BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/024

BETWEEN:

LYRA SEWER COLLAZO

Appellant

and

PERCIVAL WILLIAMS

Respondent

Before:

The Hon. Mr. Denys Barrow S.C. — Justice of Appeal
The Hon. Mde Ola Mae Edwards — Justice of Appeal [Ag.]
The Hon. Mr. John Carrington — Justice of Appeal [Ag.]

Appearances:

Ms Susan Demers for the Appellant
Mrs. Lorna Shelly-Williams for the Respondent

2008: June 3;
September 22

Vendor and Purchaser – option under lease to purchase property – Whether agreement to purchase property concluded - Registered Land Act Cap. 229 section 37– admissibility of parole evidence to show terms of agreement contained in several documents read together- whether a term should be implied that completion depended on the Purchaser being able to obtain financing using the property- whether agreement could be specifically enforced against the Vendor – effect of making time of the essence

The appellant, who resides in the United States Virgin Islands, owned 6 ½ acres of land at Garner Bay, Jost Van Dyke in the British Virgin Islands which she let to the respondent under a lease dated 21st March 2003. The lease contained clauses granting the lessee an option to renew or to purchase upon expiry of the lease at a negotiated price between the lessor and the lessee. The lessee exercised the option in 2004, and during the course of that term purported to exercise the option to purchase the property in the sum of $260,000, which was a price that had been previously agreed between the parties, and informed the appellant that he was seeking financing for this purpose. The appellant wrote to the

respondent agreeing to give him until 30th September 2005 to complete the sale otherwise he would have to vacate the property. No written agreement for sale was made between the parties but there was a series of correspondence which ended with the respondent's indication to the appellant that if the sale did not close by the end of September 2005, the deal was off. None of these correspondence referred to the respondent seeking to charge the property to secure the loan to purchase it.

The respondent communicated to the appellant that his loan was approved in September 2005, but the sale was not completed as the appellant did not come to Tortola to execute the Instrument of Transfer nor did the respondent go to the St. Thomas for this purpose.
In November 2005, the appellant offered the respondent a new lease which did not include the option to purchase and in January 2006 the appellant gave the respondent notice to quit and deliver up possession of the property.

The respondent brought an action seeking specific performance of the agreement for sale alleging that the series of correspondence when read together constituted a written agreement as required by the **Registered Land Act** Cap 229, section 37. The appellant counterclaimed for unpaid rent. The learned judge upheld the claim and granted specific performance against the appellant and awarded damages on the counterclaim. The appellant appealed to the Court of Appeal.

Held: allowing the appeal, and setting aside the orders made by the learned judge.

(1) That the agreement between the parties as evidenced in the various documents appears to have been a complete agreement for the sale of the property by the appellant to the respondent for the sum of $260,000.

(2) Parole evidence was admissible to link the unsigned transfer document dated 2003, with the chain of correspondences between March and September 2005, to show the terms of such agreement.

Elias v George Sahely & Co [1983] 1 AC 646, applied

(3) One of the terms of the agreement was that the time was made of the essence with respect to the date of completion of the sale.

Dictum in Harold Wood Brick Co v. Ferris [1935] 2 KB 198, 204 considered

(4) Where parties have made time of the essence, the courts would not grant the remedy of specific performance where this condition has not been met.

Steedman v Drinkle [1916] 1 AC 275,279 and **Brickles v Snell** [1916] 2 AC 599 applied

(5) The courts will not imply a term into a contract for sale of land that completion was conditional upon the purchaser being able to charge the property by way of security for the purchase price as such a term was not necessary to give business efficacy to a contract for sale of land.

JUDGMENT

[1] **CARRINGTON, J.A. [AG]**: This is an appeal against the order of Madam Justice Charles in the High Court declaring that the respondent, the claimant in the proceedings below, is entitled to purchase Parcel 148 Block 1640A, Jost Van Dyke Registration Section (the "Property") from the appellant for the sum of $260,000 no later than 30th September 2007, and further ordering costs to the respondent in the sum of $7,000. The learned judge also gave judgment on the counterclaim for unpaid rent, against which there has been no cross appeal by the respondent. The learned judge was called upon to determine three main issues with respect to the claim, namely: (i) whether there was an agreement between the parties that complied with the requirements of the **Registered Land Act** Cap. 229; (ii) if so, what were the terms of this agreement; and (iii) whether in the circumstances the court should grant an order for specific performance by the claimant/appellant of this agreement.

