ANTIGUA AND BARBUDA

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

A.D. 2010

CLAIM NO. ANUHCV2007/0099

BETWEEN:

JOSEPH HUTCHENS	**Claimant**
And	
JEFFREY CAHALL	**Defendant**

Appearances:

Ms Karen Campbell for the Claimant

Mr Kevin John, Mr Loy West and Mrs Lisa John-West for the Defendant

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2010: February 24,

December 16

JUDGMENT

[1] **THOMAS J**: In an amended Claim Form filed on September 20, 2007 the Claimant, Joseph Hutchens, seeks against the Defendant Jeffrey Cahall, a number of declarations, costs and interest

with respect to an alleged contract for the sale of land, being Registration Section: South East Block 56 2280A, Parcel ("the property') with two private dwelling homes thereon.

[2] In an amended Statement of Claim of even date the Claimant pleads matters respecting the contract: the purchase price and its determination, payment of the deposits, the payment of the initial deposit of US$1,000, and the second deposit of US$39,000.00, the matter of the Defendant being a non-citizen of Antigua and Barbuda and the terms relating to the application for the grant and the consequences where there is a refusal of such a license; the failure of the Defendant to apply for such a license, and the methodology for the completion of the contract, the forfeiture of the Defendant to complete this purchase of the property on March 31, 2006 as agreed, and the recession of this contract.

[3] In the premises the Claimant claims various reliefs.

[4] **Defence**

In his Defence the Defendant admits the pleadings relating to the contract, the property and the determination of the purchase price; but contends that the purchase of the property, by virtue of the provisions of the contract, was subject to a number of conditions including the following:

(a) The Defendant being given 60 days from the date of the execution of the agreement to have a structural survey done on the buildings, identify the boundary survey, and test the systems servicing the property. The results being subject to the sole approval of the Defendants and all work was to be done at the expense of the Defendant.
(b) The consequences failure to perform by the Defendant and the status of the deposit in the event of such failure.
(c) The consequences of failure to perform on the part of the Claimant.

[5] The Defendant admits paragraph 6 of the Statement of Claim relating to the payment of a second deposit of US$39,000.00 to Stacey Richards of Richards and Company. In the same paragraph it is pleaded that on completion of the study of the property the Defendant met with the Claimant on or about December 2005 and advised that he and his business partner would require a full topographical survey to be conducted on the property in order to determine whether the proposed

real estate development would be feasible. According to the Defendant, the result was the Claimant orally agreed with and warranted to the Defendant as an agreement collateral to the contract. – the collateral contract and warranty. It is the Defendant's contention that based on a collateral contract and warranty in this regard and with the intent that the Defendant would rely on same. The second deposit would be delayed until the survey was completed.

[6] The Defendant further contends that upon enquiry about the survey the Claimant advised that the land would have to be cleared and certain monies were forward to the Claimant for this purpose. It is also pleaded by the Defendant that the second deposit was paid on the understanding that the Claimant would have the land surveyed.

[7] At paragraph 8 of his Defence the Defendant pleads that the Claimant's request for a certain sum was transferred to the Claimant for the purpose of the clearing of the land and a retainer payment for the surveyor.

[8] With respect to the matter of the non-citizen land holding license, the Defendant contends that it was not his intention to obtain such a license as he had made an agreement to venture his proposed real estate development with a company registered under the Laws of Antigua and Barbuda and operated by a citizen of Antigua and Barbuda whereby the contract would be assigned and closed through this company.

[9] At paragraph 10 of his defence the Defendant denies paragraph 8 of the Statement of Claim where it is contended that the Defendant never applied for an extension of time to complete. The Defendant then goes on to plead the following: "By the aforementioned Collateral Contract and Warranty is was mutually agreed that and understood that the Defendant required a survey of the land before the sale transaction could complete and the Claimant would instruct the surveyor to conduct the survey. In the circumstances completion of the contract was dependant on the Defendant obtaining the survey report."

