

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. 507/2004

BETWEEN

RACHEL CALIXTE
DAVID CALIXTE

Claimants

AND

AYRTON CORNELIUS SARGUSINGH Administrator in
the Estate of GARNET SARGUSINGH

Defendant

Appearances:

Ms. Samantha Charles for the Claimants

Mr. George Charlemagne and Mr. Bryan Stephen for the Defendant

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2008: April 16, 17
June 24
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JUDGMENT

MASON J:

[1] By this action in which an order for specific performance is being sought, the Claimants claim to have purchased by two (2) separate Agreements for Sale, two (2) parcels of land

from the deceased (now represented by the Defendant as Administrator of his estate) who died before the due execution of a Deed of Sale.

- [2] The Defendant denies any Agreement for Sale or the payment of any monies. He further contends that in any event the deceased was suffering from dementia for at least one (1) year before his death and so could not consent to any agreement for sale.

Evidence

- for the Claimants

- [3] Mrs. Shirley Lewis, the former attorney at law for the Claimants, by her witness summary, indicated that the Claimants and the deceased attended at her office on 18th August, 2003 and again on 18th September 2003 with respect to the sale and purchase of two (2) disparate parcels of land belonging to the deceased. On each occasion, Mrs. Lewis prepared an Agreement for Sale which the parties all signed in her presence. According to her, she counted out the money which the Claimants gave her and handed it over to the deceased. She said that it was clear to her that the parties had discussed before coming to her the terms of the agreement which she reduced to writing. One copy each of the agreements was given to the Claimants and the deceased and she kept a copy in her office. Mrs. Lewis stated that since the transactions were in cash, she explained to the deceased that she needed to lodge cautions against the property in order to protect the Claimants' interest until the surveys were registered. The deceased signed the caution as requested. The cautions were registered on 30th September, 2003.

[4] Mrs. Lewis stated that it was only when the second caution was ready to be lodged that she realised that that her copy of the second agreement was undated. She then inserted the date of 8th September 2003 instead of 18th September 2003. She also dated the second caution 8th September 2003.

[5] When the surveys were registered and the property mutated and it was time for the Deed of Sale to be signed, the deceased was resident in the Marian Home. When she went there together with the Claimants the deceased appeared sedated. She felt it prudent to have another Notary present and so one (1) week later accompanied by that Notary she returned to the Marian Home but the deceased again appeared sedated and bloated. Mrs. Lewis decided against having the deceased sign the document and so filed an action to have the Registrar of the High Court sign on his behalf. Before the matter was heard, the deceased died.

[6] Under cross examination Mrs. Lewis denied Counsel for the Defendant's suggestions that there were more than two (2) agreements and reiterated the circumstances of the signing of the agreements and the mistake surrounding the dating of the second agreement. She explained that of the three (3) copies of the first agreement the one kept in her office though signed by the parties and herself was undated. The copies given to the parties bore dates. A similar situation occurred with respect to the second agreement. She also indicated that because the Claimants informed her of their intention to purchase the second portion of land, she did not register the caution on the first portion. When she filed the caution for the second portion she inserted on both the caution and the second agreement the date of 8th September instead of 18th September, the date when the transaction had in fact taken

place. Mrs. Lewis further explained that she had to retrieve from the Claimants their original copy to produce to the court on the day of the trial as ordered by the Judge her copy having previously been filed in the Land Registry.

[7] Mr. Rosemont Joseph, former gardener to the deceased, stated that he had worked for the deceased for over 32 years until the deceased fell ill and went to the hospital. He said that he knew when the deceased sold the land to the Claimants because the deceased drove himself to and from work every day and appeared normal up until he went to the hospital.

[8] This evidence was not dislodged under cross examination.

[9] The first Claimant gave evidence on behalf of both Claimants. In her Witness Statement, Mrs. Calixte stated that she had known the deceased for 14 to 15 years, that he lived not far from her, that they were on friendly terms. In January 2003 he offered her a parcel of land for sale which she and her husband agreed to purchase. They commissioned a surveyor to survey the property and went with the deceased to see their lawyer to have an agreement for sale drawn up. While at the lawyer's office the deceased indicated that he had a second parcel of land for sale and the Claimants offered to purchase that as well.

[10] Mrs. Calixte indicated that the deceased accompanied the surveyor to the property where he pointed out the boundaries of his land and the portions to be excised. She later learnt that the deceased was in the Marian Home and when she visited him there, he suggested

that she bring the documents for his signature. She later accompanied her lawyer to the Home.

