[2025] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00002

BETWEEN **SAMUEL DIXON** **APPELLANT**

AND **CLIVE FAIRWEATHER** **RESPONDENT**
(**In his capacity as named Executor**
in the Estate of Dudley Harris)

Lenroy Stewart instructed by Wilkinson Law for the appellant

Mikael Lorne for the respondent

22 January and 11 July 2025

Civil procedure – Default judgment – Litigation brought against one of four trustees who were signatories to a sale agreement – Registered title in the name of the one trustee who later died – Whether the learned judge was justified in law to exercise her discretion to refuse to grant default judgment – the approach that the court should take on an application for default judgment – Civil Procedure Rules, 2002, Part 12

F WILLIAMS JA

[1] I have read, in draft, the judgment of Foster-Pusey JA and agree with her reasoning and conclusion. I have nothing to add.

FOSTER-PUSEY JA

Introduction

[2] This is an appeal brought by Mr Samuel Dixon ('Mr Dixon') against the decision of M Jackson J (Ag) (as she then was) ('the learned judge') made in the Supreme Court on

29 March 2023. The learned judge denied Mr Dixon's application for default judgment after Mr Dudley Harris ('Mr Harris'), now deceased, failed to file a defence to Mr Dixon's claim.

Background

[3] The background to the application is as follows. On 25 February 2014, Mr Dixon filed a claim form and particulars of claim, suing Mr Harris for specific performance of an agreement, dated 31 August 2006, for the sale of land ('the Agreement').

[4] Upon reviewing the particulars of the claim and its numerous attachments, a number of facts emerge. The parties to the Agreement were Mr Dixon, the purchaser, and four Vendors, Mr Harris, Tailor, of 25 Sommers Town Road, Port Antonio in the parish of Portland, Ms Vivia Hyman, of an address in the parish of Portland and Ms Maria Bobb and Mr Joshua Johnson both of addresses in the parish of Kingston. The occupations of the other vendors were also included in the Agreement. In continuing the description of the Vendors, the Agreement stated:

> "**ALL ARE TRUSTEES** for the **SAINT MATTHEW'S LODGE NO. 41** of the Independent Order of Galilean Fishermen, a Friendly Society duly registered under the Provisions of **6 Vic. Chap. 27** and having its Registered Office at **PORT ANTONIO, in the parish of PORTLAND**." (Emphasis as in original)

The sale price was $3,200,000.00. I will refer to the four vendors as 'the trustee vendors'.

[5] On signing the Agreement, Mr Dixon was to pay a deposit of $320,000.00 and a further payment of $160,000.00. The balance was to be paid on completion, due not later than 60 days after the Agreement was signed. The Agreement provided that possession was to be given on completion. Mr Michael Lorne, attorney-at-law, had the carriage of sale, and Mr Ian Wilkinson, attorney-at-law, represented Mr Dixon.

[6] Although the land was unregistered, under the Agreement, the trustee vendors contracted to provide a duplicate certificate of title under the Registration of Titles Act in

Mr Dixon's or his nominee's name. The Agreement included many of the usual provisions, but also included a provision allowing the trustee vendors to refund the monies paid if the Commissioner of Stamp Duty and Transfer Tax believed that the purchase price was substantially less than the market value. Another provision stipulated that time was of the essence regarding all payments to be made by Mr Dixon. Mr Dixon made two payments of $500,000.00 to Mr Michael Lorne in September 2006.

[7] Strangely, on 31 August 2011, the title to the property was issued in Mr Harris' name solely, seemingly in his personal capacity, and recorded at Volume 1452 Folio 1 of the Register Book of Titles. The registered title for the property reflected the following description of the registered owner:

> "DUDLEY HARRIS, Tailor of 25 Sommers Town Road, Port Antonio, Portland is now the proprietor of an estate in fee simple subject to the incumbrance notified hereunder."

