendant's property. The application was heard by Charles J. (as she then was), who ordered on 14 June 2021 that the status quo would remain until the substantive action was determined.

The issues

24. The parties did not agree the issues to be determined by the Court, but on a compendious reading of the rival claims, the main issues appear to be as follows:

1. Whether the plaintiff's failure to provide the alleged title documents constituted a fundamental breach entitling the defendant to terminate the Agreement;

2. Whether the termination of the Agreement by the defendant was effective in the absence of notice to complete;

3. Whether by the execution of the Agreement the parties intended to yield up possession to each other prior to the exchange or delivery of the deeds of conveyance;

4. Whether the actions of the plaintiffs on the defendant's property subsequent to the signing of the Agreement and prior to the exchange of deeds constituted trespass;

5. Whether the plaintiffs are entitled to specific performance.

DISCUSSION AND ANALYSIS

The Plaintiffs' case

Delay

25. The plaintiffs addressed submissions to five main issues in support of their case: (i) delay; (ii) the title to Lot 29; (iii) the attempt at unilateral termination; (iv) possession of Lot 281; and (v) the availability of the remedy of specific performance.

26. First, with respect to the issue of delay, they submit that where there is no expressed term in a contract or agreement as to a completion date, the law will usually infer an implied term that each party must perform their part of the contract within a "reasonable time" having regard to the circumstances of the case. For this proposition, they rely on an extract from **Halsbury's Laws** (3rd Edition Vol. 8, pg. 163), which provides as follows:

> "Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within what is a reasonable time having regard to the circumstances of the case".

27. The plaintiffs do not shy away from the fact that there was a major delay between the date the Agreement was signed and the date when the defendant purportedly rescinded. But they reiterate that Hurricane Dorian and the Covid-19 pandemic were events beyond their control (*force majeure*), which caused major disruption with accessing various services, including access to Government offices and documents. By way of contrast, the plaintiffs underscored the point that before the intervention of the storm and pandemic, conduct of the title search and appraisals (the other matters they had committed to in the Agreement) were progressed with expedition. For

example, by 11 July 2019 the appraisals of both properties were done, and by 12 July 2019 both CompuTitle searches were available.

28. Further on the issue of delay, the plaintiffs acknowledged that the joint counsel "*was not on trial*", but contended that his conduct and omissions helped to steer the matter "*into the tangle it became*", by failing to offer advice and assistance in moving the transaction along and obtaining the documents. In this regard, it was noted that the second plaintiff had specifically asked Mr. Wallace Whitfield to assist with obtaining the requisite documents (on 4 May 2020), and he had agreed to do so. The plaintiffs contend that having expressly been engaged and offered payment for his services, Mr. Wallace Whitfield was under a duty to assist in obtaining the certified copies, and the plaintiffs were entitled to rely on joint counsel's indication that he was assisting with procuring them. Further, on 9 September 2020, when he was again contacted about the transaction after some time had elapsed, he indicated that "*everything was already done by me to complete the transaction*".

Title to Lot 29

29. The second point argued by the plaintiffs is that they adduced evidence of a good and marketable title to Lot 29, and the failure to obtain a *certified* copy of the grant of resealing was not a defect in their title or gap in devolution. In this regard, the title report for Lot 29 showed a clear unbroken chain of documentary title stretching back more than 30 years, satisfying the requirement for a good root of title under the Law of Property and Conveyancing Act. As noted, the title search showed a root of title commencing with Crown Grants in 1969 and 1971 to Pine Beach Ltd. (incidentally the same root of title of the defendant's Lot), then to Gregory Alan Engelbriet in 1978, then from Gregory Alan Englebriet and Kimberly Kay Engelbriet to Julio Edward and April Natasha Parotti in 2002. For completeness, it should be noted that Kimberly Engelbreit was the wife of Gregory Engelbriet, and was appointed the general personal representative of Mr. Englebriet's estate on 11 August 1999 by the District Court (Fourth Judicial District) of the State of Idaho, which was resealed by the Supreme Court on 17 June 2002 (No. 329/2001).

30. The plaintiffs contend further that contrary to the suggestion by Mr. Wallace Whitfield (during his oral evidence) that the CompuTitle Report did not provide the requisite cause list information he requested (pg. 87 of the transcript of 23 September 2021), the Report recorded "Nil" entries in the cause list as against the second plaintiff, Mrs. Parotti, and the only action noted for Mr. Parotti was his previous divorce proceedings. So there were in fact no outstanding claims providing any encumbrances to the plaintiffs' title.

Termination of the Agreement

31. On this point, the plaintiffs submit that, in the absence of a term relating to cancellation or rescission, the Agreement could only be determined on reasonable notice by one or both parties. They refer to several authorities for this proposition as follows:

> "A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both parties." –**Chitty on Contracts, General Principles, 23rd Ed., pg. 709.**
>
> "In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay…But the time fixed must be reasonable having regard to the position of things at the time when notice is given, and to all the circumstances of the case." –**Halsbury's Laws, 3rd Edition, Vol. 8, pg. 165.**

Reference was also made to **Re Barr's Contract, Moorwell Buildings Ltd v Barr [1956] Ch. 551** at p 556 where it is stated *"once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time"*; and **MacBryde v Weekes** (1856) 22 Beav. 533, for the principle that what is a reasonable time is fact-sensitive and depends on the contract and the circumstances of each case

32. The plaintiffs submit further that for the contract to be lawfully rescinded, the defendant ought to have made time of the essence by serving a Notice to Complete. Again reference is made to an extract from Halsbury's Laws:

> "A contract cannot be rescinded in the strict legal sense of the term without the consent of the parties or an order of the court, and a mere intimation by one party of his intention not to perform his promise does not discharge the contract."—**Halsbury's Laws, 3rd Edition, Vol. 8, pg. 173**.