[11] Under cross examination she denied hearing that the deceased was senile "at the latter part of his days". She stated that in fifteen (15) years of knowing the deceased and being his neighbour, she never noticed anything strange about his behaviour, nor did she hear anyone in the area say that he did strange things. She denied taking the opportunity of getting his land at a lower price than the true value.

[12] Mr. Rufinus Baptiste, licensed Land Surveyor, in his Witness Statement stated that he carried out two (2) surveys for the Claimants, that on both occasions the deceased was present and pointed out the boundaries to him and the areas to be surveyed and that at all times he appeared normal.

[13] Under cross examination he admitted to being aware of a transaction between the parties but was unaware of the price the Claimants were paying for the parcels of land. He explained that his description of the deceased as "normal" was of "someone who can converse, comprehend,someone who is not senile, who is ok". He denied completing the surveys "in a hurry" stating that the surveys were done in August and September 2003 and the plans were authenticated in May 2004.

- for the Defendant

[14] In his witness statement, the Defendant Ayrton Sargusingh, son of the deceased stated that though he had been living in Canada for over twenty (20) years, he made periodic

visits to see his father. In 2002, on one such visit he noticed his father exhibiting strange behaviour "showing absent mindedness, senility and partial amnesia". From time to time the deceased would not remember the Defendant's name or the Defendant's brother's name, he would forget to do simple things like locking the front door when leaving the house, putting out the garbage etc. In November 2003 he made an appointment for his father to see a psychiatrist who confirmed that the deceased was suffering from senility. In April 2004 he procured an order of the High Court making him his father's curator.

[15] He was of the opinion that his father could not in the circumstances have consented to any agreement. On searching his father's records, he could not locate any receipts for the sums which the Claimants were supposed to have paid to his father. He was of the view that at the time when the Claimants were supposed to have purchased the land, his father was being well taken care of by him and his siblings and "did not want for anything".

[16] Under cross examination, the Defendant admitted that in 2002 when his father visited him in Canada and he noticed that he was acting strangely, yet he allowed him to return to St. Lucia to continue to live alone. The Defendant stated that he had no reason to believe that his father could not live alone, that he was a very independent person.

[17] He reiterated that when his father signed the agreements he did not know what he was doing. Further the signature on the second agreement was not his father's. He conceded that the doctor saw his father after the agreement had been signed and that he did not himself know about the agreements for sale. He stated that the doctor went to his father's drugstore in November 2003 to conduct the examination.

[18] Also giving evidence for the Defence was the Defendant's brother who in his Witness Statement more or less repeated the Defendant's claims. Cross examination did not reveal anything more of significance.

[19] The final witness for the Defence was Mr. Sylvester Leon, the self proclaimed best friend of the deceased. In his Witness Statement he indicated that he had known the deceased for over 25 years, that he visited and talked to him frequently and also did "odd jobs" around the deceased's house. He stated that from about 2002, he noticed the deceased acting strangely. He said that in 2003 the deceased told him that some people had asked him to sell them his land but that he was not even sure who the people were or what deal he was entering into or what he was asking.

[20] Under cross examination he vehemently denied that statement saying instead that he went to the deceased at his drugstore and told him that he had seen the "trace line" (for the survey) and the deceased denied knowing anything about it. He stated that the deceased lived alone but that he had a maid and a gardener and he went to work every day. He conceded that although he saw this strange behaviour, he never once alerted the deceased's sons.

Submissions

- for the Claimants

[21] Counsel for the Claimants considered that there were two (2) main legal issues to be considered:

1. *What would be the effect if the deceased had not possessed full mental capability during and before the time the agreements for sale were executed; and*
2. *What would be the effect if he had possessed full mental capability during that time.*

[22] Counsel in referring to the case of Witshire v Cain (1960) 2 WIR 13, submitted that the Defendant did not produce any evidence to prove that the deceased was suffering from any mental deficiency or that the Claimants knew that he was so suffering.

[23] Counsel contended that if the Defendant sought to suggest that the Claimants had taken advantage of the deceased because of his supposed mental incapacity, that the onus of proving undue influence rested on the Defendant. Counsel for this contention cited the case of Marie Egger v Herbert Egger St. Lucia Civil Appeal No. 17 of 2002.

