IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No BBCV2014/002
BB Civil Appeal No 10 of 2006

BETWEEN

SYSTEM SALES LTD **APPLICANT**

AND

ARLETTA O BROWNE-OXLEY
(Executrix of the Estate of Glenfield Da Costa Suttle, deceased) **FIRST RESPONDENT**

SONJA PATSENA SUTTLE **SECOND RESPONDENT**

Before The Honourables **Mr Justice Wit**
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Hal Gollop QC Mr Vernon Smith QC and Mr Steve A H Gollop for the Applicant

Mr Alair P Shepherd QC and Ms Wendy Maraj for the Respondents

JUDGMENT
of
Justices Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Hayton
on the 25th day of November 2014

JUDGMENT

[1] This is an application filed by the Applicant, System Sales Ltd, on 26th June 2014 for special leave to appeal the judgment of the Court of Appeal dated 15th May 2014. That court had dismissed an appeal from the judgment of Kentish J dated 26th April 2006 rejecting the Applicant's application of 15th April 1999 for specific performance of a contract dated 15th July 1998 ("the Contract"). The Contract was for the Applicant to purchase from Mr & Mrs Suttle eighteen plots of land situate at Hopewell in the parish of Christ Church, Barbados for BB$ 181,007.53. Since then Mr Suttle has died so that his executrix, Mrs Browne-Oxley, is now a Respondent alongside Mrs Suttle.

[2] Despite the fact that the value of the property entitled the Applicant to seek leave as of right from the Court of Appeal to appeal its decision to the Caribbean Court of Justice, the Applicant chose to approach the CCJ directly for special leave to appeal to it. In such circumstances the CCJ will not grant leave automatically but only if the application shows that the proposed appeal has a realistic chance of success[1] or if in a matter of public importance a definitive reasoned judgment is required from the CCJ[2].

[3] This application was heard on 14th October 2014 but was inadequately supported by documentation to establish an arguable case. Normally, this would have led to an immediate refusal of the requested leave. Counsel for the Respondents, however, was content to allow the Applicant (on payment of costs of that day) to file further submissions (with supporting documents) within fourteen days and thereafter to have fourteen days in which to respond. This Court reserved the right then to determine the application on the papers or to schedule a further hearing. Having now before us a copy of the Contract, the relevant Plans, the judgment of Kentish J and her Notes of Evidence in addition to the judgment of the Court of Appeal that had accompanied the Application, we are of the view that no further

[1] *Barbados Turf Club v Melnyk* [2011] CCJ 14 (AJ), (2011) 79 WIR 153; *Browne v Griffith* [2013] CCJ 6 (AJ), (2013) 83 WIR 62.
[2] *L O P Investments Ltd v Demerara Bank Ltd.* [2009] CCJ 4 (AJ), (2009) 74 WIR 333.

hearing is necessary and that we can properly determine the application on the papers.

[4] We find that the application does not have a realistic chance of success. The first issue concerns the background factual context for determining the plan referred to in the Schedule to the Contract only as "a proposed sub-division plan as follows" after which is set out the sold Lots 3 to 20 enumerating the square metres for each Lot, but, remarkably and crucially, no plan is identified in the Contract. There is thus uncertainty as to the subject-matter of the contract. It must be borne in mind that the Applicant, as the person seeking to enforce the Contract, bears the burden of resolving this uncertainty.

[5] The Vendors, Mr & Mrs Suttle, owned an area of land subdivided for planning purposes into twenty Lots, and resided in a chattel house on Lot 2 of Lots 1 and 2 that they were retaining and which side by side fronted to the south onto a public highway, the two Lots being divided by a boundary running north to south. The Applicant Purchaser intended to develop the eighteen Lots, 3 to 20, stretching to the north behind Lots 1 and 2 but would first need to build an access road to the east in order that those living in houses to be built on the purchased Lots could have access to the public highway. It was intended that the access road would use rights of way over some landowners' land further to the east and require a right of way over the land retained by the Vendors. These matters are apparent from the undated plan admitted into evidence by consent as Exhibit "GS3" ("the GS3 Plan")[3].