33. In this regard, the plaintiffs contend that contrary to the defendant's suggestion, the email of 26 April 2020 did not constitute proper notice, as it did not provide a date for the Agreement to be completed failing which there would be rescission. All that email expressed was a wish to cancel the Agreement, and indicated that the plaintiff would be requesting all of her documents. Consequently, it is submitted that the Agreement continued to be in full force and effect past the 26 April 2020 to be performed at a future date.

34. Further, it is contended that the fact that the Agreement was not terminated is evidenced by the conduct of the parties. For example, the second plaintiff specifically asked the defendant not to cancel the Agreement and reached out to the joint counsel for assistance, who did not indicate that the Agreement was at an end but offered to assist. Further, in September 2020, Mr. Wallace Whitfield stated to the Second Plaintiff via email that he had done "*all that was needed to be done*" to complete the transaction. Additionally, on 8 February 2021, when the VAT-stamped documents were sent to Maillis and Maillis, they were collected by the defendant and delivered to Mr. Wallace Whitfield.

35. Finally, it is said that the very terms of the defendant's letter of 10 February 2021 make it clear that she did not consider that the Agreement had been terminated. It made no reference to the 26 April letter, and stated in part as follows: *"I write to inform you that after much contemplation I am no longer interested in making an exchange of my property...my decision not*

to proceed is final." In all the circumstances, the plaintiffs contend that this was a repudiatory breach of the Agreement which was not accepted.

Possession of the defendant's property

36. The plaintiffs do not deny that they entered onto Lot 281 at some point following the signing of the Agreement. However, they contend that they were operating on their interpretation and understanding of the final clause of the Agreement, which they understood allowed them to take possession. Thus, they felt justified in utilizing the portion of Lot 281 as part of their homesteading activities, as well as taking action to protect the property from animals and intruders by erecting fencing. In reliance on equitable principles, they assert that "*the law of the Commonwealth of The Bahamas is that the "beneficial interest passes on the execution of the Agreement*" (probably a reference to the principle in **Lysaght v Edwards**) (1876) 2 Ch. D 499) and that pursuant to that doctrine they ought not be considered trespassers.

Specific Performance

37. In all the circumstances, the plaintiffs submit that specific performance would be the appropriate remedy, as they remain in possession of part of the property (pursuant to the Order to maintain the status quo pending determination of the proceedings) and the property (though lesser in value) was acquired for its practical utility to their homesteading plan. Furthermore, it is argued that as the defendant confirmed in her testimony that she did not have any prospect of a sale, she does not stand to lose anything but rather to gain a property that is nearly triple the value of the one she is exchanging. The plaintiffs contend that the certified copies of the grant of resealing have been obtained since the commencement of this action and there is no legal obstacle to the Agreement being performed.

The Plaintiffs' Evidence

38. The plaintiffs called three witnesses in support of their case. Ms. Calliope Couchell, the Office Manager at Maillis and Maillis, was briefly cross-examined as to events surrounding her receipt of the original Deed of Exchange sent by the plaintiffs for collection by the defendant. It was Ms. Couchell's evidence that she contacted the defendant to collect the documents from the office, and on the morning of 9 February 2021, the defendant collected the documents. The package was not opened in her presence.

39. The second witness was the first plaintiff, Mr. Julio Parotti. Mr. Parotti was extensively cross-examined on his involvement in the matter. It was his evidence that the actual transaction and steps taken to obtain any legal documents were primarily left to his wife, and he could not say much about those aspects of the case. However, he was able to give evidence of actions taken to secure the plaintiffs' several properties, which were also extended to Lot 281, by erecting fencing, constructing structures on the properties, and taking occupation. He testified that he was operating

under the belief that the Agreement gave him the defendant's permission to occupy the property before the exchange was completed and he denies that the agreement was terminated.

40. The final witness was the second plaintiff, Mrs. Parotti. She testified as to the genesis of the transaction between the plaintiffs and the defendant, including the details of how the exchange agreement came into being and how both parties came to instruct Mr. Wallace Whitfield. It was her evidence that Hurricane Dorian and the COVID-19 Pandemic caused significant delays with the transaction and in obtaining the requested documents, and that some legal documents had been lost in the storm. She further testified that she relied on the representation made by Mr. Wallace Whitfield that he would help procure the certified copy of the resealing of the grant of probate in the estate of Gregory Engelbreit. She stated that she never saw or received the counterpart of the Deed of Exchange purportedly signed by the defendant, and admitted that the plaintiffs took possession of the defendant's property shortly after the signing of the Agreement.

The Defendant's case

41. The defendant's case, as far as I understand it, may be summarized as follows.

42. Firstly, the defendant raised the issue of whether an agreement without a time for completion is valid, although this point was not developed in written or oral submissions. In my view, whatever the Agreement lacked in legal precision, I do not think there is any merit in the contention that the omission of a term for completion made it invalid for uncertainty. It is trite that the courts will always seek to give effect to a contract, and will only find it void if it is legally or practically impossible to give effect to it (**Hillas & Co. Ltd. v Arcos Ltd.** (1932) 43 LL 359).

43. In fact, the suggestion of invalidity was contrary to the alternative submission of counsel for the defendant that where there is no time specified for completion, the conveyancing practice of allowing a reasonable time for compliance (which counsel pegged at 45-60 days) should be implied and upheld by the Court. In the defendant's view, the 20 months or so which elapsed between the signing of the Agreement and when it was cancelled by the joint attorney, was far from reasonable and this, it is said, amounted to a fundamental breach of Agreement justifying termination.