[24] Counsel considered that in accordance with Article 354 of the Civil Code of St. Lucia, a person can sell his land at any price, having the free disposal of things that belong to him. Further for a court to set aside a contract for undue influence the "Court must be satisfied that no undue advantage had been taken of the party who was in the weaker bargaining position and needed to be protected" and "if the respondent and the deceased had bargained on equal terms ... law nor equity would intervene" per Singh v Singh (1978) 25 WIR 410.

[25] Counsel maintained that the Defendant had failed to prove that there was either any mental incapacity on the part of the deceased or that the Claimant exercised any undue influence over the deceased. The contract should therefore be upheld and specific performance ordered.

[26] Counsel also argued that the agreements for sale being in compliance with the requirements of the law as contained in the Civil Code are valid and enforceable and are not to be avoided by the deceased's death.

- **For the Defendant**

[27] Counsel for the Defendant argued that the Claimants are not entitled to the relief sought and has identified the following issues as being critical to the determination of the case:

- a) *whether the purported agreement meets all the legal requirements*
- b) *if it does, whether at the time of execution, the deceased possessed the legal capacity to form legal relations*
- c) *which agreements for sale are enforceable given the fact that the Claimants are seeking to enforce four (4) agreements for sale for two (2) parcels of land.*

[28] Counsel is of the view that all four (4) of the purported agreements for sale fail to satisfy the requirements for a valid agreement or contract in law, that they are void for lack of certainty. The first purported agreement according to Counsel does not clearly identify the

- land, specify who the owner of the land is, whether the Claimants accepted the offer nor a date for completion of the sale. If the full purchase price was paid, it could not be termed an agreement in the term legal sense. Thus this was merely an offer.
- [29] For what he refers to as the second purported agreement for sale, Counsel advances the same argument as for the first purported agreement.
- [30] With respect to his third purported agreement, Counsel contends that upon close examination of the signatures affixed to the agreements there is no consistency with the deceased's signatures.
- [31] The fourth purported agreement which was produced on the day of the trial is undated and similar to the third.
- [32] Counsel submits that the claim for specific performance must fail since there is nothing for the court to enforce.
- [33] Counsel contends that at the time of signing the deceased was already suffering from a mental disorder and as such was incapable in law of forming legal relations.
- [34] Since the Claimants never made an application for the Court to declare any of the purported agreements for sale as the true agreement for sale, it is left to the Court which is being relied on by the Claimants. A claim for specific performance is a very strict and

specific exercise of the court's power and must be related to a specific agreement with definite terms which are not vague in any manner.

Issues

[35] I am satisfied that the sole question to be determined by this court is whether there were valid agreements between the Claimants and the deceased. [This will of necessity involve consideration of issues regarding the mental capacity of the deceased and whether or not there was undue influence by the Claimants].

Findings

The Agreements

[36] Counsel for the Defendant suggested that during the course of the trial, the Claimants presented four (4) different agreements for sale to the court, with different dates and handwritings among other discrepancies. He listed these agreements as follows:

- *one agreement dated August 18th 2003 which accompanied the Claimants' Re Amended Statement of Claim filed on April 22, 2005*
- *one dated September 8th 2003 which accompanied the Claimants' Reply to the Defendant's Defence filed on 15 August 2005;*
- *one dated September 18th 2003 which accompanied the Claimant's application for leave to correct the amended Statement of Claim filed on the 28th September 2007; and*

- *an undated one which accompanied an application to the Registrar of Lands for registering a caution against the deceased's property.*

[37] I am however not so persuaded .

[38] I have accepted the testimony of Mrs. Lewis that there are and always have been only two (2) agreements. While she might not have been as scrupulous as she ought to have been in ensuring that the same copies of the agreements were appended to her documents on each occasion, I found entirely satisfactory the explanations she proffered for what at first appeared to be a proliferation of agreements.

[39] It should be noted that Mrs. Lewis gave her testimony with the equanimity and candour worthy of her calling and impressed me as a witness of truth for although she was thoroughly challenged under cross examination, her evidence remained unaltered.

[40] By Article 354 of the Civil Code of Saint Lucia individuals have the free disposal of the things belonging to them "under the modifications established by law". There having been no suggestion that the deceased was not the owner of the property in question, then prima facie he was free to enter into agreement with the Claimants for the sale of the land.

[41] An agreement for the sale of land operates as an alienation by the vendor of his beneficial interest in the property. This is made clear by Article 958 of the Civil Code which provides in part:

A contract for alienation of a thing certain and determinate makes the purchaser owner of the thing by the mere consent of the parties....and in the case of immovables there must be a deed of sale or memorandum in writing, stating the conditions of the sale.