[6] This GS3 Plan dealing with twenty Lots was a development of an earlier Plan known as the Suttle Plan which, dealing with only thirteen plots, was held by Kentish J not to be the plan referred to in the Contract. However, the evidence shows that negotiations between the parties to the Contract commenced on the basis of the Vendors' two Lots fronting onto the southern highway as in the Suttle Plan, and the subsequent GS3 Plan covering twenty Lots reflected this.

[3] At page 129 of the CCJ Record.

[7] The Purchaser, however, insisted upon specific performance of a plan known as the "SSL Plan" or, more particularly the certified "SSL2A Plan"[4] dated 2nd February 1999 and based upon the approved 26th March 1998 "SSL2B Plan"[5]. On these Plans Lots 1 and 2 are now divided by a boundary running from west to east with Lot 2 being north of Lot 1, which alone has a boundary onto the public highway, and they both have an eastern boundary fronting onto the access road. Moreover, the access road to the east encroaches more than originally intended upon both these Lots to take account of the fact that the landowners to the east were not prepared for their land to be used as part of the access road. As a result, the area of Lots 1 and 2 was reduced. It appears that this so narrowed the frontages of Lots 1 and 2 if left side by side fronting the highway to the south that it might raise planning approval problems that were avoided by having Lots 1 and 2 side by side fronting the eastern access road.

[8] It is clear that the negotiations between the Purchaser and Mr Suttle (acting for himself and his wife) were based upon their Lots 1 and 2 fronting onto the southern highway. However, to obtain the relevant planning permission for the development of the other eighteen Lots it was purchasing, the Purchaser discovered that it was best for Lots 1 and 2 to be eastern fronting onto the access road. In his evidence Mr Suttle was adamant that he had not learned of this key change until well after entering into the Contract when legal proceedings were threatened and that (as the Purchaser's Managing Director accepted) he had not, when entering into the Contract, been shown or given any copy of any plans, let alone the SSL Plans indicating that Lots 1 and 2 were becoming east fronting with a diminished area. He had never agreed to sell his land with Lots 1 and 2 facing east: that was unacceptable. Kentish J accepted his evidence and was concerned that experienced property developers dealing with an inexperienced layman living in a chattel house should have made clear to him what their proposals were and have provided signed evidence of agreed proposals.

[4] At page 137 of the CCJ Record.
[5] At page 136 of the CCJ Record and referred to by Kentish J at [44] and [45] of her judgment.

[9] Thus Mr Suttle on 15th July 1998 came to sign the Contract at a time when believing he was signing up to a plan, like the GS3 Plan, based on south fronting Lots 1 and 2, but no plan was produced. The Purchaser, however, had in its possession the SSL 2B Plan of 26th March 1998 based on east fronting Lots 1 and 2 with an area less than that in the GS3 Plan. The Contract referred to a parcel of land situate at Hopewell in the parish of Christ Church "as shown on a proposed sub-division plan as follows: [with the square metres for Lots 3 to 20 following]".

[10] The GS3 Plan had endorsed thereon "PROPOSED sub-division" as appeared in the Contract, while the SSL 2B Plan had endorsed thereon, "REVISED PROPOSED sub-division". Also in favour of the GS3 Plan underlying the Contract is the fact that the square metres set out in the Contract for Lots 3 to 20 precisely match those set out on the GS3 Plan, while the SSL 2 Plans' area for Lot 3 is a larger figure (552.7 sq metres) than that in the GS3 Plan (544.2 sq metres). Against the GS3 Plan and in favour of the SSL2 Plans is clause 12 of the Contract which requires a right of way over the eastern fronting edges of Lots 1 and 2 for creation of the eastern access road, when if Lots 1 and 2 are south fronting the right of way is only needed over Lot 2 (on the east of Lot 1). A superficial reader, however, regarding Lots 1 and 2 as the 'sold land' and the right of way as being over the 'sold land' might not have picked up the significance of clause 12.