44. Secondly, it was submitted that although the parties entered into "*a flawed Agreement drawn by the plaintiffs*", it was clear from the exchange of emails that time was of the essence with respect to the requirement to provide the supporting documents of proof of ownership. Thus, any failure to comply could potentially constitute a breach of the contract and any party would have a right to avoid the contract by giving "*written notice to the other side of their intention not to complete*". Counsel for the defendant submitted that the email of April 2020 constituted (as stated in written submissions) "*notice of her intention to end the contractual relationship*".

45. On the issue of specific performance, counsel for the defendant contended that as the plaintiffs themselves were allegedly in breach of the Agreement, they should not be entitled to

specific performance, relying on the equitable principle that he who comes to equity must come with clean hands. In this regard, counsel for the defendant referred to the Privy Council decision in **George Alexander Selkirk v Romar Investments Limited (Bahamas)** [1963] 1 WLR 1415, on appeal from The Bahamas, which was said to illustrate the principle that "*the offending party could not take advantage of their non-compliance with the term of the contract*".

46. I should say at once that I think this is an erroneous reading of the case of **Selkirk v Romar Investments,** and does not assist the defendant. That case is really authority for the principle that counsel for a purchaser is well within his rights to raise proper requisitions where the sales agreement provides for it, to seek the best evidence establishing the vendor's chain of title, and to exercise the purchaser's contractual right to rescind if the vendor is unable or unwilling to answer the requisitions.

The Defendant's Evidence

47. As indicated, attorney Wallace Whitfield submitted a witness statement on behalf of the defendant, and the plaintiffs duly applied for him to be cross-examined, which was permitted by the Court. In his testimony, Mr. Wallace Whitfield stated that he represented both parties in the transaction with "utmost good faith". He alleges he was not paid for his work, but also admits that he did not submit a bill (although these are irrelevant to the matters under consideration by the court). In his evidence, he acknowledged that the Agreement did not contain a completion date, but indicated that the defendant was exasperated with the amount of time that had lapsed when she gave notice that she was terminating the agreement.

48. In cross-examination, Mr. Wallace Whitfield stated that it was not his responsibility to make it known to the plaintiffs that the matter was time-sensitive, as the transaction was between the plaintiffs and the defendant. He further testified that he was ready willing and able to close the transaction because he was in possession of the complete chain of title of the defendant's property, and a Deed of Exchange executed by her. He stated that the plaintiffs did not furnish him with their documents and he was not in a position where he was satisfied with the plaintiffs' complete chain of title. When questioned (both by the Court and counsel for the plaintiffs) about the whereabouts of the counterpart deed of exchange said to have been executed by the defendant, he answered that the Deed was not produced because he returned it to the defendant once the transaction fell apart.

49. Mr. Wallace Whitfield denied any duty to obtain the certified copy of the resealed grant of probate on the plaintiffs' behalf. He acknowledged that the second plaintiff requested his assistance with obtaining a certified copy of the grant, and that he agreed to assist, but that he was unable to do so due to the closure of government offices during the COVID-19 pandemic. It was his evidence that he did all that was required of him to do to progress the transaction. He testified that he did not advise the defendant to cancel the agreement, but "*simply accepted it for what it was*." He also did not feel the need to communicate the defendant's decision or advise the plaintiffs to seek independent legal advice, because as far as he was concerned the transaction was cancelled.

50. The defendant was the final witness in the matter. She indicated that she initially engaged Mr. Wallace Whitfield, but he later agreed to act for both parties after the second plaintiff suggested that she also wished to use his services. The defendant indicated that she signed her Deed of Exchange in July 2019, but admitted that they were not "properly executed" and were held in escrow by Mr. Wallace Whitfield. By "properly executed" she explained that she meant that all necessary documents from the plaintiffs were not provided for the transaction to be completed. However, she was unable to explain why the deed purportedly executed by her was not put in the record.

51. The witness was extensively cross-examined on her email of April 2020 which purported to cancel the agreement. The defendant indicated that she did not inform Mr. Wallace Whitfield in advance that she would be canceling the agreement, nor did she take advice from him. She indicated, however, that she took advice from attorneys at her place of employment, who advised her that the agreement had already expired because it was "*more than 12 months old*". It was her evidence that the agreement was canceled by the April 2020 letter and she collected her documents from Mr. Wallace Whitfield in May 2020, but did not inform the plaintiffs that she had collected her documents.

52. She was questioned as to why she collected the plaintiffs' documents from Maillis and Maillis if she had already canceled the agreement. She indicated that when she collected the documents she had already informed Mr. Wallace Whitfield that she had no intention of completing or proceeding with the Agreement. Notably, counsel for the plaintiffs drew to the attention of the Court that Ms. Bethel executed a re-conveyance of the plaintiffs' property in March 2021, prepared by counsel who represented her in these proceedings. The defendant stated that this was done by the lawyers as a precautionary measure to ensure that the agreement was canceled.

DISCUSSION AND ANALYSIS

The Legal framework

53. I do not think that there is any dispute between the parties that it is the common law which regulates the position when there is a contract that does not stipulate any date for completion. The law is basically as stated by the plaintiffs, but a more modern and fuller exposition is found in **Halsbury's Laws (Contract) Vol. 22 (2019) at 291 and 293,** which provides as follows:

> "291. Where no time specified.
>
> Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case, as in the case of the carriage of goods, the sale of an interest in land, the sale of goods, or the opening of a letter of credit or guarantee. The position is the same where the contract merely

uses indefinite expressions as to the time of performance, but not where the act requires the concurrence of both parties.