[2] The facts are not substantially in dispute. The appellant said to be an 88 year old resident of the United States Virgin Islands at the time of the trial, let the Property, comprising 6 ½ acres of land at Garner Bay, Jost Van Dyke, to the respondent under a written instrument of lease dated 21st March 2003. Among the material terms of this lease were the condition that the lease was for one year from 21st March 2003, at a yearly rental of $6,500 payable in advance with an option to renew or to purchase upon expiry of the lease at a price to be negotiated between the lessor and the lessee and the covenant by the lessor, that if she should at any time decide to sell the premises, the lessee would be afforded the option to purchase the same before it is sold to any other person.

[3] It appears that the lease was renewed in 2004, for a further term of one year, during which the respondent fell into arrears with respect to his rent. By letter dated 11th February 2005, the appellant indicated to the respondent that she had not yet received a request for renewal of the lease from the respondent and stated that:

> "if you are interested in renewing, we require the balance of last year's lease, $3,500, in addition to this year's amount in full. Since you are in default, your lease with the option to purchase will not be considered until you pay the agreed upon portion of the transfer documents, $1,950."

This was the first letter in a sequence of correspondence between the parties from which the court was asked to make an inference that an enforceable agreement was created.

[4] Shortly after this letter, by Instrument of Transfer dated 25th February 2005, the appellant transferred the Property to herself and her grandniece, Desiree Sewer for love and affection. Notwithstanding that this transfer was pleaded, at least in the amended Defence and Counterclaim, the respondent did not join Ms Sewer to the proceedings as defendant. The learned judge commented that this transfer was done under surreptitious circumstances and accepted the respondent's evidence that he was not aware of the transfer to Ms. Sewer and that "The [appellant] had her solicitors prepare the transfer [to the respondent] and she did not add Desiree Sewer's name to it." There was, however, no evidence that any instrument transferring the Property to the respondent had been prepared at the request of the appellant after she had added her niece's name to the title to the Property. Indeed, the evidence appears to suggest that no Instrument of Transfer was ever prepared. The respondent's evidence was that his lawyers would copy the existing transfer instrument. The respondent's witness statement states that the appellant did not indicate to him that in preparing the transfer he would have to do a transfer for her and her niece, Ms Sewer. No Instrument of Transfer was put into evidence. In the light of the unsatisfactory state of the evidence on this issue, I find that the respondent has not discharged the burden of proving that an

Instrument of Transfer had actually been prepared or that it had been prepared by the appellant.

[5] The respondent responded to the appellant by letter of 3rd March 2005. In this letter he indicated his intention to pay off the balance of rent owed for 2004/2005. He further stated:

> "I am currently awaiting on approval (sic) of loan for the pending project from First Bank and would like to offer to pay you a deposit of 10% of the sale price of the land, with the balance to be paid in full upon completion of the loan from the bank, with all necessary transfers and taxes, etc."

[6] The appellant responded by letter of 12th April 2005, stating that per the request of the respondent the balance had been adjusted to $8,700 and continuing that

> "You are being billed for only one-half of this year's lease due to your continuing efforts to purchase the property. Once this payment is received, I will continue to extend to you the courtesy of waiting until no later than 30th September 2005, to receive the purchase price for the property. If you are unable to purchase the property at that time, I will expect your immediate departure from Block 1640A, Parcel 148. In expectation of your timely remittance, I remain"..

The respondent paid the $8,700 requested by the appellant. The appellant made no reference to accepting the offer of the payment by the respondent of a deposit with the balance payable upon completion of financing.

[7] The loan was approved in September 2005, and the learned judge found that thereafter, the respondent contacted the appellant and informed her that he was ready to close on the sale. The respondent's evidence was that the appellant told him that because of her ill health, it was not possible for her to travel to Tortola but that she was going to talk to Lorna Johnson, her niece, about making arrangements for her to come over.

[8] On 26th September 2005, the respondent sent a fax to Lorna Johnson, stating:

> "The Bank has approved the loan for the amount of $260,000 that was agreed for the land that is leased by me with the option to purchase. How soon could you come over so we could do the transfer? The Lawyers just

> need to know time and day. Also, remember that you gave me a deadline for the 30th of September, if we cannot close by then, the deal is off".

The learned judge accepted that this correspondence was sent to Mrs Johnson and that although this letter was addressed to Mrs. Johnson, it was meant to refer to and intended for the appellant. The appellant never came to Tortola.

[9] In my view, there is no basis on which this court can interfere with any of the findings of the learned judge on the evidence as her findings appear to be as a result of her determination of the truthfulness of the witnesses from her observation of them in the witness box. We have not had that advantage. We are equally able as the learned judge, however, to draw inferences from the evidence, especially the inference whether a contract had been made in writing between the parties.