[11] In these circumstances, construing the terms of the Contract in the light of the factual context, Kentish J and the Court of Appeal found that the Vendors and the Purchaser should be taken to have contracted on the basis of the GS3 Plan. We consider that this finding was reasonably open to Kentish J and the Court of Appeal (although they might, perhaps, have considered the parties not to be *ad idem* and the Contract void for uncertainty if this had been argued before them). We see no grounds for interfering with the findings in the courts below so as to justify the grant of special leave to appeal. The Purchaser, an experienced property developer, has only itself to blame when relying upon "*a proposed sub-division plan"* instead of taking the elementary step of relying upon "*the proposed sub-division plan endorsed with the initials 'SSL' and annexed hereto".*

[12] The Purchaser, however, had sought specific performance of the Contract as based on the SSL 2A Plan, which could not be granted if this was substantially different from the GS3 Plan. Kentish J and the Court of Appeal held the SSL 2A Plan to be substantially different from the GS3 Plan in changing the frontages of Lots 1 and 2 from south facing to east facing and diminishing the areas of those Lots. We see no grounds for interfering with those conclusions so as to justify granting special leave to appeal.

[13] Specific performance of the Contract based on the SSL2A Plan could then only be granted if there was evidence of an agreed variation of the GS3 Plan-based Contract and compliance with written formalities satisfying section 60(1) of the Property Act, Cap 236, (unless the contractual variation was enforceable by evidence of acts of part performance in reliance thereon). There was insufficient evidence of an agreed variation and thus also no such writing[6]: see judgments of Kentish J at para [69] and the Court of Appeal at para [42]. We see no grounds for interfering with such findings so as to justify granting special leave to appeal.

[14] Since the Purchaser insisted upon enforcing the Contract as based upon the SSL2A Plan with Lots 1 and 2 facing east and the Vendors made it clear that they would only sell their lands to the Purchaser with Lots 1 and 2 facing south to the highway, the Vendors have accepted the Purchaser's conduct as a breach of contract amounting to repudiation of the Contract. Thus there is now no contract to be enforced.

[15] The Purchaser in the Court of Appeal raised the issue whether it could obtain "damages in substitution for specific performance" under section 46 of the Supreme Court of Judicature Act, Cap 117A, even though it had not pleaded damages flowing from wasted expenditure or loss of profits and whether such "damages" could extend to restitutionary compensation payable for the unjust enrichment of a defendant. The Court of Appeal took the view that special damages needed to be pleaded before they could be claimed and that the object of

[6] See judgments of Kentish J at [69] and Court of Appeal at [42].

"damages" in s.46 is to compensate for financial losses resulting from breach of contract not to prevent a defendant's unjust enrichment. We see no reasons for differing from those views, though, in any event, it would appear that because it was the Purchaser who was the wrongdoer who occasioned its own losses it cannot take advantage of its own wrong to claim damages. It would similarly seem that this would preclude a claim based upon the defendant having been enriched unjustly.

[16] As pointed out at [11], the Purchaser, in the development business for 35 years, has only itself to blame for not clearly identifying the SSL2B Plan as indicating the subject matter of the purchase at the time of conclusion of the Contract. The problem with the Contract based upon the GS3 Plan is that this Plan, unlike the SSL2B Plan, had not been approved by the planning authority, yet it contained no adequate provisions for the position if planning approval required significant substantial changes, and, of course, the doctrine of frustration of contract could not apply due to the foreseeability of the problem.

Decision of the Court

[17] Special leave to appeal is therefore refused. The Applicant is to pay the Respondents' costs of this application, to be taxed if not agreed.

/s/ J. Wit
The Hon Mr Justice J Wit

/s/ D. Hayton
The Hon Mr Justice D Hayton

/s/ Winston Anderson
The Hon Mr Justice W Anderson