293. Time not generally of the essence.

At common law stipulations as to time in a contract were as a general rule, and particularly in the case of contracts for the sale of land, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Therefore, one party could not insist on performance by the other unless he could show that he had performed, or was ready and willing to perform, his part of the contract within the stipulated time. However, in the exercise of its jurisdiction to decree specific performance, the Court of Chancery adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless either they were made so by express terms, or it appeared from the nature of the contract, or the surrounding circumstances, that such was the intention of the parties: unless there was an express stipulation or clear indication that time should be of the essence of the contract, specific performance would be decreed even though the plaintiff failed to complete the contract or take the various steps towards completion by the date specified.

By statute, wherever stipulations as to time are not, according to the rules of equity, deemed to be or to have become of the essence of the contract, the same rule prevails at law. The common law rules still apply to those contracts in respect of which equity did not intervene.

The current law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

If time is not of the essence, a party who fails to perform within the stipulated time does not commit a repudiatory breach (unless the extent and effect of the delay causes serious prejudice) but will be liable in damages. Where there is no express time of payment one may sometimes be implied. With regard to a loan repayable on demand, the creditor need only allow the debtor reasonable time to get the money from some convenient place, but this does not include time to negotiate a replacement loan.

In determining whether the time of payment is of the essence, the above general rules usually apply."

54. The position with respect to giving notice to a party in default of contractual undertaking making time of the essence was discussed in **Shawton Engineering Ltd v DGP International Ltd (trading as Design Group Partnership) and another v Limit (No 3) Ltd [2005] All ER (D) 241 (Nov),** where May LJ in the UK Court of Appeal stated as follows:

> "In the present case, there were originally fixed dates for completion, but it is correctly agreed that variations had rendered those dates inoperable. Instead, the obligation was to complete within a reasonable time. That obligation did not depend on Shawton giving any notice. But such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either
>
> (a) they gave reasonable notice making time of the essence; or
>
> (b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.
>
> Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense. So here, I think, where on any view DGP were performing at least in part."

55. As noted, what constitutes a reasonable time will depend on the particular facts and circumstances of each case.

56. I was not addressed on the interpretive principles to be applied to a commercial contract, but these are well known and I would simply set out and adopt the principles as stated in **Arnold v Britton [2016] 1 All ER 1**, where Lord Neuberger summarized the relevant principles in the following terms:

> "[15] 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 Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 (at [14]). And it does so by focusing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, 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."

Discussion

57. The first point to note is that the contract was drafted by the plaintiffs and written (unsurprisingly) in non-technical language. As indicated, it contained no completion date or timelines for the performance of the terms by either party. Counsel for the defendant described

the contract as "flawed" and suggested that because it was prepared by the plaintiffs, any ambiguities should be construed in favour of the defendant.

58. The critical paragraphs of the Agreement that fall for consideration are the fourth and the fifth clauses (although un-numbered in the original). They are short and bear repeating:

> "Both parties agree to deliver unto the other party all supporting documents as chain of ownership.
>
> This agreement represents each party surrendering their full ownership of noted lots above to the other party with no other encumbrances."

59. To decide the point of whether the failure to produce the certified document was a fundamental breach of contract, it is necessary to look a little more carefully at what the Agreement provides and the conduct of the respective parties. Notwithstanding any inelegance in drafting, it is reasonably clear on a plain reading of the words that by cl. 4 the parties agreed that they would deliver to each other the documents establishing their chain (or devolution) of title. In other words, these were the documents intended to provide evidence that each party had a good and marketable title to the properties they had agreed to exchange.

60. As indicated, the hiccup seems to have been over the plaintiffs obtaining a "certified" copy of the grant of resealing. While it is understandable that counsel representing a purchaser (or in this case parties to an exchange) would want to obtain the best evidence that could be obtained in confirmation of the title offered, i.e., the certified copy, this is not strictly what was required by the parties' contract. It simply provided for them to produce *all* documents. In fact, the requirement for a "certified copy" was insinuated by joint counsel himself in the covering letter dated 15 August 2019 forwarding the deed of exchange to the plaintiffs, in the following terms:

> "When returning the enclosed document, I will also require you to provide me with a certified copy of the Grant of Resealing of the Estate of Mr. Gregory Engelbreit by the Bahamas Supreme Court referred in the 2002 Conveyance to yourselves as this forms part of the documents of title to your lot. Upon receipt of the enclosed document and Grant of Resealing, I will provide you with a Statement of Account for my fees and any expenses and the Deed of Exchange signed by Karen."

61. At paragraph 13 of his witness statement, Mr. Wallace Whitfield deposed as follows:

> "For the record, from 9th July 2019 to 15th February 2012 when I cancelled the Deed of Exchange from the Plaintiff to the Defendant, the Plaintiffs have not provided me with (1) certified copies of the Crown Grants from The Queen to Pine Beach Limited dated 17th July 1969 and 22nd March 1971 respectively; (2) the original of the Conveyance from Pine Peach Limited to Gregory Alan Engelbreit dated 20th April 1979 all of which are mentioned in the title report by CompTitle referred to Paragraph 7 hereon; (3) a certified copy of the Grant of Resealing of

> the Letters Testamentary in the Estate of Gregory Allan Engelbreit referred to in Paragraph 9 hereof, which documents all comprise part of the chain of title to the Plaintiff's lot; and (4) the results of a judgment search against each of the Plaintiffs by CompuTitle, all of which are consistent with the agreed requirement that each party to the exchange of property transaction was to "provide a proof of clear title", such that at 15th February 2021 I was not satisfied that the Plaintiffs had provided as up to that date I had not received all of the Plaintiffs' documents of title."