[42] Such deed of sale or memorandum in writing must further satisfy certain formal requirements viz: who are the parties i.e. who is the vendor and who is the purchaser; what is the property being disposed of and what is the consideration,

[43] The learning to be found in Halsbury's Laws of England 4th edition Volume 42 at paragraph 27 et seq. and reiterated in Chitty on Contracts 29th edition at paragraph 4 –022 et seq indicates that the memorandum is required only as evidence of a contract and it has been consistently held that no special form of such evidence is required provided only that it is contained in a document in writing containing all the essentials terms of the contract and signed by the party to be charged. Thus where there was provided a rough draft, the parties contemplating the execution of a more formal agreement, it was held to constitute a sufficient memorandum: see Gray v Smith (1889) 43 Ch D 208. It is therefore essential to prove that any informal agreement amounts to a concluded contract.

[44] I am satisfied that the agreements in the present case comply with the requirements as to form, validity, content and effect as contained in Book Third of the Civil Code with respect to contracts. In each of the agreements the parties are sufficiently identified, the price for the land clearly set out, the particular portions of land – their sizes and location - adequately verified and the signatures of the relevant parties appended thereto.

[45] Counsel for the Defendant asserted that if the Claimants had indeed paid the full purchase price for the property, nothing prevented them from preparing and executing a deed of sale, that the deed of sale ought to have been executed contemporaneously. According to Counsel there was no need for an agreement for sale since by paying the full purchase price for the land, the sale would have been completed.

[46] It is my view that in this case the term "agreement for sale" amounts to a mere misnomer since the evidence reveals that the documents contain the necessary essentials of a fully concluded contract. Nomenclature can never be fatal to a document once the intentions of the parties are made sufficiently clear for it is to those intentions that the court will look for assistance in construing the document.

[47] In the case of Branca v Cobarro (1947) KB 854, an agreement for the sale of a farm provided that it was "a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed". The Court of Appeal held that the provisional agreement was binding until it was superseded when the formal agreement was drawn up and signed; execution of the formal agreement was not a condition which had to be fulfilled before the parties were bound.

[48] I am therefore unable to accept the Defendant's contention that the agreements were merely an offer for sale, that they are void for lack of certainty and fail for misdescription.

[49] Counsel for the Defendant claimed that upon close examination of the signatures affixed to the agreements there is no consistency with the deceased's signature and for this reason the court should deem the agreements null and void ab initio.

[50] However in addition to the fact that the Defendant has led no evidence from an appropriately qualified professional/expert in the art of handwriting which would have assisted me in making a clear determination on this issue, I must admit to not having been able with my untrained eye to detect the discrepancies to which Counsel refers. To do so would be to impute notions of dishonesty to Mrs. Lewis whereas throughout this matter, I considered her to have acted with rectitude. It was clear to me that while she sought to safeguard the interests of her then clients, the Claimants, she recognized that she had also to protect her integrity and so was meticulous in her conduct with the deceased.

Mental capacity of the deceased

[51] It has been established that a contract for the sale and purchase of land entered into by a person suffering from a mental disorder sufficient to deprive him of contractual capacity is voidable if the other party knew of the disorder. However if the other party had no knowledge of the disorder or of facts from which such knowledge should be inferred, the contract is valid and enforceable against the person suffering from the disorder. Similarly a contract between parties capable of contracting at the time is not avoided by the fact that either party becomes mentally disordered before completion.

[52] This was the rule laid down by Lord Esher MR in Imperial Loan Co. Ltd v Stone (1892) 1QB 599:

When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

[53] It is the Defendant's contention that the deceased was mentally incompetent to conclude a contract. Reliance for this contention was elicited in part from a letter dated 14th November 2003 from a psychiatrist who was unable to attend at the trial. He had seen the deceased at the deceased's drugstore on the day before and gave a diagnosis of "onset of vascular dementia" and general opinion that the deceased "wouldn't be able to make any legal decisions". He stated that the deceased had "lost physical and mental capabilities and his recent memory is well affected". There was however no explanation of this diagnosis nor indication of how he defined "recent". It is be noted that this diagnosis came some three (3) months after the conclusion of the first contract and two (2) months after the second.

