GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2006

BETWEEN:

[1] NELSON LEWIS
[2] SHEILA LEWIS

Appellants

and

[1] DIRK BURKHARDT
[2] VALERIE DANIEL-BURKHARDT

Respondents

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Haynes Q.C with Mr. Dickon Mitchell for the Appellants
Ms. Celia Edwards with Ms Sabrita Khan for the Respondents

2006: December 7;
2007: March 28.

JUDGMENT

[1] GORDON, J.A.: The appellants, who reside in England, are the owners of property consisting of an apartment house situate on two roods of land at Morne Rouge in the parish of St. Georges in Grenada ('the property'). The respondents entered into possession of the property as tenants of the appellants some time in August 2002.

[2] Some time subsequent to the respondents entering into possession of the property correspondence commenced between the parties with a view to the respondents

purchasing and the appellants selling the property. The principal issue in this appeal is whether the finding of the trial judge that there was a completed contract between the parties can be supported by the facts and in law. The learned trial judge found that there was such a contract for the sale of the property and he ordered specific performance of the contract of sale by the appellants.

[3] The correspondence commenced with an undated letter from the respondents to the appellants. (As there is an identity of interest between the respondents inter se and the appellants inter se reference will be made to the respondents or to the appellants even where only one of either of them might be involved) The letter was in the following terms:

> "We are a family with four children and we moved from Germany to Grenada to live here (my wife is Grenadian). We are renting your house in Morne Rouge and Mr. Babtiste told us that you are interested in selling the house.
>
> He mentioned that you are asking 320,000.00US$ for it. As there are some necessary repairs to be done (windows, roof, floors, bathrooms, ect.) we would offer you US$250,000.00 (US$190,000.00 for the house and US$60,000.00 for air condition and furniture). If we do it this way, that reduces taxfees in Grenada. We have some money in Germany and would like to pay the down payment or part of it in Euros.
>
> Please contact us as soon as possible.
>
> Best regards
>
> D. Burkhardt"

[4] The evidence of the respondents suggests that this letter was dispatched electronically in October 2002. The appellants responded electronically on November 28, 2002 in the following terms:

> "Thank you for your interest in the property. Sadly, your offer of 250K is much too low to be considered. The asking price is in fact 350K but we were prepared to considers offers of around 325K in view of the work that needs to be done. It is nice to hear that your wife is Grenadian and we do appreciate the difficulties in trying to resettle so we are prepared in your case to consider a minimum total offer of 300K providing it can be paid in the UK. We did have plans to come to Grenada in the new year in order

to carry out the necessary work on the property and then put it on the market so we will understand if you are unable to meet our minimum consideration. We wish your family all the best in your efforts to resettle. Please let us know 'either way' what you decide.

Kind Regards

Nelson & Sheila Lewis"

[5] Thereafter followed correspondence which is reproduced hereunder:

By e-mail dated December 16,2002, the respondents wrote to the appellants:

"Thank you for your email. We apologise for not responding earlier, but (we) it was necessary to take some time to seriously consider your response. After taking everything in consideration, we hope that you will be willing to consider a compromise of 280,000.00US.

If you are in agreement with this offer we can pay you the usual 10% deposit immediately. We make this offer after considering the fact that there are some necessary repairs to be undertaken.

We look forward to a response as soon as possible.

May we take this opportunity to wish you and your family a happy Christmas and a prosperous new year.

Valerie and Dirk"

The appellants responded on December 20, 2002 in the following terms:

"In response to your reply, although we are not enthusiastic about the offer, all things having been considered we have decided to accept your offer and would like to proceed as soon as possible. If we are in agreement then we can start discussing the mechanics of the transfer asap. We hope that all goes well and that your family will settle in ok.

Kind regards

Nelson & Sheila"

The respondents responded on December 23, 2002 as follows:

> "Thank you (sic) for your prompt response and we are pleased that there has been no protracted delay in arriving at an agreement for the purchase of your property.
>
> It is our intention to complete the process as soon as possible so we already have contacted our Bank which has advised us to ask you to forward the following documents to us:
>
> 1. Notarified (sic) sale agreement, pointing out that you are willing to sell your property in Morne Rouge to Valerie Daniel-Burkhart and Dirk Burkhardt at a price of 200,000.00 USD for the house and land and 80,000.00 USD for furniture and air conditioning, an overall total of 280,000.00USD = 20
>
> 2. Deed of the property = 20
>
> 3. Name of your Attorney at Law or local representative acting on your = behalf".
>
> Our address is: Valerie Daniel-Burkhardt
> Dirk Burkhardt
> P.O. Box 3521
> St. George's
> Grenada
> West Indies

