

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGULLA CIRCUIT
A.D. 2009

CLAIM NO. AXAHCV 2008/0051

BETWEEN:

(1) THOMAS P. LYDON
(2) SHARON K. LYDON

Claimants

AND

(1) BARNES BAY DEVELOPMENT LIMITED
(2) STEWART TITLE EASTERN CARIBBEAN

Defendants

Appearances:

Ms. Tameka Davis of Webster Dyrud Mitchell for the Claimants
Ms. Merline Barrett of Keithley Lake & Associates for the First Defendant
Mr. Michael Bourne of Caribbean Juris Chambers for the Second Defendant

2009: April 7th
July 31st

JUDGMENT

- [1] **MICHEL, J. (Ag.):** By an agreement dated 27th May 2006 the Claimants agreed to purchase and the First Defendant agreed to sell Unit No. C203 of The Resort Residences in Anguilla at a price of US\$1,525,000, discounted to US\$1,372,500, while the Second Defendant agreed to act as Escrow Agent for deposits paid by the Claimants to the First Defendant in respect of the purchase and sale of the Unit.
- [2] By Claim Form filed on 29th July 2008, along with a Statement of Claim, the Claimants instituted these proceedings against the Defendants claiming the following relief:

1. The immediate return to the Claimants of US\$274,500 paid as a deposit on the purchase price of the Unit;
2. A declaration that the Purchase and Sale Agreement dated 27th May 2006 was effectively terminated by notice dated 2nd June 2008 following which the Claimants were entitled to have the deposit returned to them;
3. A declaration that the Second Defendant wrongfully transferred the deposit of US\$274,500 to the First Defendant;
4. Interest on US\$274,500 at the rate of 18% per annum, being US\$105,453.12 from 22nd May 2006 for 779 days and continuing at the daily rate of US\$135.37 until payment or as the Court deems just;
5. Costs;
6. Such further or other relief as the Court deems just.

[3] A Defence and Counterclaim was filed by the First Defendant on 13th October 2008 and on the same date a Defence was filed by the Second Defendant. A Reply and Defence to Counterclaim of the First Defendant was filed by the Claimants on 21st November 2008. The First Defendant's Defence and Counterclaim was amended on 2nd February 2009, while the Second Defendant's Defence was amended on 3rd March 2009.

[4] In the meantime, on 8th December 2008 an application was made by the Second Defendant to strike out the Claimant's case against it as disclosing no reasonable ground for bringing the claim against the Second Defendant and as being an abuse of process of the Court, while on 30th January 2009 the Claimants made application to the Court for the following to be determined as preliminary issues:

1. What, if any, rights and obligations are owed by the Second Defendant as escrow agents under the Purchase and Sale Agreement of the Resort Residences dated 27th May 2006?

2. Whether on a proper construction of the Agreement, and clause 4 thereof in particular, there existed a deadline for closing of on or about May 2008 and, if so, whether the statements alleged by the First Defendant to be extensions of that deadline were valid?

[5] The application by the Second Defendant, which was supported by an affidavit, was heard on 10th February 2009 and was dismissed with costs to the Claimants.

[6] On 12th February 2009 the application by the Claimants, which was supported by an affidavit on behalf of the Claimants and opposed by an affidavit on behalf of the First Defendant, was heard and it was ordered that –

1. The following be determined as a preliminary issue:

(a) What, if any, rights and obligations are owed by the Second Defendant as escrow agents under the Purchase and Sale Agreement of the Resort Residences at Anguilla dated 27th May 2006?

2. The parties are to file their written submissions with authorities in support by 1st April 2009.

3. The trial of the preliminary issue is fixed for hearing on 7th April 2009.

4. As regards the First Defendant, costs in the cause.

[7] All three parties were tardy in the filing of their written submissions, the First and Second Defendants filing their submissions on 2nd April and the Claimants filing their submissions on 6th April. The trial of the preliminary issue then took place on 7th April 2009 as fixed.