[8] Before the title was issued, in February 2011, Mr Michael Lorne, attorney-at-law for the trustee vendors, had written to Mr Dixon's attorneys-at-law indicating that the National Land Agency ('the Agency') had mandated his office to carry out a valuation of the property, and the Agency confirmed the value to be $6,000,000.00. He attached a copy of a certificate of valuation, prepared by the Commissioner of Land Valuations, dated 27 January 2011, which reflected that the property was valued at that sum as of 21 May 2008. Mr Michael Lorne stated that the agreement between the parties (Mr Dixon and the trustee vendors), for $3,200,000.00, represented a gross undervalue of the property in light of the valuation. He went on to indicate that "his clients" would have to up-stamp the documents and incur additional costs; however, they would be willing to continue with the sale at the then-current valuation of $6,000,000.00.

[9] The attorneys-at-law for the parties exchanged various letters. Mr Dixon's attorneys-at-law insisted that the matter be completed in accordance with the stated consideration in the Agreement.

[10] Mr Dixon indicated that under the agreement, he was allowed to enter into possession of the property in 2008, and he had been in continuous and undisturbed possession of the property since that time.

[11] In 2012, Mr Dixon's attorneys-at-law lodged a caveat against the property to protect his interest. Mr Dixon's attorneys-at-law then served a notice dated 15 March 2013, directed to **all** the trustee vendors at their addresses listed in the Agreement, making time of the essence for the Agreement to be completed within 14 days. That notice was the final attachment to the particulars of claim.

[12] Mr Dixon then filed the claim against Mr Harris solely in February 2014.

Mr Harris' response

[13] On 14 May 2015, Mr Harris' attorney-at-law, Mr Michael Lorne, filed an acknowledgment of service of the claim form indicating that Mr Harris would defend the claim. Then, on 2 February 2016, Mr Lorne filed an appearance in the claim. Mr Harris did not file a defence, and the matter was not resolved.

The application

[14] Dissatisfied with the situation, on 13 December 2018, Mr Dixon filed a notice of application for court orders to determine the terms of a default judgment. He asked the court to enter default judgment in the following terms:

> "a) Specific performance of the Agreement for Sale dated the 31st day of August 2006 regarding ALL THAT PARCEL of land part of Lot being numbered one (1) Church Street in the Parish of Portland being all the land comprised in Certificate of Title registered at Volume 1452 Folio 1 of the Register Book of Titles ('the said property');
>
> b) An Order that [Mr Harris] execute and deliver to [Mr Dixon] through [Mr Dixon's] Attorneys-at-Law, an instrument of Transfer and all or such documents required for the said property to be transferred to [Mr Dixon] within **six (6)** weeks of the date hereof, failing

which the Registrar of the Supreme Court be empowered to sign all such documents required for the transfer of the said property to [Mr Dixon] and generally to complete the said Agreement for Sale; and

c) An Order that [Mr Harris] gives possession of the said property to [Mr Dixon] forthwith." (Emphasis as in the original)

[15] Mr Dixon requested liberty to apply and such further or other relief as the court saw as just. He relied on several grounds for the application. The main grounds were that Mr Harris had not filed a defence or applied for an extension of time to do so, although the time for filing a defence had long expired. In the application, he referred to rules 12.2 and 12.3 of the Civil Procedure Rules, 2002 ('CPR'), stating that the rules did not prevent the entry of a default judgment in the claim, and the court did not need to grant permission for him to make the application. He also relied, however, on rules 12.10(4) and (5) of the CPR, which provide that the court must determine the terms of any relief being sought in default. He complained that he was prejudiced by Mr Harris' failure to complete the Agreement.

[16] In his affidavit supporting the application, Mr Dixon outlined all the background and facts of the matter. He also stated that his attorneys-at-law had tried, without success, to obtain a closing statement of account from Mr Harris' attorneys-at-law. He insisted that he had discharged his obligations under the Agreement and was ready and willing to fulfil any that remained, but the "**Vendors** have refused to honour the terms of the agreement for sale" (emphasis added), see para. 22 of the affidavit filed on 13 December 2018.