[10] It was the respondent's case that the above documents when read together with a draft, unsigned document headed Instrument of Transfer merely dated 2003, that appears to be in respect of the sale of the property from the appellant, to the respondent for $260,000 sufficiently evidenced a contract for the sale of the property which he was entitled to enforce against the appellant.

[11] It is, however, useful to refer to some additional correspondence that was in evidence but appears not to have been the subject of any findings of the learned judge. In **Thomas Hussey v. John Horne-Payne and G.M. Horne-Payne, his wife**[1] Earl Cairns LC emphasized that:

> "…it is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, "We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond." In order fairly to estimate what was arranged and agreed, if anything was agreed

[1] (1878-1879) LR 4 App Cas. 311

between the parties, you must look at the whole of that which took place and passed between them."

[12] By letter dated 14th November 2005, from their solicitors, the appellant and Ms Sewer offered the respondent a new lease that did not include an option to purchase. By letter dated 5th January 2006, the appellant and Ms Sewer through their solicitors gave the respondent notice "that you quit and deliver up possession of the premises situate at Jost Van Dyke which you now hold as a monthly tenant, on 15th February 2006 …". The respondent gave evidence that he had instructed his solicitors to send to the appellant's solicitors a letter dated 10th January 2006, but it appears this response was not put into evidence and no evidence was given as to the content of this response.

[13] The **Registered Land Ordinance** Cap 229 of the Revised Laws of the Virgin Islands (the "Ordinance") regulates inter alia the ownership and disposition of land within the Virgin Islands. Section 3 states:-

> "Except as otherwise provided in this Ordinance, no other written law and no practice or procedure relating to land shall apply to land registered under this Ordinance so far as it is inconsistent with the Ordinance"

Section 37 states:-

> "(1) No land, lease or charge shall be capable of being disposed of except in accordance with the Ordinance, and every attempt to dispose of such land, lease, or charge otherwise than in accordance with this Ordinance shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.
> (2) Nothing in this section shall be construed as preventing any unregistered instrument from operation as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised"

This section repeats the provisions of section 4(1) of the **Conveyancing and Law of Property Ordinance** Cap. 220 to which reference was made in the submissions of Counsel before us. The authorities with respect to the interpretation of such legislation, would therefore be assisting in interpreting

section 37. Section 2 of the Ordinance defines an interest in land as including absolute ownership of land.

Section 27 states that:-

> "Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of any law relating to bankruptcy and to the winding up provisions of the Companies Ordinance, but save as aforesaid such transfer when registered shall in all respects have the same effect as a transfer for valuable consideration."

[14] Ms Demers for the appellant in effect submitted that the provisions of section 37 had not been complied with in the instant case. Mrs. Shelly-Williams for the respondent on the other hand, invited this court to uphold the finding of the learned judge that there was clearly a written agreement for the sale of the property in the circumstances. Before this court, she based her submissions in the alternative, either that the agreement should be inferred from the exchange of correspondence between February and September 2005, together with the unsigned draft Transfer dated 2003, or that the agreement came into effect at the point when the respondent indicated to the appellant, that he wished to exercise his option to purchase the property.

[15] In the light of the specific requirements under section 37 that an enforceable agreement must be in writing and signed by the party to be charged, Mrs. Shelly-Williams' alternative submission is untenable, as there was no evidence that the notification of the exercise of this option was in writing signed by the appellant.

[16] There is no requirement under section 37 that the agreement for sale should be embodied in one document and the courts have frequently examined more than one document to see if the material terms of an agreement for the sale of land can be inferred from such documents. The critical question therefore, is whether it is possible to read any of the correspondence signed by the appellant with prior

correspondence and/or the 2003, unsigned transfer instrument together and to infer from them a complete agreement between the parties.

[17] In **Elias v. George Sahely & Co**[2]**,** a decision of the Privy Council on an appeal from the Court of Appeal of Barbados, the principles that apply to reading documents together for the purpose of inferring the existence of a contract were reviewed. These can be condensed as follows: There must exist a writing to which the document signed by the party to be charged clearly refers. When such reference exists, the other document can then be identified by parole evidence. Parole evidence may be given to identify a document referred to in the signed document or to explain a transaction referred to in a signed document and to identify any document relating to such transaction. Where such evidence brings to light a document containing the terms of the agreement not contained in the document signed by the party to be charged, then the two documents are read together.

[18] In the instant case, the letter of 12th April 2005, which was signed by the appellant, makes reference to her waiting to receive the purchase price of the Property. This is a clear reference to some existing transaction between the parties involving a purchase by the respondent and so the learned judge was correct in allowing parole evidence to be lead to identify firstly the letter of 3rd March 2005. This letter then in turn refers to the earlier letter from the appellant of 11th February 2005. That letter in turn referred to the existence of transfer documents. Parole evidence showed that this transfer document was the unsigned document dated 2003. When read together this chain of documents does reveal the contract between the parties for the sale of the property for the sum of $260,000.