[8] The Claimants' principal submission, as expressly stated by them on page 3 of their Skeleton Argument, is that, on a proper construction of the Agreement, the Escrow Agent was obliged to hold and not to release the deposit until such time as required under the terms of the Agreement. As a corollary, the Claimants submit

that clause 2 of the Agreement is an anomaly and does not reflect the true intentions of the parties.

- [9] The submission of the First Defendant is essentially that the Escrow Agent was under no obligation to hold the deposit until the occurrence of events as alleged by the Claimants, but was instead obligated to pay the deposit to the First Defendant in accordance with the express terms of clause 2 of the Agreement, which provides for the immediate release of the deposit by the Second Defendant to the First Defendant.
- [10] The submission of the Second Defendant, although presented and supported differently, amounted to essentially the same thing as that of the First Defendant.
- [11] The issue which the Court is required to determine, as per the Order dated 12th February 2009, is what, if any, rights and obligations are owed by the Second Defendant as escrow agents under the Purchase and Sale Agreement of the Resort Residences of Anguilla dated 27th May 2006?
- [12] It is common ground between the parties that clause 3 of the Purchase and Sale Agreement sets out rights and obligations owed to and by the Second Defendant as follows:
- (a) To act as escrow agent to hold the deposit(s) under the Agreement, subject to the terms set forth in the Agreement;
 - (b) To hold the deposit(s) in a non-interest bearing account in Comerica Bank in Redonda Beach, California or at another federal insured US bank designated by Stewart Title and to pay the deposit(s) to the party entitled thereto in accordance with the Agreement;
 - (c)
 - (1) To act as a depository only and not be responsible or liable in any manner for the sufficiency of any amounts deposited with it;
 - (2) Not to be liable for acting upon any written notice, request, waiver, consent, receipt or other instrument or document which the

Second Defendant believes in good faith to be genuine and what it purports to be;

- (3) Not to be liable for any error in judgment or for any act done or step taken or omitted by it or for any mistake of fact or law or for anything which it may do or refrain from doing in connection herewith, except occurring by reason of or arising in connection with the Second Defendant's bad faith, negligence or willful misconduct;
- (4) To consult with and obtain advice from legal counsel upon the occurrence of any dispute or question as to the construction of any of the provisions hereof or its duties under the Agreement and it shall incur no liability and shall be fully protected in acting in accordance with any unconditional opinion and advice of such counsel; and
- (5) To assume that any person purporting to give any written notice of instructions in accordance with the provisions of the Agreement has been duly authorized so to do.

[13] There is an issue, however, between the parties as to clause 2 of the Agreement, with both Defendants contending that it obligates the Second Defendant to immediately release to the First Defendant the deposit paid by the Claimant on the purchase price of the Unit, while the Claimant contends that it does not make good commercial sense that the Second Defendant should immediately release the deposit to the First Defendant and that the words used in clause 2 must therefore be interpreted to mean something else.

[14] It is this disputed provision which the Court must pronounce upon in determining the preliminary issue as per the Order of 12th February 2009.

[15] Several cases were cited by Counsel in their submissions on this issue, particularly on the construction of contracts. In the end it comes down to whether

one takes the view that the words contained in clause 2 of the Sales and Purchase Agreement mean that the Second Defendant as escrow agent was entitled to or required to immediately release to the First Defendant as seller the deposit paid by the Claimants as purchasers and, if they so mean, whether there is any basis in fact or in law to imply a term essentially to negate it.