[17] The affidavit in support of the application included as attachments all the documents attached to the particulars of claim along with a few additional ones such as the application to bring the land under the operation of the Registration of Titles Act, signed by Mr Harris, and a document entitled "Consent of proposed Registered Proprietor" that Mr Dixon had signed to facilitate the title to the property being issued in his name. In the application dated May 2008, Mr Harris, one of the trustee vendors (with no

reference to his role as a trustee), had directed that the Certificate of Title be issued in Mr Dixon's name.

The response to the application and Mr Harris' death

[18] In an affidavit filed on 15 September 2020, Mr Harris referred to the fact that he was a trustee of St Matthew's Lodge No 41 of the Independent Order of Galilean Fishermen ('the Lodge'), mentioned in para. [4] above, and that he, along with three other trustee vendors, signed the Agreement. He highlighted that the Lodge was not named as a party to the proceedings. He stated that his delay in filing a defence was not a disrespect to the court, but unforeseen circumstances complicated his legal representation and retarded his progress. He stated that he was in possession of the land and requested that the court dismiss the claim. Unfortunately, a few days later, on 24 September 2020, Mr Harris died.

[19] On 1 July 2021, Clive Fairweather, an executor named in Mr Harris' will, filed an application in the Supreme Court to be appointed to represent him in the proceedings. No formal order in the record of appeal reflects the application's outcome; however, Mr Fairweather is the respondent to this appeal in his capacity as executor of Mr Harris' will.

The reasons of the learned judge

[20] The learned judge denied the application on 29 March 2023. The primary reason the learned judge gave in her memorandum of reasons for that outcome was Mr Dixon's failure to join in the claim all the vendors in the Agreement for which he is seeking specific performance. The learned judge acknowledged that, under rule 12.5 of the CPR, a claimant is entitled to a default judgment where a defendant fails to file a defence within 42 days of being served with the claim and there is no pending application for an extension of time to file a defence. However, the learned judge went on to refer to rule 12.9 of the CPR, which outlines the circumstances under which a default judgment may be entered when the claim is against more than one defendant. The learned judge noted that the trustees of the Lodge signed the Agreement as vendors, but Mr Dixon only served one of the trustee vendors, Mr Harris, who had died by the time the application was being

determined. The learned judge opined that the claim should have been against all the trustee vendors, and as a result, the application for default judgment was not sustainable.

[21] The learned judge gave Mr Dixon's counsel time to make further submissions on the matter. Counsel then relied on rule 8.4(1)(b) of the CPR, which provides that the general rule is that a claim will not fail because a person who should have been made a party to the proceedings was not. He also submitted that, pursuant to rule 26.9(1) of the CPR, the court could rectify the matter where no sanction was specified for failure to add a party, and this could be done before the court made an order for default judgment.

[22] The learned judge stated that the issue of service or notice to the other trustee vendors was imperative and said that even if Mr Harris was the registered legal proprietor of the property, the trustees needed to provide evidence as to why it was solely registered in his name. The learned judge also stated that the matter ought to have been commenced by a fixed-date claim form, as it was unlikely to involve a substantial dispute of fact, and a fixed-date claim form must be used in claims for possession of land. She noted that rule 12.2(a) of the CPR provided that a claimant cannot obtain default judgment where the claim is commenced by a fixed date claim form. She, therefore, refused the application with costs to Mr Harris, refused leave to appeal, and set the matter for a case management conference.

