IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2008/1003

BETWEEN:

RENE ISAAC

Claimant

And

1. CARMEN MC. GOWAN
2. CARMEN MC. GOWAN
Qua Executrix of the Estate
of the late Pedro Toussaint

Defendants

Appearances:
Ms. Cynthia Hinkson-Ouhla for Claimant
Mr. Ermin Moise for Defendant

2008: November 24;
December 9.

DECISION

[1] GEORGES, J.: By a Fixed Date Claim dated and filed 10th October 2008 the Claimant claims against the Defendant in both her personal as well as her representative capacity qua Executrix of the Estate of the late Pedro Toussaint specific performance of a written agreement for sale of a portion of land situated at Monchy quarter of Dauphin measuring 0.5 acres to be dismembered from parcel 1454B – 462 the said agreement being dated 7th December 1999 and entered into between the said Pedro Toussaint as Vendor and the Claimant Rene Isaac as Purchaser. Damages for breach of contract in addition to or in lieu of specific performance are also claimed as well as further or other relief and costs.

[2] Pedro Toussaint died on 14th June 2006 and probate of his last will and testament dated 29th December 1994 was granted by order of the High Court of Justice on 5th February 2007 to his duly appointed executrix Carmen Mc Gowan the first-named Defendant.

[3] The claim as I see it largely hinges on the agreement allegedly made between Pedro Toussaint (the Deceased) and the Claimant paragraph 2 of which states:

> "That THE PURCHASER agrees to pay to THE VENDOR a deposit of Three thousand dollars ($3,000.00) receipt whereof THE VENDOR acknowledges by virtue of a Receipt."

[4] In paragraph 1 of her defence the first-named Defendant denies any knowledge of the contents of the alleged agreement and puts the Claimant to strict proof regarding the existence of any contractual agreement between himself and the Deceased.

[5] Learned Counsel for the Defendant went on to demand strict proof also of the receipt referred to in paragraph 2 of the agreement. This has not been produced to the Court nor has there been any accounting for its possible whereabouts.

[6] Absence of the receipt Counsel for the Claimant contended did not affect the validity of the agreement as paragraph 2 of the agreement was couched in the present tense in which the Deceased acknowledges receipt of a deposit of $3000.00 from the Claimant. That construction was firmly refuted by Defendant Counsel who submitted that the expression that "the Purchaser agrees to pay" connotes a future intention and is a clear indication that at the date of the agreement the deposit had not been paid. The existence and production of the receipt were in his view of crucial importance to the validity and enforcement of the agreement.

[7] With respect I beg to differ for it is my considered view that on a true and proper construction of paragraph 2 of the agreement that the Deceased/Vendor clearly acknowledged receipt of the deposit from the Claimant/Purchaser notwithstanding the fact that a receipt has not been produced in evidence by the Claimant at or since the date of filing the claim almost nine years after the agreement was allegedly entered into between the parties. This is the only construction that can possibly be attributed to those words in their plain and ordinary meaning. There is no ambiguity. By his acknowledgment/admission the Vendor would be estopped from denying the existence of the agreement which would be deemed to be a private writing between the contracting parties.

[8] This is borne out by Article 1154 of the Civil Code which states that:

> "1154. Private writing acknowledged by the party against whom they are set up or legally held to be acknowledged or proved have the same effect as evidence between the parties thereto and between their heirs and legal representatives as authentic writings."

And is exemplified by the Privy Council judgment of Lord Cross of Chelsea in John Bertram Goddard v John Laurent (1994) 19 WIR at page 517 letters D and E where the learned law lord in referring to the case of Rimouski Fire Insurance Co v Cedar Shingle Co (1892) R.J.Q 1 B R 559 declared that:

"Although the point was not decided it appears to have been accepted by the parties and the court in that case that the document though not an "authentic writing" might well be valid as a "private writing". Even apart from such assistance as may be derived from that case their Lordships think that in principle this must be so. When the parties signed the document in question in this case at Laborie it was undoubtedly at that stage a "private writing" which could have been used to prove the agreement which they had made...".

[9] It was further contended by Counsel for the Claimant that the first-named Defendant had been sued in her personal capacity because she was a beneficiary under the will and had made certain promises and representations to the Claimant. Those representations and alleged promises were not particularised and were wholly unsubstantiated. In any event clothed with the legal authority as executrix of the deceased's estate the first-named Defendant could not be held to have been personally intermeddling in the estate as suggested by Counsel for the Claimant albeit that she herself was a beneficiary. Indeed as executrix of the last will and testament of the Deceased she was unquestionably under a legal obligation to administer his estate in accordance with the testator's wishes and to satisfy all claims upon satisfactory proof of their existence.

[10] Consequently the claim against the first-named Defendant in her personal capacity in the circumstances is struck out. Any claim arising out of the agreement would be against the Estate of the late Pedro Toussaint.