- [16] Clause 2 clearly states that the deposit of 20% of the Purchase Price due and payable on the date of the Sales and Purchase Agreement shall be immediately released to the Seller. This is what the Agreement says and, unless it is determined that there is some basis to rectify it so that it says something different, then it must be that the Second Defendant as escrow agent was entitled to or required to immediately release to the First Defendant as seller the deposit paid by the Claimants as purchasers.
- [17] The question then becomes – is there a basis in fact or in law to rectify the Sales and Purchase Agreement and/or to imply a term into the Agreement to negate clause 2?
- [18] The Claimants contend that the Second Defendant as escrow agents were obligated to hold and not to release the deposit until such time as required under the terms of the Agreement. They say that the immediate release of the deposit to the First Defendant by the Second Defendant would constitute the Second Defendant as a mere conduit through which the deposit is paid to the First Defendant by the Claimants, rather than as an escrow agent as defined in Blacks Law Dictionary. They contend further that if the Second Defendant was required to immediately release the deposit to the First Defendant then the deposit would not serve its purpose, which is to secure the seller's interest if the contract is completed while at the same time securing the purchaser's interest if the seller defaults. They submit therefore, in effect, that a term should be implied into the Agreement to negate clause 2 of the Agreement in order that the Agreement can make good commercial sense.

- [19] In accordance with the decision of the House of Lords in the case of *Prenn v Simmonds*, if it can be shown that one interpretation of the Agreement would completely frustrate the commercial or business object of the transaction, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But one cannot come to the conclusion on the facts of this case that if the deposit is released to the First Defendant immediately upon its payment to the Second Defendant that the commercial or business object of the transaction would be completely frustrated to the extent of rendering the transaction futile. Indeed, the view may well be taken that it is precisely this which must have been in the contemplation of the parties since the purpose of the deposit was in fact to provide funds up front to the First Defendant to undertake the construction of the Units in order to be able to complete the sale of the Units to the intended purchasers like the Claimants and that it is the deposit remaining in a bank account, instead of being released to the First Defendant as developer/seller, which would defeat the commercial or business objective of the transaction.
- [20] In the circumstances, this Court can find no basis in fact or in law to rectify the Agreement and/or to imply a term into it to negate clause 2. The Court is therefore constrained to accept and apply the natural meaning of the words used in the Agreement and, in so doing, one arrives ineluctably at the conclusion that, in accordance with clause 2 of the Agreement, the rights and obligations owed by the Second Defendant as escrow agents under the Purchase and Sale Agreement of the Resort Residences at Anguilla dated 27th May 2006 include the right and obligation to immediately release to the First Defendant as the seller, the deposit paid by the Claimants as purchasers upon receipt of same.
- [21] The answer to the question, therefore, which constitutes the determination of the preliminary issue as per the Order of 12th February 2009 is that the following rights and obligations are owed by the Second Defendants as escrow agents under the Purchase and Sale Agreement of the Resort Residences at Anguilla dated 27th May 2006:

- (a) To act as escrow agent to hold the deposit(s) under the Agreement, subject to the terms set forth in the Agreement;
- (b) To hold the deposit(s) in a non-interest bearing account in Comerica Bank in Redonda Beach, California or at another federal insured US bank designated by Stewart Title and to pay the deposit(s) to the party entitled thereto in accordance with the Agreement;
- (c) To act as a depository only and not be responsible or liable in any manner for the sufficiency of any amounts deposited with it;
- (d) Not to be liable for acting upon any written notice, request, waiver, consent, receipt or other instrument or document which the Second Defendant believes in good faith to be genuine and what it purports to be;
- (e) Not to be liable for any error in judgment or for any act done or step taken or omitted by it or for any mistake of fact or law or for anything which it may do or refrain from doing in connection herewith, except occurring by reason of or arising in connection with the Second Defendant's bad faith, negligence or willful misconduct;
- (f) To consult with and obtain advice from legal counsel upon the occurrence of any dispute or question as to the construction of any of the provisions hereof or its duties under the Agreement and it shall incur no liability and shall be fully protected in acting in accordance with any unconditional opinion and advice of such counsel;
- (g) To assume that any person purporting to give any written notice of instructions in accordance with the provisions of the Agreement has been duly authorized so to do;
- (h) To immediately release to the First Defendant as the seller, the deposit paid by the Claimants as purchasers upon receipt of same.

[22] Costs in this application shall be costs in the cause.

Mario Michel
High Court Judge (Ag.)