The appeal

[23] On 18 December 2023, this court granted Mr Dixon leave to appeal the learned judge's order. Mr Dixon filed his notice and grounds of appeal on 2 January 2024, outlining the grounds as follows:

> "(a) The learned Judge erred in law in relying on Rule 12.9(2)(b) of the Civil Procedure Rules in her written reasons for Judgment as the said rule was inapplicable to this case;
>
> (b) The learned Judge erred in law in invoking *suo moto* and relying on Rules 8.1(4)(b) and (c) of the Civil Procedure

Rules in her written reasons for Judgment as the said rules were inapplicable to this case;

(c) The learned Judge erred in failing to apply Rule 8.4(1)(b) of the Civil Procedure Rules which was applicable to this case;

(d) The learned judge erred in rejecting the submissions of [Mr Dixon] which answered her questions and addressed the issue of the absence of the other named vendors.

(e) The learned Judge erred in failing to consider that on the pleaded case, it was only the Respondent [Mr Harris] alone, who breached the contract by causing the Certificate of Title to be registered in his name only and that, therefore, [Mr Dixon's] claim was properly instituted and sustainable against him for breach of contract.

(f) The learned Judge erred in applying only one principle of **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7 but failed to properly apply other principles contained in the said judgment.

(g) In the circumstances of this case the learned judge erred in finding that specific performance could not be ordered against only one of the vendors.

(h) The learned Judge erred in her finding that the other vendors need to provide evidence stating why the property was registered in the name of [Mr Harris]." (Emphasis and underlining as in the original)

[24] In light of the grounds of appeal, Mr Dixon asks this court to set aside the learned judge's decision, determine the terms of the default judgment, award costs of the appeal and those below to him, and make any orders that may be just.

The appellant's submissions

[25] Mr Stewart, counsel for Mr Dixon, submitted that the learned judge erred when she relied on rule 12.9(2)(b) of the CPR which addressed claims against more than one

defendant, and rule 8.1(4)(b) and (c) of the CPR which addressed claims for possession of land and hire purchase matters, as they were not applicable. The former did not apply as Mr Dixon had only sued one person, Mr Harris. Counsel explained that since Mr Dixon was neither seeking possession of lands nor pursuing a hire purchase claim, the latter provisions did not apply.

[26] On the other hand, counsel argued that the learned judge ought to have but failed to apply rule 8.4(1)(b) of the CPR, which provided that a claim is not to fail if a person who should have been added to the claim was not made a party.

[27] Counsel submitted that the learned judge ought to have understood that the other vendors did not need to be defendants, as it was Mr Harris who breached the Agreement, and they were not registered proprietors. It was Mr Harris who was the sole registered proprietor. As a result, the other vendors could not be ordered to transfer the property to him.

[28] Counsel also contended that upon the signing of the Agreement and the payment of the deposit, the appellant gained an equitable interest in the property, and the vendors became trustees until the remainder of the purchase price was paid. He cited **Lysaght v Edwards** (1876) 2 Ch D 499 as authority for that legal principle. Since Mr Harris was the registered proprietor, counsel argued that he held the property in trust and was the only person that the appellant could have sued.

[29] Mr Stewart argued that the learned judge did not correctly apply the principles outlined in **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7, as the issue in that appeal was different. In that case, the court was determining whether it was desirable and necessary for the appellant to be a party to the claim. In addition, in that matter, the court emphasised that it is a matter for a claimant to decide which causes of action to pursue and against whom, and a claim was sufficiently constituted if it asserted a single cause of action by a single claimant against a single defendant. In the case at bar, counsel argued that the claim

was properly constituted against the sole defendant, Mr Harris, against whom an order for specific performance could have been made.

[30] Counsel submitted that the learned judge erred when she opined that the other vendors needed to provide evidence stating why the property was registered solely in Mr Harris' name, as this was not relevant to the default judgment application that she was to determine.

[31] Mr Stewart, referring to **Glen Cobourne v Marlene Cobourne** [2021] JMCA Civ 24, submitted that the learned judge referred counsel to the case, but failed to follow its guidance on the correct approach when an application is made to determine the terms of a default judgment. Counsel stated that the learned judge did not consider whether there was a breach of contract on the face of the pleadings and, if specific performance was not appropriate, or whether she could have ordered damages. Counsel relied on **The Attorney General v John McKay** [2012] JMCA App 1, concerning the principles governing this court's review of the exercise of a judge's discretion in an interlocutory matter.