62. What is notable about this is that the only document requested of the plaintiffs when the Deed was transmitted for the plaintiffs' execution (and seemingly as the sole condition for the delivery of the counterpart Deed from the defendant) was the certified copy of the grant of resealing. As to No. 1, it was accepted that the parties had a common root of title in the Crown grants to the original developers, Pine Beach Limited, and in his witness statement joint counsel stated that he had been provided with this document by the defendant at some point after 9 July 2019. As to document 2, this was not requested and in any event it would have been open to joint counsel to obtain a certified copy as the conveyance was registered. With respect to 3, the plaintiffs eventually managed to obtain from the law firm that handled the Engelbreit estate a copy of the grant of resealing and Mr. Wallace Whitfield acknowledges receiving a copy of this on 26 August 2019. With regard to No. 4, it was put to Mr. Wallace-Whitfield in cross-examination (and not refuted by him) that the title search showed "nil" entries with respect to any outstanding judgments against the plaintiffs. Further, Mr. Wallace Whitfield as well as the defendant would also have been in possession of the CompuTitle Report which showed the devolution of the plaintiffs' title and did not flag any encumbrances.

63. In his witness statement, joint counsel further stated that the defendant had "*provided me with originals of all her documents"* and he was satisfied that the defendant had "*an unencumbered fee simple title to her lot*". But it is noted that among the documents said to have been provided by the defendant was a "*copy" of a certified copy* of the death certificate of Howard Shaw, and there was a generic reference to "*Crown Grant from the Queen to Pine Beach Limited*".

64. Other than the request for certified copies, there was never any issue raised as to whether the plaintiffs had a good and marketable title to the property, and in fact the Agreement recited that both parties had "clear title" to the respective properties they were about to exchange. Further, while a certified copy of the grant of resealing might have been the best available evidence, it was not strictly required by the terms of the Agreement. I therefore do not accept that the failure to produce a "*certified*" copy of the grant of resealing was a breach of the Agreement, and certainly not a fundamental breach that would have entitled the defendant to unilaterally repudiate the Agreement.

Whether delay justified termination

65. A lot has been said about delay in this matter, and ostensibly it was said that the failure to produce the certified copy of the grant of resealing over a period of 20 months was the reason why

the defendant repudiated the contract. There is no dispute that the other obligations which the plaintiffs undertook under the Agreement relating to title searches and appraisals were performed with admirable promptness. A period of 20 months may be considered unreasonable delay with respect to completing a transaction for the conveyance of land, even allowing for the extraordinary natural events which manacled both the plaintiffs' and joint counsel's ability to progress the transaction. But it appears that the plaintiffs did everything they could in the circumstances to secure the requested documents, and in fact joint counsel's evidence is that he himself was unable to obtain the documents because of these events.

66. However, the law is clear that even where there is unreasonable delay, a notice must be served making time of the essence and requesting the defaulting party to comply before they can be guilty of a repudiatory breach.

67. In this regard, it is notable that the evidence of the defendant and the joint attorney diverged as to their understanding of the effect of the defendant's 'termination' letters. The defendant's evidence was that the Agreement was terminated by her letter of 26 April 2020 and that she requested and collected her documents from Mr. Wallace Whitfield in about May 2020. On the other hand, Mr. Wallace Whitfield's evidence was that the letter of 2020 constituted notice, and that the Agreement was not terminated until 10 February 2021.

68. The letter dated 26 April 2020 by the Defendant to the Second Plaintiff via WhatsApp messenger provided:

> "Good morning April Parotti; This is Karen Stubbs-Bethel from Nassau, Bahamas. I am writing you with reference to the Abaco properties exchange between yourself and I. It would be in our best interest that we cancel this transaction. A lot of life changes have happened with both you and I. However, some closure to this transaction must be enforced.
>
> I have copied Mr. Wallace Whitfield in this message. I will be requesting all of my documents with reference to my property from him and canceling all [processes] started with this transaction. I tried to call you on many occasions, with no success and no return calls from you. I trust this message [reaches] you [safely].
>
> Once again I wish to cancel the exchange properties between you and I. You keep your property and I will keep mine.
>
> Sign: Karen Stubbs-Bethel"

69. I have no hesitation in finding that the April 2020 email from the defendant did not constitute notice making time of the essence. It is also not in dispute that subsequent to this letter all the parties continued making attempts to perform the Agreement. For example, the defendant in August 2020 and on 7 February 2021 was still communicating with the plaintiffs as if the deal were still on foot. The defendant also stated in cross-examination that she was aware that the

plaintiffs were sending the Deed of Exchange on 8 February 2021 and also thought they were sending the outstanding documents. In addition, the defendant collected the documents from Maillis and Maillis to give to Mr. Wallace Whitfield, although her evidence was that she informed Mr. Wallace Whitfield that she had no intention of completing the transaction. Further, it is clear by the actions and evidence of Mr. Wallace Whitfield that he certainly did not consider the Agreement terminated by the April 2020 letter. He made representations up to 9 September 2020 that he had done everything to complete the transaction, and at no time between April 2020 and the 10 February 2021 did he communicate or explain to the plaintiffs that the transaction was cancelled and there was no need to have the documents delivered or have the Deed executed and VAT-stamped.

70. The letter of 10 February 2021 was less equivocal and was in the following terms:

> "I write to inform you that after much contemplation I am no longer interested in making an exchange of my property, Lot 281, Block #47 situated in the Pinehurst Section of The Bahama Palm Shores Subdivision, Great Abaco with your property, Lot #29, Block #23, Section #4 situated at Bahama Palm Shores Subdivision Great Abaco Island.
>
> I shall be returning all documents relative to your property provided to Mr. Vincent Wallace Whitfield with reference to this matter,
>
> My decision not to proceed is final. I would greatly appreciate it if you refrain from trespassing on my property.
>
> Sincerely
> Karen J. Stubbs-Bethel"

71. But as indicated, this could not be done unilaterally without first a notice making time of the essence and specifying the breaches which the plaintiffs were required to make good. Moreover, the parties were all still taking steps to perform the Agreement. I repeat the passage in **Shawton** (*supra*) which I find is quite apposite these proceedings:

> "Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense."