[19] This, however, is not the end of the matter. The letter of 12th April 2005, contained the further term that the payment of the purchase price should be made no later than 30th September 2005. The correspondence of 26th September 2005, which

[2] [1983] 1 AC 646, 654-655

was signed by the respondent, shows that he accepted this as a term of the agreement between the parties. The parole evidence lead at the trial shows that the term "deadline" in that correspondence is referable to the letter of 12th April 2005, from the appellant. As the fax of 26th September 2005, was signed by the respondent, a person to be charged under the agreement, the chain of documents evidencing the agreement that he made with the appellant extends to this document. Mrs. Shelly-Williams submitted that the reference to the deadline in the respondent's fax of 26th September, should be ignored as it was not more than mere repetition of the appellant's earlier correspondence. I am satisfied, however, that it was his intention that this term should form part of the agreement between the parties. There could be no other good reason for him to include it in his correspondence that was intended for the other contracting party.

[20] The terms of the agreement between the parties therefore, were that the appellant, as vendor, would sell and the respondent would purchase the Property for the price of $260,000 and that the sale would be completed by 30th September 2005, failing which the deal would be off and the respondent would have to vacate the property. I do not accept Ms Demers' submissions that there was in fact no agreement or alternatively parole evidence was not admissible in the circumstances to disclose the terms of the agreement. I also do not accept her submission that the terms of the agreement were uncertain.

[21] What therefore is the effect of the failure to complete by 30th September 2005? We have not been asked to interfere with the findings of the learned judge that the respondent had made his arrangements for financing the purchase of the property, apparently by way of a charge on the said property, in time for completion on 30 th September. The respondent therefore, needed the appellant to complete the sale contemporaneously with the creation of the charge so that payment could be effected. However, an examination of the documents constituting the agreement between the parties does not show that it was an express term of the agreement that the obligation of the respondent to pay the purchase price by 30th September

2005, was dependent upon his being able to charge the property to secure such price. I do not consider that the willingness of the appellant to come to Tortola for the completion necessarily entailed her agreement to the method of financing which was of no concern to her. In any event it was not part of the written agreement between the parties that the appellant would have to come to Tortola to complete the sale and so no such term could be enforced against the appellant.

[22] As I have indicated above, the agreement between the parties as evidenced in the various documents appears to have been a complete agreement. Could therefore terms be implied that completion by the respondent depended on his ability to secure the sale price on the property and must take place in Tortola? In **Liverpool CC v. Irwin**[3] Lord Wilberforce addressed the spectrum of situations where the court may be willing to imply terms into a contract. In the instant case, there is apparently a complete agreement between the parties but this is not a mercantile contract. The relevant principle therefore, is whether the court will be willing to imply a term that the respondent's obligation to complete depended on his ability to secure the purchase price on the property on the ground that without it the contract will not work. It is not enough that this may have been a reasonable position for the respondent to adopt as mere reasonableness has been rejected as the basis for implication of terms into an agreement. I find that it was not necessary to give business efficacy to the agreement for the purchase of the property that either the parties must have contemplated that the respondent would finance the purchase by granting a charge over the property or that the completion of the sale had to take place in Tortola.

[23] The evidence is that the respondent was a businessman at the relevant time and the appellant was an elderly infirm woman who resided in St. Thomas in the United States Virgin Islands. It would not be far fetched for the appellant to have contemplated that the respondent would have been able to finance the purchase of the property otherwise than by a charge of it or that he would travel to St.

[3] [1976] 2 AER 39, 43d

Thomas to complete the contract. The parties were free to agree otherwise by express terms but chose not to do so. I note the evidence that the appellant was aware that the respondent was seeking bank financing to purchase the property but this does not necessarily, in my mind, entail her agreement that performance by the respondent would depend on the loan being secured on the property.

[24] The evidence before the learned judge shows that the sale was not completed on 30th September 2005. The evidence further shows that while the respondent did request the appellant to come to Tortola for her to complete by that date, she made it clear to him that her ability to travel was dependent upon arrangements that Mrs. Johnson could make for her. The respondent did not offer to make the relevant arrangements when he must have realised that the deadline was drawing near nor did he make any effort to go to her in St. Thomas to complete the sale despite the fact that he expressly agreed that the deal was off if the sale were not completed by 30th September 2005. It has been stated[4] that the standard condition of sale in England, that completion is to take place at the seller's solicitor's office, mirrors the convention that the money goes to the deeds. Whether or not this convention obtains in this Territory, the convention at least demonstrates that in the absence of agreement to the contrary, it is a reasonable course for the buyer to seek out the seller and tender the money and transfer document for execution.