[10] The Defendant denies that any breach of contract on the basis that the purchase was not completed on March 31, 2006.

[11] At paragraphs 14 to 17 of his Defence the Defendant pleads a number of events in support of his case as follows:

(a) After the payment of US$5,000.00 the Defendant was unable to obtain a status report on the survey and was eventually informed that the land was being cleared and on completion the survey would commence.

(b) On May 22, 2006 the Claimant informed the Defendant that the clearing would be complete on the same day and the survey would follow and the report would be submitted by the following week. The survey report was never received by the defendant.

(c) In or about June 2006 the claimant informed the Defendant that he was going to England for two months. The Defendant did not hear from the Claimant until on or about 14 August 2006, when it was claimed that the Defendant was in default for failing to close the sale transaction in a timely manner.

(d) The Defendant later discovered that in breach of the collateral contract and warranty the surveyor had not commenced the survey and had indicated to the Claimant that he would not commence the survey until the land was adequately cleaned. Further, notwithstanding requests by the Defendant, in breach of the agreement the Defendant has neglected failed and/or refused to take any steps towards the completion of the contract.

[12] **Counterclaim**

In his counterclaim the Defendant contends that at all material times he had been and is now ready and willing to fulfill his obligations under the contract. It is further pleaded that by reason of the breach the Defendant has suffered loss and damage.

[13] **Reply to Defence**

In Paragraph 3 of his Defence the Defendant makes certain contentions regarding the purpose of the second deposit; this is denied by the Claimant who denies any agreement to delay the payment of the deposit until a survey was completed.

[14] With respect to the matter of the clearing of the land and the surveyor, it is admitted that the Defendant was informed as to his cost involved in cleaning the land the surveyor, but denies the

Defendant was advised that he provided the surveyor with all relevant information required to conduct the survey.

[15] In terms of the non citizen license the claimants contends that it was always understood and agreed that the Defendant would seek a non citizen land holding licence to purchase land. For this reason the pleading by the Defendant concerning the involvement of an Antiguan company is denied. The Claimant also denies any involvement with a surveyor since the responsibility for instructing a surveyor rested with the Defendant.

[16] **Defence to counterclaim.**

In his Defence to counterclaim the Claimant denies that he entered into any collateral contract with warranty with the Defendant because it is not true. The Claimant also denies that the Defendant is now or has ever been ready and willing to fulfill his obligations.

[17] **The Evidence**

In his witness statement the Claimant, Joseph Hutchens, outlines the nature of the contract entered into with the Defendant for the sale of Parcel 137 at a price of US$360,000.00 plus a further US$40,000 for furniture, fixtures and equipment. He also speaks to the deposits required to be paid by the Defendant.

[18] It is the evidence of the Claimant that the contract made no provision for the Defendant to conduct a full survey to determine whether the land was suitable for any proposed real estate development. The matter of a full topographical survey to determine the suitability of the land for the proposed real estate development is also addressed.

[19] The central issues of a survey, topographical survey, instructing a surveyor and a request for US$5000 to cover the cost of clearing the land and retaining surveyor are also addressed by the Claimant at paragraphs 5 to 7 of his witness statement and denied. The claim by the Defendant to have paid DSI Services LLC to design a proposed real estate development is also questioned by the Claimant. Similarly, the assignment of the contract to Mr Mark Easten on 1st February 2006

and the fact of the Defendant having no intention to apply for a non citizen land holding licence are also questioned and denied, and their implications for the contract are also addressed.

[20] In cross-examination by learned counsel for the Defendant; Mr Loy West testified that the contract was executed on 20th October, 2005.

[21] In addressing the matter of the survey the witness explained that it was a topographical survey which arose after the contract was signed and it was to be done at the expense of the Defendant. He added that it was the type of survey the Defendant was looking for and explained further that a secondary survey is not the same.

[22] In terms of the 60 days specified in Clause 6.4 of the contract ; the witness said that after the expiration of that period he did not give Mr Cahall a new date to obtain a boundary survey.