72. In the circumstances, I find that the defendant's attempt to terminate the contract by the letter of 10 February 2021 was therefore ineffective and a breach of contract.

Specific Performance

73. The main remedy sought by the plaintiffs is the equitable remedy of specific performance of the Agreement, i.e., the due completion of the transaction in proper form according to the contract. Like all equitable remedies, however, specific performance is discretionary, and the exercise of the court's discretion will involve considerations of the situations that might act as bars to the remedy. To take a few examples, equity will not assist with an order for specific performance where to do so would cause undue hardship to a party (**Patel v Ali** [1984] 1 All ER 978), or where there was undue delay in seeking the relief (**Lazard Bros & Co. Ltd. v Fairfield Properties Co Mayfair) Ltd.** (1977); or where there is uncertainty surrounding the seller's title (**Re Handman and Wilcox's Contract** (1902] 1 Ch. 599). The party seeking the remedy must also show that he is ready able and willing to complete (**Hynes v Vaughan** (1985) 50 P&CR 444).

74. In my judgment, there is nothing in the circumstances of this case militating against the grant of specific performance. Despite the rather inelegant drafting and the omission of some terms, the Agreement is not void and I have held that it has not been lawfully terminated. The plaintiffs have submitted that they are in possession of the certified copy of the grant of resealing that was requested and are ready and willing to produce the same to the defendant. The defendant has not alleged that there is any uncertainty or doubt about the plaintiffs' title so that it should not be forced on her. Neither will compelling specific performance cause any hardship on any party. The defendant testified that there was no prospect of sale of her property at the time of trial, and in any event the defendant stands to gain a property almost triple the value of the one which she is exchanging. In this regard, notwithstanding the inequity in the value of the properties, the plaintiffs are willing to exchange because the property adjoins theirs and fits in with their homesteading activities.

75. I will therefore grant the decree for specific performance, and declare that the Agreement dated 25 June 2019 ought to be specifically performed and carried into execution, subject to the directions given below.

Right to occupy properties under the Agreement

76. The next issue, which arises by way of the defendant's counterclaim, is whether cl. 5 of the Agreement authorized the parties to immediately take possession of each other's property. The plaintiffs clearly stated that they interpreted paragraph 5 to mean that the parties were mutually surrendering possession of the respective properties subject to the delivery or exchange of deeds of conveyance. They therefore considered that their acts on the defendant's property were covered by the Agreement and within the contemplation of the parties.

77. An agreement for the exchange of property is akin to an agreement for the sale of land. Like a sales agreement, it does not have the effect of conveying legal title to the purchaser, which is done by deed (s. 40 of the Conveyancing and Law of Property Act). There is one important difference between the two, however, and it is that in the case of an exchange there is no purchase price left to be paid to the vendor as part of completion, as the parties have agreed to accept the value of the exchanged properties. Therefore, it is far more usual in cases of exchange (as opposed

to sale, where vacant possession is normally granted on completion) to find that the parties agree to yield up possession to the other in advance of the actual conveyance of the property (see the example of *Wagg v Hammond* [1952] 160 EG 464). It is also plain that parties may agree for possession before completion pursuant to the terms of the contract for sale (see the UK Standard Conditions of Sale). The question here is whether or not cl. 5 can reasonably be interpreted as having that effect.

78. This paragraph is admittedly somewhat ambiguous. It explicitly states that *"this agreement represents each party surrendering their full ownership of noted lots above to the other party with no other encumbrances."* The Agreement was drafted without legal advice, but in my judgment, the rule of construction which favours an interpretation that is less favourable to the plaintiffs who proffered the Agreement (*contra proferentum*) should be applied. As noted, surrender of "full ownership" by either party could only be accomplished by way of the mutual delivery of deeds of conveyance, and I do not find that the paragraph in question, whatever might have been the intention of the plaintiffs, created a right to immediate possession.

79. The plaintiffs do not deny that following Hurricane Dorian in September of 2019 they built a structure on 281, parked a trailer home and fenced in a portion of the property, as well as did farming as part of their homesteading activities. But they sought to justify their entry on two grounds. The first was the equitable principle expressed most notably by Jessel MR in **Lysaght v Edwards** (*supra*), that under a contract for the sale of land, the purchaser becomes the owner in equity and may acquire something in the nature of a beneficial interest in the property. The second was their reliance on their interpretation of the terms of the Agreement.

80. The modern position of a purchaser pre completion was put by the Privy Council in **Maharaj and another v Johnson and others (Trinidad and Tobago) [2015] UKPC 28** as follows (para 17):

> "But following execution of a contract for sale of land a vendor retains certain temporary rights in relation to it and the better view is that they are proprietary rather than contractual. In *Jerome v Kelly* [2004] UKHL 25, [2004] 2 All ER 835, [2004] 1 WLR 1409, Lord Walker of Gestingthorpe said:
>
> "32 It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income."

81. I do not think that either attempt at justification helps the plaintiffs. It requires no elaboration of legal authority for the principle that a trespass occurs whenever there is an unjustified intrusion by one party onto land that is in the possession of another. The defendant

was entitled to possession during the intervening period between the execution of the exchange Agreement and the exchange of the deeds of conveyance (which never occurred), and therefore in a strict legal sense the plaintiffs were trespassers. A similar situation was considered in **Ferguson et al. v McKenzie et. al.** (CLE/gen/No. 934 of 2002, unrept'd.), where Mohammed J. held that plaintiffs, who had gone into occupation of property initially by consent and in whose favour a conveyance had been executed by the defendants but which was later returned to the plaintiffs' attorneys and the agreement repudiated after the defendants were unable to satisfy the requisitions on title, became trespassers after they failed to vacate the property and the defendants were entitled to mesne profits.