[11] The history of this matter has in truth been most unsatisfactory.
Paragraph 3 of the agreement stipulates:

> 3. That the balance of Eighteen thousand seven hundred and eighty dollars ($18,780.00) will be paid to THE VENDOR after the completion of the sub-division or at a reasonable time thereafter.

Nine years later by letter dated 29th August 2008 Counsel for the Claimant wrote to the Executrix of the Vendor's estate saying that the Purchaser was now "willing and ready to pay the balance due as per the agreement … … and if arrangement could be made to facilitate the drawing up of the Deed of Sale within the next week." By then the Vendor had died over two years!

Paragraph 4 of the agreement provides that:

> 4. Upon signing of the Agreement for sale by THE PURCHASER, THE VENDOR consents to give permission to THE PURCHASER to place a Caution on the said Property.

Nothing at all appears to have been done in that regard.

[12] Indeed learned Counsel for the Defendant contended that the claim had been extinguished by effluxion of time – whether by prescription which it was not – this being an agreement for sale of land – or by the doctrine of laches – was not clear. Counsel did not elaborate. The land appears to have been subdivided but the balance of the purchase price was not paid and remains to this day unpaid. No caution was placed on the parcel. Meanwhile the Vendor had died. Clearly a big delay had elapsed between the date of the agreement and the time which the Claimant sought to complete. Not surprisingly his receipt was by then for all intents and purposes lost.

[13] Delay of that kind would in my view certainly militate against obtaining the equitable remedy of specific performance. See MEPS Ltd v Christian Edwards [1978] Ch281 which was affirmed on more general grounds at [1981] AC 205. A court of equity has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience good faith and reasonable diligence; where these are wanting, the Court is passive and does nothing. Through his very own inertia there has in my view been inordinate delay in completing this transaction and the Claimant has thereby waived/lost his right to assert his claim at this point in time and all the more so that a third party (Barclays Bank) has since procured an overriding interest in the two lots which had since been subdivided. The claim for specific performance is accordingly refused as well as damages having regard to all the circumstances.

[14] I pause here to mention that the Testator Pedro Toussaint in clause 4 of his last will and testament dated 29 December 1994 gave devised and bequeathed to his Executrix a one-third share of his parcel of land situate at Monchy in the Quarter of Gros-Islet registered as Block and Parcel Number 1454B 462 and the remaining two thirds share to his daughter Antoinette Alphia Toussaint the selfsame Parcel from which he purported five years later on 7th December 2004 to sell 0.5 acres to the Claimant to be dismembered therefrom. (My emphasis)

[15] The portion of land which the Vendor Toussaint purported to sell and the Claimant to purchase under the Agreement for Sale is set out in a Schedule at the foot of the Agreement thus:

SCHEDULE

> All that portion of land situated at Monchy, quarter of Dauphin measuring 0.5 acres to be dismembered from Parcel 1454B 462.

[16] The unchallenged evidence exhibited with the Defendant's defence filed 18th November 2008 shows a Survey Plan DN999 dated February 2nd 2000 (Exhibit CM 3) of Parcel 1454B 462 which was surveyed between 4th and 5th December 1999 and subdivided into two lots measuring 0.22 hecatares (0.54 acres) and 1.62 hecatares (4.00 acres) respectively at the instance of the proprietor Pedro Toussaint. That survey formed part of Parcel 1454B 462. (My emphasis)

[17] The chronology of events outlined above reveals that on or about the date that the parties had entered into the agreement for sale of 0.5 acres of a portion of Parcel 462 in December 1999 part of that Parcel had indeed been surveyed and subdivided into two lots one of which is in actual fact approximately 0.5 acres in area. At this present point in time however, it would in my view be invidious and not beyond peradventure to hold even on a balance of probabilities that that

subdivision was directly referable to the agreement between the parties and was carried out in contemplation and fulfilment of it. Absolutely nothing happened thereafter until several years later after the Vendor had by then died that the Claimant moved to have the transaction concluded. In any case the Agreement (at paragraph 3) required the Claimant to pay the balance of the purchase price after completion of the subdivision or at a reasonable time thereafter. That had not been done.

[18] Following Toussaint's death in June 2006 the subdivided lots vested in his executrix as part of his estate and were registered in the Land Register in May 2007 in the name of the second-named Defendant as Parcels 805 and 806. By then a judicial hypothec had been registered against both parcels.

[19] In the result the claim is dismissed but the justice of the case in my view requires that the parties in the circumstances be placed as far as practicable in the position in which they originally were before entering into the purported agreement and I accordingly direct that the Claimant be repaid his deposit of $3000.00 out of the estate of the late Pedro Toussaint and that each party bear its own costs.

EPHRAIM GEORGES
HIGH COURT JUDGE (AG)