The respondent's submissions

[32] Mr Lorne adopted the learned judge's reasoning and highlighted that the other trustee vendors in the Agreement were not made parties to the proceedings, and Mr Harris had not acted in his personal capacity. He supported the learned judge in her conclusion that she could not grant specific performance of the Agreement because the other parties to the Agreement had not been added to the claim.

[33] Earlier in his outline of the chronology of events, he stated that no defence was filed.

Further submissions

[34] After the appeal hearing, counsel for the appellant wrote to the court requesting permission to make further submissions in response to questions that the court had raised

during the hearing. The court granted the appellant permission to do so on or before 2 May 2025 and the respondent permission to respond on or before 9 May 2025. The appellant filed further submissions and a bundle of authorities on 2 May 2025, while the respondent's filed submissions on 3 June 2025. We note that the latter submissions were filed outside of the time limit granted by the court and, pursuant to Practice Note 1/2021 "Guidance note in respect of disobedience of timelines for filing submissions in civil appeals", will take this into account when considering costs of the appeal. The additional submissions are summarised below.

[35] Firstly, counsel for the appellant argued that co-vendors are jointly and severally liable for breach of trust. Consequently, beneficiaries could 'potentially' sue one trustee in the absence of the others. He referred to section 45(5) of the Trusts Act 2019 of Jamaica and an article titled "Proportionate Liability for Breach of Trust under the Civil Liability Act: An Opiate on the Conscience of Trustees" Volume 47(4) of the University of New South Wales Law Journal.

[36] Secondly, counsel argued that as a general rule, when two or more individuals enter into a contract to perform a task, there is a presumption of joint liability unless clear language indicates otherwise. He referenced **Katara Hospitality v Guez & Anor** [2018] EWHC 3063 (Comm), judgment delivered 23 November 2018, at para. 131. Following this principle, counsel contended that in the present case, the agreement for sale was silent on the issue, and thus it would be presumed that the co-vendors were jointly liable.

[37] Counsel's third proposition was that even if the other co-vendors were joined, specific performance could not be ordered against them because they could not transfer the property to the appellant, as the property was solely in the name of Dudley Harris. He relied on excerpts from the texts Remedies for Torts and Breach of Contract, 2nd edition by Andrew Burrows at page 374 and The Principles of Equity, 2nd edition by Patrick Parkinson, Lawbook Company, 2003, at pages 585 and 586.

[38] Finally, counsel argued that the learned judge had a discretion regarding whether to grant the default judgment in the absence of the other co-vendors and was plainly wrong for failing to consider the merits of the default judgment application, but instead denying it due to the appellant's failure to join the other co-vendors in the claim. He referenced **Denise Ribaroff v Basil Williams et al** [2014] SC (Bda) 11 Civ (20 February 2014).

[39] Mr Lorne, in submissions in response, submitted that, in general, a trustee can be liable for any loss or damage suffered by the trust or its beneficiaries due to their breach of trust. He noted, however, that there was nothing before the court to suggest that the trustees had breached the trust in question. He highlighted that a breach of contract and a breach of trust should be distinguished as they are not the same thing.

[40] Counsel submitted that the vendor was the Lodge, a registered Friendly Society. He argued that none of the trustee vendors signed or entered into the contract with the appellant in their personal capacity. The appellant had, however, brought a claim against one signatory in his personal capacity, seeking specific performance to the exclusion of the vendor, the Lodge.

[41] Counsel noted that the appellant had not presented any evidence as to why he did not sue the four trustee vendors.

[42] In closing, counsel reiterated that the breach of contract asserted by the appellant was not committed by the respondent, as the contract was not between the respondent and the appellant. Instead, the appellant had a binding contractual agreement with the Lodge and/or the four trustee vendors who signed on behalf of the Lodge.