82. The fact that they entered the land under the mistaken view that the Agreement permitted them to do so is also of no avail, as trespass may also be committed by mistake where the act is voluntary (**Basely v Clarkson** (1681) 3 Lev 37.)

83. It is trite law that trespass is actionable *per se*, and a claimant may be entitled to damages even if he has not suffered any loss, although damages may be nominal (see **Armstrong v Sheppard and Short Ltd.** [1959] 2 QB 384). If the trespass has caused actual damage, he is entitled to receive such an amount as will compensate him for his loss. If the trespasser has kept the claimant out of possession of his land, he may also be liable to pay mesne profits (by way of damages) for the use the defendant made of the land, irrespective of whether the claimant has suffered actual loss from being deprived of the land, based on a fair or reasonable charge for the use the defendant has made of the land (**Whitwham v Westminster Brymbo Coal & Coke Co.** [1896] 2 Ch. 538).

84. In her counterclaim, so far as relevant to the claim of trespass, the defendant claimed the following:

(i) damages for "illegal trespass" and wrongful possession of the defendant's property;
(ii) mesne profits for wrongful possession and "unlawful trespass" on her property occasioned by the acts of constructing a structure on the property and without paying rents to the defendant for such occupation of her land;
(iii) damages occasioned by the plaintiffs' unlawful fencing of the defendant's property thereby preventing the defendant from the lawful use and enjoyment of her property.

85. The normal remedy for trespass is an injunction, and it is important to note in this regard that the defendant made an urgent application (before another Judge) for an "*interim*" injunction to restrain the plaintiffs from continuing to trespass on the land and to cease any further activity until the matter was resolved by the court. The Court, after hearing the parties, on the 12 May 2021, did not grant the injunction in the form sought by the defendant, but made an order ("*by consent"*) that "*the status quo is to remain until the substantive action is determined*". It appears to have been agreed that the plaintiffs would not conduct any further construction on the property, but there was no order for them to either remove any of the structures, or to give up whatever occupation of the property subsisted at the time the matter was heard.

86. The defendant has not asserted that any actual damage was done to the property, and based on the evidence, it appears that whatever was done was an improvement. But as indicated, a claim for mesne profits does not depend on any damage being done to the property. In this regard, the evidence of the first plaintiff is that he returned to Abaco after Hurricane Dorian sometime in the third week of October 2019 and constructed a structure on Lot 280 (the plaintiffs' Lot) and then following that constructed a smaller structure on Lot 281. He indicates that the structures were completed by September 2020 and in January 2021 he brought a trailer home to Lot 281. In other words, it appears that the plaintiffs entered the property at the earliest in or about November of 2019.

87. I was not addressed by counsel on the principles relating to the assessment of mesne profits in a case like this. But the law is clear that what is sometimes referred to as "user damages" are normally assessed on the basis of the value to the trespasser of the use of the property at the time, calculated in most cases by reference to the ordinary letting value of the property on the open market (see **Enfield LBC v Outdoor Plus Ltd.** [2012] 2 EGLR 105, and the Court of Appeal decision in **Bartan Investments Co. Ltd. v Ricardo Anton Russell** (SCCivApp No. 113 of 2010, unreported.) There is, obviously, no established market rate for the letting of undeveloped property in circumstances where the parties have signed an agreement for the exchange of those properties. In such cases, where possession is given before completion in the context of an agreement for sale (or exchange), it is granted by licence as a corollary to the equitable interest of the purchaser in the land on the expectation that this will be transformed into full legal ownership (although the parties may agree a fee). By way of example, under the UK Standard Conditions of Sale, the fee is calculated as interest on the outstanding purchase price, at the going Law Society interest rate.

88. Neither has the defendant provided any details in her pleadings of any amount claimed, or the period for which the trespass was claimed, as ought to have been done in a properly drafted pleading (**Perestrello e Cia Ltda v United Paint Co Ltd.** [1969] 3 All ER 479 [486].

89. The fact that I have granted specific performance also has implications for the defendant's claim for mesne profits. The equitable remedy of specific performance is intended to put both parties in the same position as if their respective obligations under the Agreement had been performed, which is often expressed in the maxim "equity treats as done that which ought to have been done" (see **Harvela Investments Ltd. v Royal Trust Company of Canada (C.I.) Ltd.** [1986] A.C. 207). I find that the earliest date at which this could have been done was 9 February 2021, when the plaintiffs delivered their executed conveyance to the defendant along with the copy of the grant of resealing. If the parties had exchanged conveyances on that date, the plaintiffs would have obtained the legal estate to Lot 281 and would have been entitled to possess it. This result should obtain, unless the plaintiffs were guilty of unconscionable conduct sufficient to displace the equitable maxim, and I am not of the opinion that this has been shown. In the circumstances, I would hold that any assessment for mesne profits cannot extend beyond February 2021. The plaintiffs also indicated in closing submissions that at the time of the filing of their

claim on 25 February 2021, they were in possession of a certified copy of the grant of resealing (although I have found that strictly speaking a certified copy was not required to comply with the terms of the Agreement).

90. Although I have decided that the claim for mesne profits ought not to extend beyond February of 2021 based on equitable principles, I should mention for completeness that by May of 2021, the plaintiffs' occupation of the property was in any event by *imprimatur* of the Court order to maintain the status quo, and also implicitly with the consent of the defendant, as the order was indorsed as a consent Order. While it is clear that an interlocutory Order does not determine or in any way prejudice the substantive legal claims of the parties, an order to maintain the status quo in trespass/possession proceedings does more than just prevent the parties from dealing with the property in the interim in such a way as to make any final judgment ineffectual. It requires that the situation, as found by the court, during the period immediately preceding the issue of the writ or immediately preceding the summons for the interim relief (if there is a long delay between the two) be preserved until trial (**Garden Cottage Foods Ltd. v Milk Marketing Board** [1984] AC 130). Thus, if the plaintiffs were already in occupation of the land (as they were), their continuing presence after that was with the sanction of the court. But as indicated, I do not decide the point on this basis.