[6] The appellants responded to the December 23, e-mail as follows:

> "Subject: Morne Rouge
>
> Hello Dirk & Val,
>
> Sorry for the delay in replying but as you might have guessed, almost everything closed here for the two weeks Christmas period and my computer crashed while I was sending a message to you yesterday. I have now contacted a solicitor and have deposited the deeds and relevant paperwork with him. He is:
>
> Mr. Ellis V. Hunwicks
> Fenton & Hunwicks Solicitors
> 142 South Street
> Romford
> ESSEX RM1 1SX
> United Kingdom

(Telephone: 01708 767916. Email:solicitors@fentonhunwicks.co.uk)

He will contact a local agent and will let you know as soon as possible. My computer will be back online today so you can still contact me on the normal email. All the best for the New Year.

Nelson Lewis"

On January 12, 2003, the appellants again wrote to the respondents as follows:

"Sorry for the delay, but it took me longer to get back online than I anticipated. We have recent correspondence from our solicitor in this country and he has informed us that he had made contact with local lawyers in Grenada and they should be able to supply the required information.

Please note that I have informed my local rep (Mr. Clarence Baptiste) to:

1. Collect and store our personal belongings asap and

2. to deal with the rest of the furnishings (some of which belong to him) at a time convenient to you both.

Kind regards

Nelson & Sheila Lewis"

[7] At this point solicitors acting on behalf of the appellants wrote to the respondents on January 14, 2003, in the following terms:

"Dear Mr & Mrs. Burkhardt,

Re: Sale of Mr. & Mrs. Lewis Property at Morne Rouge

We have been retained by Mr. and Mrs. Lewis to act on their behalf in the sale of their property to you.

We would be grateful if you could confirm to us the terms of sale contained in your email dated December 24, 2002, to Mr. & Mrs. Lewis.

Kindly also indicate the name/s of the attorney/s who would be acting on your behalf in this matter.

> We shall forward a draft agreement for sale together with a copy of the title deed of the property in due course.
>
> Yours sincerely,
> Dickon A. Mitchell
> GRANT JOSEPH & CO
>
> cc Mr. & Mrs. Lewis
> c/o Fenton Hunswicks"

[8] It is difficult for me to interpret the letter from Mr. Mitchell as doing other than confirming that his instructions, which he received from the appellants, were that an agreement had been concluded. Indeed, it is the evidence of Sheila Nelson on cross-examination where she stated:[1]

> "On 20th December 2002, we replied that we accepted the offer and we were prepared to proceed as soon as possible. The only outstanding matter was the mechanics. At that point we knew the price, who was buying, who was selling and what was the property."

I agree with the finding of the learned trial judge that as of December 20, 2002, there existed a contract for the sale of the property.

[9] At this point it is necessary to examine how the pleadings in this case were framed. Paragraphs 2 and 3 of the Statement of Claim stated in part:

> "2. By an agreement made between the Claimants [respondents] and the Defendants [appellants] in or about the 20th day of December 2002 the Defendants agreed to sell and the Claimants to agreed to buy a free held property situate at Morne Rouge, St. Georges…
>
> "3. The agreed purchase price was $280,000.00USD"

[10] In response to paragraphs 2 and 3 of the Statement of Claim the defence was a denial of the existence of a contract. Paragraph 4 of the defence read as follows:

> "The Defendants deny the existence of the contract alleged in paragraph 2 of the Statement of Claim."

[1] Page 40 of Record of Appeal

[11] The finding that there was a contract on the 20th December 2002 is, however, not the end of the matter. Paragraph 7 of the defence reads as follows:

> "7. Further or alternatively, the Defendants state that at no time whatsoever has their [sic] come into existence a contract in writing signed by them as required by section 4 of the Real and Personal Property Act Cap 273 of the 1990 Revised Laws of Grenada and as a result the Claimants are barred from bringing and maintaining the action against the Defendants."

[12] Section 4 of the Real and Personal Property Act (Special Provisions) Cap 273, which is in pari materia with section 40 (1) of the Law of Property Act, 1925, of England reads as follows:

> "No action shall be brought whereby to charge any person upon any contract for sale of lands, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized."