[23] Regarding paragraph 9 of his witness statements, Mr Hutchens testified that it is true and correct as stated therein is all he did in relation to the survey. In further testimony the witness denied that the topographical survey was necessary for the contract to be completed and he went on to say that he did not agree that the boundary survey and the topographical survey had to be completed.

[24] With respect to the matter of the survey after a reference to a series of emails it was put to this witness that by his conduct he led the Defendant to believe that the survey would be obtained on his behalf. This was denied by the Claimant.

[25] On the related issue of invoices, Mr Hutchens accepted that the invoices were issued in his name and relate to the clearing of the land. In this context also it was put to Mr Hutchens that the land was never cleared. He agreed and went on to say that the backhoe operator did as much as he could clear.

[26] In re-examination Mr Hutchens testified that he agreed to help to find a surveyor on behalf of Mr Cahall after the 60 days were completed. He added that this took place after the contract had

been signed, and also that the topographical survey had nothing to do with the contract signed. In particular he said that clause 6.4 does not contain any requirement for a topographical survey.

[27] **Jeffrey Cahall**

In his witness statement Mr Cahall accepts that there exists a contract between the Claimant and himself and outlines some of the clauses of the said contract.

[28] At paragraphs 12 and 13 the witness gives an account of another contract entered into with DSI to conduct a survey of the subject property, product survey, conceptual site plan, conceptual villa designs, construction study and furniture package estimate.

[29] Evidence concerning the meeting with the Claimant is given at paragraph 13 and according to the witness the meeting was held "on or about the month of December 2005" and which time the issue of his requirement for a topographical survey was discussed and certain agreements reached in this regard and reliance on the resulting collateral contract and the sequel thereto, including an agreement with the Claimant that the second deposit requirement would be paid by the Defendant on condition that the Claimant would have the property cleared and surveyed. Cahall also says that the 'agreement' was reduced to writing and contained in "my memo dated ...dated 21st day of March, 2006 addressed to the Claimant." He goes on to say that the understandings were in terms of the clearing of the land and the survey and the request made by the Claimant for the transfer of US$5000 and his compliance with the Claimant's request and purposes for which the said money was to be used.

[30] The matter of the wire transfer of the said sum of US$5000 and the second deposit of US$39,000 by Defendant to the escrow account of Mrs Stacey Richards and Company, the correspondence from Mr George McDermott concerning the said sum is addressed at paragraphs 18 to 23 of the said witness statement.

[31] It is the Defendant's contention that shortly after paying the sums mentioned above-mentioned sums, a correspondence was received from the Claimant indicating that the cost of clearing the site was EC$2000 rather than US$2000 as initially stated. In this regard Mr Cahall says that the

Claimant retained the difference of EC$3500.00 as further consideration for his personal benefit under the terms of the collateral contract.

[32] With respect to the survey Mr Cahall says that despite written assurances in May 2006 from the Claimant in this regard he never received a survey report. Rather, the information received from the Claimant was that he was going to travel to England for or stay of two months.

[33] The circumstances leading to the Claimant's claim that the Defendant was in default for failing to close the transaction in a timely manner is detailed at paragraphs 32 to 35 and of certain discoveries made by the Defendant concerning breach of the collateral contract.

[34] The issue of a request from the Claimants authority for details of the application for the Alien Land Holding Licence is mentioned at paragraph 36, but it is contended that there was no indication that the Claimant no longer wished to pursue his purported termination of the purchase contract.

[35] The matter of the termination of the contract by the Claimant on 4th September, 2006 and the response thereto on behalf of the Defendant are addressed at paragraphs 38 and 39. In this connection the Defendant says that his attorney indicated that he was ready willing and able to complete the purchase of the lands.

[36] In the final analysis the Defendant says that it is the Claimant who is in breach of the contract in that he acted in breach of the collateral warranty since he never ensured that the site was adequately cleared and or the survey was commenced despite repeated requests, and the Claimant's knowledge that the survey was essential for the completion of the contract.