Discussion

[43] The primary issue in this case is whether the learned judge was justified in law in exercising her discretion to refuse to grant default judgment for specific performance or another remedy.

[44] The basis on which this court will set aside the exercise of discretion by a single judge is not in dispute. Morrison JA (as he then was) in **The Attorney General of Jamaica v John McKay** stated at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[45] Part 12 of the CPR governs default judgments. A claimant cannot receive default judgment where the claim is commenced by a fixed date claim form (rule 12.2(a) of the CPR). Mr Stewart is correct in his submission that this rule, as well as rule 8.1(4)(b) and (c) of the CPR, did not apply to the claim. The learned judge erred in relying on rule 12.2(a) of the CPR as the claim was not commenced by a fixed date claim form, and it would not have been appropriate for it to have been. It was not a claim for possession of land. She also erred in relying on rule 12.9(2) of the CPR, which relates to a scenario where a claim is made against more than one defendant, as Mr Dixon had only sued Mr Harris, not multiple defendants. Although grounds of appeal (a) and (b) have merit, they do not resolve the main issue in the appeal.

[46] Mr Stewart, however, is not on solid ground when he relies on rule 8.4(1)(b) of the CPR, which provides that a claim is not to fail if a person who should have been made a party was not joined in the proceedings. The learned judge did not strike out the claim. Mr Dixon's claim is still alive; it has not failed. The learned judge scheduled a case management conference to determine how to manage the claim. Ground of appeal (c) fails.

[47] What do I make, however, of the primary basis on which the learned judge refused to grant specific performance? In my view, she cannot be faulted.

[48] A review of Part 12 of the CPR is necessary. Rule 12.5 of the CPR states:

> "**Conditions to be satisfied - judgment for failure to defend**
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> 12.5 The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –
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> (a) the claimant proves service of the claim form and particulars of claim on that defendant; or
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> **(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and**
>
> **(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired**;
>
> **(d) that defendant has not** –
>
> **(i) filed a defence within time to the claim or any part of it** (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));
>
> (ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
>
> (iii) satisfied the claim on which the claimant seeks judgment; and
>
> **(e) there is no pending application for an extension of time to file the defence."** (Emphasis supplied)

[49] There was no dispute before the learned judge that the respondent had filed an acknowledgment of service, had not filed a defence, and had not applied for an extension of time to do so. The appellant was, therefore, entitled to apply for a default judgment.

[50] Due to the nature of the claim, rule 12.10(4) and (5) of the CPR applied. They state:

> "(4) **Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the particulars of claim.**

> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply." (Emphasis supplied)

[51] In **Glen Cobourne v Marlene Cobourne**, McDonald Bishop JA (as she then was) helpfully outlined the approach that the court should take on an application for default judgment, pursuant to Part 12 of the CPR, where a defendant has either failed to file an acknowledgment of service or has failed to file a defence. As the application for default judgment did not concern money or the delivery of goods, in line with the approach followed in **Glen Cobourne v Marlene Cobourne**, the learned judge had to review and assess the particulars of claim "to determine if it disclosed a reasonable cause of action upon which [she] could have granted default judgment in the terms sought by the appellant in his claim" (see para. [24] of the judgment). The court will proceed on the basis that the respondent does not intend to challenge the pleadings in the particulars of claim (see para. [28] of the judgment of **Glen Cobourne v Marlene Cobourne**).

[52] In this matter, it is also essential to recall that specific performance is an equitable remedy, the grant of which is discretionary.

[53] Mr Stewart's submission that the other vendors need not be defendants is erroneous in the circumstances of this case. It is correct, as he has stated, that upon the signing of the Agreement and payment of the deposit, Mr Dixon gained an equitable interest in the property, and the vendors became trustees until the remainder of the purchase price was paid. **Lysaght v Edwards** is a well-known and accepted authority on this point. However, that principle is separate and apart from the role that the vendors in these circumstances collectively and undeniably have as trustees of the Lodge.