[54] The Defendant gave as his personal experience of the deceased's senility, observation of "strange behaviour" viz mistaking the Defendant for his (the Defendant's) brother, misplacement of keys, forgetting to lock the front door and to take out the garbage etc. According to the Defendant, the deceased began exhibiting this strange behaviour from as far back as 2002. He stated that when the deceased visited him and his family in Canada, he even forgot which bus he should take to return to the Defendant's home.

[55] While it may be termed filial impropriety, I considered it significantly so that in spite of the deceased's strange behaviour, the Defendant allowed the deceased to return from Canada alone to continue to live alone and to continue to drive to work at his drugstore everyday. His explanation was that the deceased was a very independent man. He also indicated that he had no reason to believe that his father could not live alone. This in my view contradicts his assertion of senility and of a man who would have been exploited. It is also to be noted that the Defendant observed strange behaviour in 2002 but it was not until November 2003 that he sought curatorship of the deceased.

[56] On the other hand all of the witnesses for the Claimants viewed the deceased's behaviour as normal: Mrs. Lewis when she interacted with him on the couple of occasions he visited her office to conclude the contracts; the surveyor who testified that it was the deceased who indicated on both occasions the areas to be surveyed; the gardener who told of the deceased preventing him from tending the areas which the deceased informed him he had sold to the Claimants and the first Claimant herself who did not encounter any strange behaviour on the part of the deceased.

[57] Counsel for the Defendant attributed mala fides to the first Claimant in that she never bothered to contact the deceased's children before, during or after the purported transactions for the sale of land although she knew he had children. Yet it is to be noted that the Defendant's witness and the deceased's purported "main friend" in addition to observing the deceased's strange behaviour as well as being aware of the trace line for the

survey placed on the deceased's land did not alert the Defendant or his siblings to these occurrences.

[58] The legal authorities reveal that what is required is that the party in question should have an understanding of the general nature of what he is doing and the mere existence of a delusion in the mind of a person making a contract is not conclusive of his inability to understand it. Evidence that he is well known in the neighborhood to be mentally disordered is not admissible to prove that the other party knew of the insanity: Chitty (op.cit). Mrs. Calixte under cross examination stated : "In my 15 years of knowing Mr. Singh and being his neighbour I never noticed any strange things. I never heard anyone in the area say that Mr. Singh did strange things".

[59] From the evidence adduced I can make no finding of mental deficiency on the part of the deceased sufficient to void the contracts. There was revealed no behaviour obviously beyond the pale of what could be expected of an elderly man. It is my view that the examples of "strange behaviour" cited by the Defendant are no more than the normal everyday experiences of ordinary folk.

[[60] I find therefore that the Agreements for Sale of 18th August 2003 and 18th September 2003 constitute valid and enforceable contracts.

Undue Influence

[61] While there was no overt charge that the Claimants exerted any undue influence over the deceased, it was suggested to the first Claimant during cross examination – a suggestion

which was denied – that she knew that the deceased had been acting strangely and that she “took that opportunity to get his land at a lower value”.

[62] In his written submission, Counsel for the Defendant urged the Court to take judicial notice of the purchase price of the two (2) lots which he submitted was way below the market value/price of land in the Castries area.

[63] In my judgment the court cannot accede to this request. My understanding of judicial notice is the observation without the need for proof of a well known or indisputable fact. This court is not privy to nor was made aware of such fact.

[64] Conversely it is the evidence of the first Claimant that she did not consider as “strange” the price she paid for the land in that area of Castries because she had earlier purchased two (2) acres of land in Castries for \$7,000.00 an acre. The surveyor while being aware of the “going price” for land in certain areas of St. Lucia was not “surprised” at the price paid by the Claimants because he “came across those deals often”.

[65] As quoted previously (see paragraph 42 above) Article 354 of the Civil Code provides that individuals have the free disposal of the things belonging to them under the modifications established by law. Thus inadequacy of consideration or other inequality in transactions is not necessarily enough for a transaction to be set aside. In the New Zealand case of Brusewitz v Brown Sir John Salmond put the position thus:

“The mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable, or unjust is not in itself any ground on which the Court can set it aside as invalid. Nor is such a circumstance in itself even a sufficient ground for a presumption that the transaction was the result of fraud, misrepresentation, mistake, or undue influence, so as to place the burden of supporting the transaction upon the person who profits by it. The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust, such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances, such as fraud or undue influence”.

[66] His Lordship went on to consider the exception to this principle viz the existence of some special relationship between the parties which could have influenced the transaction and given rise to a presumption of use of power by the receiving party over the granting party, a presumption unless rebutted, would result in the transaction being set aside.