91. Notwithstanding the defendant's failure to provide any details of the claim for mesne profits, I do not think that it would be in the interest of justice to refer this matter to a Registrar for assessment, considering the peculiar features of this case and the decision this Court has come to on specific performance. Therefore, the Court must do its best on the material available to it to assess an amount. Having regard to my conclusions on specific performance, at best it can be said that the plaintiffs trespassed on the defendant's land from November 2019 to February 2021 (about 16 months), and the circumstances I would assess a nominal rate of $50 per month for 16 months ($800) for use of the defendant's land. I would also grant nominal damages of $10 for trespass, which I think is sufficient affirmation of the defendant's right to possession during this period.

Role of Joint Attorney

92. As intimated, I cannot end this decision without making some general observations about the practice of counsel acting for both parties where there are conflicting interest, as this case is a classic example of the dangers inherent in that practice. Although the practice is not unlawful where counsel has obtained informed consent from the parties, it is obviously risky and ought to be discouraged except in the plainest of cases where such conflicts are unlikely to manifest. I start with the sage observation of Scrutton LJ in **Moody v Cox & Hyatt** [1917] 2 Ch. 71 [p. 91]:

> "It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses the flaw in the title which he knows as acting or the vendor, by be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as

> solicitor for him. It will be his fault for mixing himself up in a transaction in which he has two entirely inconsistent interest, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relations puts upon them."

93. In the instant case, it ought to have been clear to joint counsel reasonably early in this matter (and certainly from the point of the defendant's email of 26 April 2020) that it was impossible to fairly represent both parties. It is also a matter of some concern that joint counsel defaced and cancelled the Deed executed by the plaintiffs on 15 February 2021. The law is clear that a deed may be lawfully cancelled by a person who is entitled under it, or by some other person to whom the person entitled has delivered it up to be cancelled (**Harrison v Owen** (1783) 1 Atk. 520). Joint counsel in his witness statement testified that he considered the Agreement cancelled based on the defendant's letter of 10 February 2021, but it will be noted that the letter simply stated that the defendant would be "*returning all documents relative to your property provided to Mr. Vincent Wallace Whitfield*". It is equally clear that the plaintiffs never authorized the cancellation of the Deed.

94. Further, joint counsel appeared in the proceedings as a witness for the defendant. Indeed, it was astonishing to find this statement in the defendant's Defence and Counterclaim:

> "[6.] …The Defendant says unequivocally that that up to the time of filing this Defence, her attorney in this transaction, Vincent Wallace Whitfield, had NOT been provided sufficient documents by the Plaintiffs to satisfy him that the Plaintiffs' title was CLEAR and marketable. Hence, the Defendant on that basis was admonished by his [her] counsel NOT to proceed with the Sale/Exchange of her Property for that of the Plaintiffs."

95. As counsel for the plaintiffs rightly pointed out, joint counsel was not on trial in this matter. But his conduct in this matter did come under scrutiny and drew fire from counsel for the plaintiffs during cross-examination. With that observation, I reiterate that it is generally advisable that counsel should seek to avoid putting himself in such situations in the first place. But if he does do so, with the concurrence of parties who have been made fully aware of the legal position, at the first sign of trouble or disagreement he should advise the parties to seek independent counsel. I say no more on this.

CONCLUSION AND DISPOSITION

96. For the foregoing reasons, I will dispose of the plaintiffs' claim and the defendant's counter-claim in the following manner, and invite the parties to draw up an Order reflecting the Ruling of the Court:

(i) I grant the declaration that the defendant's attempted termination of the exchange Agreement was ineffective and that the Agreement subsists and is binding on the parties.

(ii) I grant the decree of specific performance of the Agreement, and I order that the Agreement dated 25 June 2019 be specifically performed and carried into execution. I further direct that counsel for the plaintiffs be at liberty to prepare and execute a conveyance to the defendant of Lot 29 mentioned in the Agreement and that counsel for the defendant be at liberty to prepare and execute a conveyance to the plaintiffs of Lot 281 mentioned in the Agreement, and that the mutual conveyances be executed and delivered, together with all documents of title relating to their respective lots, to the other party at a time and place as may be arranged by counsel within 45 days of the date of this Ruling. And the parties are at liberty to apply as they may be advised.

(iii) I refuse the injunction sought by the plaintiffs restraining the defendant from selling transferring or otherwise encumbering the title to her lot and/or interfering with the plaintiff's construction improvement or fixtures or equipment situate on the said lot, as such an order is unnecessary having regard to the decree of specific performance and the earlier order of the Court to maintain the status quo.

(iv) I refuse the plaintiffs' claim for damages for "delay" and or loss occasioned by the defendant's action, as none has been particularized or proved.

(v) I refuse the defendant's claim for breach of contract, having found that it was the defendant that breached the Agreement by the unlawful attempt to repudiate.

(vi) I hold that the plaintiffs did commit trespass on the defendant's property for a period of 16 months between November 2019 and May 2021, and grant the nominal sum of $10 in damages for the said trespass and mesne profits assessed at $50 per month ($800.00) for the use of the defendant's land.

97. As to costs, I grant cost to the plaintiffs to be paid by the defendant (to be taxed if not agreed), from which I deduct 15% to signal the defendant's success on the counterclaim in trespass.

Klein J.

16 January 2025.