[13] The memorandum is required only as evidence of a contract. Put another way, the contract exists independently of the writing or memorandum but cannot be proved in court without the memorandum or writing. It has been consistently held in England that no special form of memorandum in writing is required provided only that it contains the essential terms of the contract and is signed by the party to be charged, or by someone on his behalf.[2] It has further been held that where the memorandum in writing consists of more than one document, but only one document is signed by the defendant or on his behalf, then if that one signed document contains some implied or specific reference to another document, then oral evidence is admissible to identify the other document and the two may be read together.[3]

[14] In this connection it is necessary once again to refer to the letter from Grant Joseph & Co, solicitors for the appellants, dated January 14, 2003 in which reference is made to the e-mail of December 24, 2002 both set out above at

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[2] Barkworth v Young (1856) 4 Drew 1

[3] Timmins v Moreland Street property Co Ltd [1957] 3 All ER 265 at 275 D - G

paragraphs 5 and 7 above respectively. I am of the view that the Grant Joseph letter, when read with the e-mail of December 23, 2002 provide a memorandum in writing containing the terms of the contract. To hold otherwise would, in my view, be to use section 4 of the Real and Personal Property Act as an engine of fraud rather than for its proper purpose, an inhibitor of fraud.

[15] There is the further matter of the witness statement admittedly signed by Sheila Lewis. At paragraph 10 of that latter statement Mrs. Lewis states as follows:

> "By email dated December 16, 2002, the Burkhardts made a further proposal to us. By email dated December 20, 2002 we accepted their proposal and indicated that the mechanics of the transaction should be proceeded with quickly…."

[16] I am therefore clearly of the view that not only was there a contract in existence between the appellants and the respondents in December 2002, but there is, before the court, a sufficient memorandum in writing signed by the appellants and on their behalf setting out the terms of that agreement. It is only if one party or the other repudiated or terminated that agreement that it could be said no longer to exist as an enforceable contract. I find no evidence of such repudiation or termination.

[17] For the sake of completeness I find it necessary to refer to two further e-mails, one from the appellants to the respondents dated March 14, 2003, and a response from the respondents to the appellants dated March 17, 2003 which I set out below:

> "Dear Mr. & Mrs. Burkhardt,
>
> Following the telephone call from Valerie we were a little disturbed that there were misunderstanding with regards to the furnishings in the house. I have collected all our correspondence for forwarding to our lawyers and I must say that for our part, from the beginning we stated that the asking price for the 'house' was US$350K and the final negotiated price of US$280K we feel is more than generous. The only mention of a split price was stated by yourself for tax purposes. We neither concur or disagree with the figures you quoted because it did not change the agreed total price or the understanding that the agreed price is for the house.

> If you feel that you were misled in any way by particular correspondence from us please refer to them and we will accept responsibility. If on the other hand you feel that you cannot proceed with the purchase based on the current understanding that the agreed price does not include furnishing then we will respect your decision. I understand that you are not willing to pay the rent which suggests to us that you are taking advantage of our trust that you would do the right thing. In view of this fact we will wait for all these matters to be clarified before proceeding if you still wish to do so. We will require a clear statement to pass on to our lawyers before the contract can be signed.
>
> We hope this clarifies the matters.
>
> Regards
>
> Nelson & Sheila Lewis"

The Respondents reply was in the following terms:

> "We agree on your proposal, that the house will be sold without furniture. So please advise Mr. Baptiste again to remove his personal belongings and to avoid further irritations, please send us a list pointing out, which further contents of the house has to be removed by Mr. Baptiste.
> Concerning the rent, Mr. Baptiste spoke to us last week and we made a proposal that, due to all the delays, we would pay the rent until February 03. Mr Baptiste he was going to speak to you about the matter and inform us about your decision. Please understand, that he mentioned to us in October that, in case we purchase the house the rent would be reduced from the price of the house. This was also withdrawn last week by Mr. Baptiste.
> It was always our intention to let things (sic) process in a smooth and fast way, and we feel very sorry about the recent ieeitationa (sic) which we feel are not our fault.
> Best regards,
> Valerie and Dirk"

[18] The only interpretation that I can logically give to that last exchange of e-mails is that the appellants were upset at an apparent misunderstanding and gave the respondents an opportunity to resile from the contract, an opportunity that the respondents refused.

[19] In all of the circumstances, I find no merit in the appeal and dismiss the same with prescribed costs to the respondents.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Albert Matthew
Justice of Appeal [Ag.]