[37] Finally, the Defendant says that he is of the view that he is not in breach of clauses 2.7 and 7.1 of the purchase contract for not having obtained an Alien Land Holding Licence since it was the Claimant who failed to fulfill his obligations under the contract thus preventing him from fully evaluating the property and proceeding to closing.

[38] In cross-examination Mr Cahall testified that he never resided in Antigua and Barbuda and that he is not a citizen of the said country. It is also his testimony that he has been in real estate for 30 years and very experienced in the United States of America.

[39] With respect to the company DSI the witness said that he has no involvement and with respect to the land in issue, Mr Cahall said that he had proposed to put a residential development thereon.

[40] Concerning the matter of the non-citizens land holding licence, the witness said that he never applied for such a licence and also that he never purchased any other land in Antigua and Barbuda.

[41] Regarding the company registered as Carib Capital Partners, Mr Cahall said that this company was not set up in conjunction with Mr McDermott. He explained that the company was set up for the purpose of opening bank accounts and to make payments.

[42] When cross examined on paragraph 12 of his witness statement, Mr Cahall said that it is correct and that he did not recall Mr McDermott conducting any site studies. He explained that Mr McDermott is an architect.

[43] With respect to paragraph 13 of his witness statement, the witness testified that after a preliminary study on the land was completed without the land being cleared, the Claimant promised to conduct a topographical survey. And with respect to the payment of $131,000 the witness said that there was no documentation.

[44] In reference to an email from "Joe" to Cahall dated 14th June 2006 in which there was a query about getting hold of a surveyor regarding the "topo survey", the witness explained that it relates to Mr Hutchens agreement to help.

[45] At the end of his testimony under cross examination, this is what Mr Cahall said, "I did not apply for the licence but had several conversations about it. I did not seek an extension of time to apply.

There was a document which I sent to him which he may not have signed. The contract was completed as there were verbal assurances between us."

[46] In re-examination Mr Cahall said that he needed to have the survey done as it was a big necessity.

ISSUES

[47] The issues for determination are.

1. Whether the Claimant or the Defendant was in breach of the contract entered into on 20th October 2005.
2. Whether the Claimant is liable on the Defendant's counterclaim.
3. The measure of damages, if any.

ISSUE NO 1.

[48] Whether the Claimant or the Defendant was in breach of the contract entered into on 20th October 2005.

[49] **Submissions on behalf of the Claimant.**

Learned counsel Ms Karen Campbell for the Claimant submits that the terms of the contract are clear and unambiguous which were concluded after the Defendant had ample time to consider his requirements hereunder. According to learned counsel, the requirements on the part of the Defendant are that: the Defendant had 60 days to undertake any survey of the land; the Defendant was obliged to use his best endeavours to obtain a non citizen land holding licence; completion date was 5pm on the 31st March, 2006 or if a licence was required within 15 business days of the Defendants' receipt of such licence; time was of the essence of the contract and the Defendant must show that he used due diligence in satisfying all the terms of the agreement.

[50] The Claimant contends that the Defendants' failure to comply with the terms of the contract gave rise to a breach of the said contract. The breaches cited are as follows: (a) non-compliance with clause 2.7 of the contract by failing to complete the purchase on 31st March 2006, (b) failure to apply for a licence as required by clause 5.1 of the contract; (c) capital partners and its directors require licences for the purchase to be completed in the company's name with no application being

made for the purpose; (d) the Defendant indicated in his defence and counterclaim that he had no intention of applying for a licence because he had made an agreement to venture his proposed real estate development with an Antiguan company without revealing any details of the company; the Defendant did not seek any extension of the contractual completion date; (f) the Defendant failed to notify the Claimant that he had not applied for a licence and had no intention to do so; (g) failure to notify the Claimant that he had allegedly assigned the contract; (h) failure to provide the Claimant with details of the alleged assignee; (i) failure of the Defendant to complete the survey enquiries within the 60 days as provided in clause 6.4 of the contract; (j) failure by the Defendant to act expeditiously or with due diligence to honour the commitments under the contract; (k) failure by the Defendant to pay the second deposit within the time stipulated by the contract.