[54] In the claim form, Mr Dixon sought specific performance of the Agreement in which the vendors are four trustees of the Lodge, acting on its behalf. As a general rule, one trustee cannot fulfil the obligations of all of them unless the agreement for sale, or

perhaps some other document governing the trust's operations, or legislation, makes such a provision. Mr Harris became the sole registered proprietor of the property. Did this, without more, mean that he alone now had the authority to act on behalf of the other three trustees and, by extension, the Lodge?

[55] When Mr Dixon's attorney issued a notice making time of the essence, he correctly addressed it to all four trustee vendors. They are the ones who, together, have the authority to fulfil the terms of the contract. As noted by the authors Gilbert Kodilinye and Trevor Carmichael in the text Commonwealth Caribbean Trusts Law, 2nd edition, at pages 220-221:

> "in administering a trust, trustees are under a duty to act unanimously. Equity does not approve of a 'sleeping trustee' and all trustees are required to be active in exercising discretions and in carrying out the business of the trust. Further,
>
> > **'there is no law…which enables the majority of trustees to bind the minority. The only power to bind is the act of them all'**.
>
> Therefore subject to any contrary direction in the trust instrument, only the unanimous decisions of all the trustees **and those transactions which are jointly executed will be valid.** Thus, for instance, if a single trustee enters into a contract to sell trust property without concurrence or subsequent ratification of his co-trustees, the sale will not be enforceable against the trust estate." (Emphasis supplied)

[56] Sir George Jessel MR in **Luke v South Kensington Hotel Company** (1879) 11 Ch D 121, after careful consideration of the circumstances where two of three trustees had acted without the consent of the third trustee, stated at pages 125-126 that:

> "It recites an agreement by the three, which was intended to be carried out. It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that

> ground the deed would not have bound the two. Then it was suggested that the two, not having dissented in sufficient time would still be bound, having acted on the deed. To that it was answered that the two were trustees as well as the one, and that they had no power to bind their *cestuis que trust* by such an arrangement. All three together might or might not; that depends on the nature of the arrangement. It is not every agreement for a composition, or to accept less than the full amount, that is a breach of trust. But two out of three trustees have no power to bind *cestuis que trust*. **There is no law that I am acquainted with which enables the majority of trustees to bind the minority. The only power to bind is the act of the three**, **and consequently, the act of the two**, even if it could not bind them by reason of delay or acquiescence, **could not bind the trust estate, and therefore in no way was the trust estate bound…"** (Emphasis supplied)

[57] If the majority of trustees cannot bind the minority, it stands to reason that, without more, the minority cannot bind the majority.

[58] It was reasonable for the learned judge to be concerned as to whether it would have been appropriate to make an order against one trustee vendor to transfer a property that four trustee vendors were selling on behalf of a registered friendly society. The fact that the property was registered in Mr Harris' name solely demanded some explanation. Contrary to Mr Stewart's submissions, it was not only Mr Harris who had breached the contract. Instead, it was all four trustee vendors who had failed to complete the transaction. The learned judge was not unreasonable in her desire for the other trustee vendors to be joined to ensure that the wishes of the Trust/friendly society were being carried out.

[59] Mr Stewart's line of argument concerning breach of trust is not helpful to resolve the issues before the court. As Mr Lorne has correctly pointed out, the claim before the court does not involve beneficiaries suing for breach of trust. What it is, is a claim for specific performance brought by a purchaser.

[60] At para. 135 of **Katara Hospitality v Guez & Anor** Moulder J, sitting in the High Court of Justice of England and Wales, in a case relating to the sale of shares, noted that in cases of joint liability, there is only one obligation, and for joint liability to be created, all of the joint "obligors" must execute the deed. In the same paragraph, he also referred to Chitty on Contracts for the principle that in cases of joint liability, performance by one of the contractors discharges the others. There is no gainsaying this general principle. However, the learned judge was considering circumstances involving real property, trustees, and trust property.