[25] While there may be a general presumption that time is not of the essence with respect to payment on the sale of property, this has always been a rebuttable presumption: see **United Scientific Holdings v. Burnley BC**[5] where Lord Diplock confirmed that the presumption that time is not to be regarded as of the essence applied in the absence of any contra-indications in the express words or in the interrelation between the clause concerning time and others in the agreement or in the surrounding circumstances. The court is required to construe the agreement

[4] Frances Silverman The Law Society's Conveyancing Handbook 1999, law society publishing 1999. at F.2.1.
[5] [1977] 2 AER 62, 72j

between the parties to determine the effect of the clause relating to time for completion and in so doing, the court has to determine whether the express words used by the parties, the nature of the subject matter or the surrounding circumstances of the agreement, make it inequitable not to treat the failure of one party to carry out his obligations under the agreement as relieving the other party of his obligations.

[26] The express wording adopted by the parties is of paramount consideration. I find that the wording of the agreement that the "deal would be off" or the respondent "would be required to vacate the premises" could only mean that if payment was not made by the agreed date, the agreement between the parties was to come to an end. The parties therefore agreed that the agreement would be rescinded if not performed by 30th September. The strength of the language employed by the parties appears to make it abundantly clear where each stood in relation to the issue of the date of completion. As Greer LJ put it in **Harold Wood Brick Co. v. Ferris**[6]

> "Parties may say by express words that notwithstanding any rule of law or equity to the contrary, time shall be of the essence of the contract; or they may use words which in substance mean the same thing."

To use the language of lawyers, it appears to me that the parties intended that the timely performance of this obligation was to be treated as a condition of the agreement so that any breach would entitle the innocent party to rescind the agreement, irrespective of the gravity resulting from the breach: **Photo Productions Limited v. Securicor Transport Ltd.**[7]

[27] The failure of the parties to complete by 30th September, arose from the inability of the appellant to come to Tortola without assistance, which was not forthcoming, and the possible inability of the respondent to go to St. Thomas to complete the agreement on account of the manner in which he arranged the financing. In my

[6] [1935] 2 KB 198,204-205
[7] [1980] A.C. 827, 849

view, this resulted in the discharge of the agreement for the sale and purchase of the property. The respondent is unable to discharge the burden of proving that he is a party without fault in the circumstances. His own evidence is that the appellant indicated her willingness to complete the sale subject to her frailty and inability to travel. The onus was therefore, upon the respondent to ensure that he was able to keep his side of the bargain by ensuring timely payment, which he was ultimately unable to do. By the respondent's inability to complete, the appellant became entitled to exercise her right at common law to rescind the agreement: see **Halsbury's Laws of England** Vol. 42 at paragraph 127.

[28] The subsequent correspondence from the appellant's solicitors in November 2005 and January 2006, offering a renewed lease and then ordering the respondent to quit the property evidence that she exercised her option by treating the sale and purchase agreement as having come to an end. I do not find that there are any circumstances in the instant case whereby such recission should be treated as ineffective in equity.

[29] In **Steedman v. Drinkle**[8] Viscount Haldane in delivering the judgment of the Privy Council stated:

> "Courts of Equity which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach."

In **Brickles v. Snell**[9], the Judicial Committee upheld the refusal of specific performance where time was of the essence even though they considered the default, which was due to the illness of the purchaser, as trivial. That case

[8] [1916] 1 AC 275, 279
[9] [1916] 2 AC 599

illustrated the stark consequences of treating time as of the essence in an agreement.

[30] As I have found that time was of the essence in the agreement between the parties and the obligation to complete was not performed by the respondent in a timely manner in accordance with the terms of the agreement, and further that the appellant exercised her option to rescind the agreement by treating the respondent as no more than a tenant at will thereafter, I find that the learned judge should not have ordered specific performance of the obligations of the appellant. In the circumstances and I do not need to address further the submissions made by Counsel in relation to this remedy or the effect of the transfer of the property to the appellant and Desiree Sewer, who was not a party to the proceedings neither do I need to deal with Mrs. Shelly-Williams' alternative submission that the order made by the learned judge could be limited to the appellant's interest in the property.

[31] I would therefore allow the appeal and set aside the Orders made by the learned judge against which this appeal lay. I would further order that the appellant shall have her costs in the court below in the sum assessed by the learned judge and of this appeal at two thirds of that sum.

John Carrington
Justice of Appeal [Ag.]

I concur.

Denys Barrow
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]