[51] On the other hand, it is submitted that the Claimant acted in full compliance with his contractual obligations and it is denied that there were any changes in the contract regarding the second deposit and the conduct of a topographical survey. In particular the Claimant submits that the Defendant adduced no documentation or evidence to show that (a) the Claimant agreed to accept responsibility for any additional survey; (b) the Claimant agreed to incorporate such alleged agreement into the contract; (c) there was any agreement to extend the 60 days contractual period in which the Defendant was to conduct surveys (d) there was any agreement to extend surveys contemplated within the contract to include a topographical survey; (e) there was any agreement to extend completion until the topographical survey was concluded; (f) the Claimant received any payment in order to organise a topographical survey.

[52] **Submission on behalf of the Defendant**

It is submitted by the Defendant that the Claimant agreed and warranted to the Defendant as an agreement collateral to the contract that the payment of the second deposit would be delayed until a full topographical survey of the land was complete and that the Claimant would instruct the surveyor to do so. It is also contended by the Defendant that the Claimant also breached the collateral contract and warranty and failed to instruct the surveyor.

[53] The Defendant further contends that he did not intend to apply for the licence as he had made an agreement to venture his proposed real estate development with a company registered under the

Laws of Antigua and Barbuda and operated by a citizen of Antigua and Barbuda whereby the contract would be assigned and closed through that company.

[54] Having regard to the pleadings, the submissions on the law the issue will be analysed under the following subheads: terms of the contract, the alleged collateral contract; and the alleged assignment.

[55] **Terms of the contract**

The following terms of the contract are identified on the pleadings and submission clauses 2.4, 2.7, 5.1, 6.4, 7.1 and 7.3. It is the Claimants case that the Defendant is in breach of all of the above clauses. In exact terms they provide as follows:

> "2.4 Deposits meant the initial deposit plus all additional deposits. The Initial Deposit will be deposited within five (5) business days after the contract is signed and is acceptable to both the Buyer and the Seller to the Buyer. The first deposit is due on the signing of this agreement by the Buyer the second Deposit is due no later than 60 days after the contract has been signed by both buyer and Seller and delivered by seller to Buyer. Initial and Second Deposits are both non-refundable (subject to contract) after second Deposit is paid.
>
> 2.7 Unless otherwise agreed in writing, this Contract will be completed, the purchase price will be fully paid and vacant possession shall be delivered by 5:00pm on 31st March, 2006, or within 15 business days upon receipt of the Alien Land Licence (The Completion Date), whichever date is later when a duly executed land transfer for the parcel shall be delivered to the buyer together with the original land certificate for the said parcel.
>
> 5.1 The following terms are part of this contract:
>
> A. The Buyer is responsible for any new survey fees to accurately locate the survey pins.
>
> B. If the Buyer is a non citizen and will require Government approval to purchase this property the Buyer will use best endeavours to obtain such licence. In the event that the non citizen licence is neither granted nor refused by the completion date, provided that every reasonable effort was made by the Buyer. The Buyer may request an option for an extension until such time as the non citizens land licence is granted in accordance with this agreement.
>
> 6.4 This offer to purchase is subject to the Buyer being given 60 days from the date of the execution of this agreement to have or structural survey done on the buildings identify the boundary survey pins and test the systems servicing the property. The results being subject to the Buyers sole approval. All work to be done at the expense of the Buyer.

7.1 If the Buyer fails to perform this contract for any reasons other that satisfaction of the Terms of this contract or any action or inaction by seller that prevents Buyer from performing under this contract or force majeure then the seller may keep the Deposit. The Buyer must show that he used due diligence in satisfying all the terms of the agreement.