[61] In the light of these legal principles, ground of appeal (f) has no merit. The learned judge could not be faulted when she wrote:

> "[23] In **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7 at paragraph [39], Phillips JA opined that:
>
> > '[39]....*the court must be careful to ensure that all parties concerned in a dispute before the court, are before the court, as that serves the ends of justice'*
>
> [24] Accordingly, in this court's opinion, any proceedings for specific performance ought to have commenced against all three [sic] vendors from the outset. The other two [sic] vendors should have been served and brought before the court. It is difficult to see how an order for specific performance could be made only against one of the three [sic] vendors when he cannot give effect to the sale agreement on his own…" (Italics as in the original)

[62] As Mr Lorne noted, the appellant has not indicated that he had any difficulty locating the three other trustee vendors. The very specific description of the trustee vendors, including their occupations and addresses, would provide a starting point for attempts to locate them.

[63] I note Mr Stewart's submissions that even if the other co-vendors were joined, specific performance could not be ordered against them as they could not transfer the property to the appellant. That assertion is not necessarily correct. It depends on how the property came to be registered in Mr Harris' name and whether they were complicit or are unable to undo that transfer. But, in any event, it is not merely who could fulfil the contract, but whether in the circumstances, it would have been correct for the learned judge to proceed to order specific performance in a scenario presenting many unanswered questions.

[64] When one considers the circumstances of the case at bar, the learned judge was not unreasonable, contrary to what Mr Dixon asserts in ground of appeal (h), when she stated that the other trustee vendors needed to provide evidence stating why the property was registered solely in Mr Harris' name. It was entirely appropriate for the learned judge to make the above comment about the absence of the other trustee vendors, and to refuse to exercise her discretion to enter judgment in Mr Dixon's favour. Contrary to Mr Stewart's submissions, the points made before the learned judge had neither adequately answered her questions nor addressed the absence of the other trustee vendors. For example, why was the property registered in Mr Harris' name solely? Was there a basis on which one trustee could act on behalf of all four? What was the impact of Mr Harris' death, he having been the only trustee that was sued? Grounds of appeal (d), (e), and (g), concerning the central question of whether the learned judge erred in stating that it would not be appropriate to grant specific performance in the absence of the other trustee vendors, are not well-founded.

[65] In my view, Mr Dixon has not demonstrated that the learned judge erred in law or fact when she refused to grant his application for specific performance of the Agreement or damages instead of that remedy. While it does not appear that the learned judge considered the possibility of making an award of damages instead, the same concerns that she expressed regarding the default judgment sought for specific performance would, in all likelihood, have impacted her approach.

[66] It was open to the learned judge, after assessing the particulars of claim, to conclude that it was not appropriate for her to exercise her discretion to grant a default judgment for specific performance. I suggest that the appeal be dismissed with costs to Mr Harris' estate, and the matter be remitted to the Supreme Court and set for a case management conference, as ordered by the learned judge. I have not seen any basis to deny costs to the respondent, the executor of Mr Harris' estate, however, his attorneys-at-law filed their submissions in response late. I have considered this and recommend that the estate be granted 90% of the costs of the appeal. If Mr Dixon can identify a reason for the court to deny costs of the appeal to the estate, he may file submissions before the court for our consideration.

LAING JA

[67] I have read the draft judgment of Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

F WILLIAMS JA

ORDER

i. The appeal is dismissed.

ii. The matter is remitted to the Supreme Court for a case management conference to be held.

iii. 90% of the costs of the appeal to the respondent to be agreed or taxed.

iv. If the appellant opposes the above costs order, he may file and serve submissions regarding costs on or before 25 July 2025 and the respondent may file submissions in response on or before 8 August 2025.

v. If submissions on costs are filed, the court will consider the written submissions and provide its ruling. If no submissions on costs are filed, the order made at para. iii above stands as the final order of the court.