[67] In the case of Allcard v Skinner (1887) 36Ch D 145 it was determined that if there is no special relationship between the parties, the onus is on the person seeking to avoid the transaction to establish that undue influence existed. Thus a person relying on a plea of undue influence must show (a) that one party to the transaction had the capacity to influence the other, (b) the influence was exercised, (c) its exercise was undue and (d) the

exercise brought about the transaction: per Slade LJ in Bank of Credit and Commerce International SA v Aboody (1990) 1QB 923.

[68] In the present case the parties lived on the same street, interacted only on occasion, and although the first Claimant had visited the deceased's home on a couple of occasions, she had never entered the house. While she knew that he owned and operated a drugstore in the city, she had "no reason to visit in recent months". The deceased was described by her as a fairly successful businessman and by the Defendants as having a "thriving business and did not want for anything". It is to be noted that the first Claimant is a seamstress and her husband, the second Claimant, a musician.

[69] In the premises, the deceased considered as an astute businessman and no evidence of his mental incapacity having been proved, it is my view that it is highly unlikely that the Claimants would have been able to exercise the influence necessary to induce the deceased to sell the land to them at a lower price than it was valued.

Remedies

- Specific Performance

[70] It is an established principle of law that a purchaser who enters into a specifically enforceable contract for the sale of land acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable. Thus that contract is not avoided by the death of either or both parties before completion but remains enforceable both at law and in equity by and against the personal representatives of the party so dying: Halsbury's Laws (op. cit.) Volume 42 paragraph 208.

[71] In an application for specific performance such as the present one, the question is whether specific performance will “do more perfect and complete justice than an award of damages”. It has been stated that the law takes the view that the purchaser of a particular piece of land cannot on the vendor’s breach obtain a satisfactory substitute so that specific performance is available to him: Chitty (op. cit) paragraph 27-007.

[72] By Article 956 of the Civil Code it is provided:

“The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which by equity, usage or law are incident to the contract, according to its nature”.

That Article must be read in conjunction with Article 997 which provides:

“The creditor may without prejudice to his claim for damages, demand specific performance or fulfillment in a case which admits of it or that he may be .authorized to execute the obligation at the debtor’s expense”.

[73] A “creditor” is defined by the Code as “not merely one to whom money is owing but one to whom is owing any kind of obligation. A “debtor” is “not merely one who owes money, but who owes or is subject to any kind of obligation, whether arising from contract, quasi contract, delict, quasi delict or any other source”. (my emphasis)

[74] In light of the circumstances extant in our case – a fully enforceable contract, particular parcels of land excised and surveyed and the survey plans made and recorded – I consider that an order for specific performance is equitable, just and appropriate. I so order.

- Damages

[75] Counsel for the Claimants submit that the Claimants are also entitled to damages for the Defendant's refusal to execute a deed of sale thereby unlawfully preventing the Claimants gaining registered title to the two (2) parcels of land. To support this contention, Counsel referred the case of Glouster House Ltd v Peskin (1961) 3 W1R 379 which involved the purchase of land for the purpose of erecting a hotel.

[76] I am in agreement with Counsel for the Claimants that the legal authorities seem to indicate that the court has jurisdiction to award damages in addition to ordering specific performance.

[77] According to Mc Gregor on Damages 17th edition paragraph 22 – 011, where there is delay in effecting the completion of sale of land, the normal measure of damages is the value of the user of the land, which will generally be taken as its rental value, for the period from the contractual time for completion to the date of actual completion. This is so whether the delay is brought to an end by the voluntary action of an indolent seller or by a decree of specific performance against a recalcitrant seller.

[78] But while the right to such damages is a right at common law, some loss must be proved.

[79] In the case at bar, the Claimants have given no indication as to the use to which the land will be put so that damages could be awarded based on the formula stated above. There has neither been any proof of loss evidenced.

[80] In the circumstances, while acknowledging the entitlement of the Claimants to damages, lack of proof of loss precludes the court from making an award other than one for nominal damages.

ORDER

Judgment is hereby entered for the Claimants.

An order for specific performance is hereby granted directing the execution of a Deed of Sale within one (1) month of this judgment.

Nominal damages to the Claimants in the sum of \$100.00

As agreed by the Case Management Order of 23rd October, 2006 prescribed costs to the Claimants in accordance with Part 65 CPR 2000.

SANDRA MASON Q.C.

High Court Judge