7.2 If for any reason other than the seller to render his title marketable after diligent effort, the seller fails neglects or refuses to perform this contract, the Buyer may receive all of his deposits or may proceed in law or in equity to enforce his legal rights under this contract, and all costs involved in enforcing said rights shall be borne by the seller.

7.3 ....Time shall in every respect be of the essence."

[56] It is the Claimant's case that contrary to the express terms of the contract the second deposit was not paid within 60 days after the signing of the contract by both parties,[1]the contract was not completed on 31st March 2006 or within 15 days of the receipt of the Alien Land Licence[2] and he did not obtain a licence or use his best endeavours to obtain such a licence[3]. The Claimant contends further that he did not agree to any topographical survey, nor was it contemplated by clause 6.4 of the contract.

[57] From the evidence it is not in dispute that the second deposit was not paid as contemplated and provided for in the contract; no licence was obtained and the contract was not completed on 31st March, 2006.

[58] The Defendant has pleaded a number of issues to refute the Claimant's contention that the Defendant has acted in breach of the contract. These are in alignment with the issues regarding the topographical survey, variation of the contract and assignment of the contract.

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[1] Clause 2.4

[2] Clause 2.7

[3] Clause 5.1B

[59] **Topographical survey**

The Defendant posits that a topographical survey was always contemplated by both parties and in this regard points to certain correspondence between them. The first of these is an email dated 23rd March 2006 in which the Claimant wrote to an agent of the Defendant seeking to ascertain the type of survey "you are looking for." The second is another e-mail dated 14th June, 2006 in which the Claimant is seeking to obtain information the "topo survey" and the surveyor. Reliance is also placed on the response to the Claimant from George McDermott. It states "[4] Boundary survey & access road/drive to your site. [5]Topo survey on a 2'- 0" contour."

[60] At paragraph 6 of his written submissions the Defendant advances the following:

> "The Claimant did not at no time state that a topographical survey was never considered to be part of the contract. On the contrary, his further correspondence illustrate that he actively sought to secure the said topographical survey on behalf of the Defendant. This is evidenced in the Claimants e-mail to the Defendant dated the 31st day of March 2006, stating *inter alia*: 'as per our conversation last week, Cleveland Williams has contacted me and has received all the relevant information he needs to carry out the Topo on parcel 137."

[61] Further e-mails[6] are prayed in aid of the Defendant's contention that the Claimant agreed to the topographical survey.

[62] In the circumstances the Defendant submits that "... it is incongruent and disingenuous for the Claimant to now allege that the obtaining a topographical survey was never contemplated or agreed to be an essential term of the contract which the parties agreed would precede completion of the sale." And a further submission is that clause 6.4 of the agreement contemplates a topographical survey.

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[4] Supplemental Bundle page 5

[5] Ibid at page 14

[6] These are between the Claimant and the Defendant and dated April 19, 2006, May 22, 2006 and June 14, 2006 appearing at pages 8, 13 & 14 of the Supplemental Bundle

[63] **Collateral Contract**

The foregoing submissions regarding the conduct of a topographical survey is part of a wider picture of the Defendant's case that certain exchanges with the Claimant gave rise to a collateral contract. It is pleaded at paragraph 2 of the defence in part as follows:

> At this meeting the Claimant orally agreed with and warranted to the Defendant as an agreement collateral to the contract (hereinafter referred to as the 'Collateral Contract and Warranty') and with the intent that the defendant should rely thereon that the payment of the second deposit would be delayed until the survey was complete and further that the Claimant would take the necessary steps to instruct a surveyor to conduct the survey and the Defendant would pay for the same. Relying on the aforementioned Collateral Contract and Warranty the Defendant duly awaited the Claimant.

[64] In his Reply the Claimant pleads the following:

"4. Save that the Claimant admits that he was informed by the Defendant in or around December 2005 that the Defendant together with his business partner wanted to undertake a full topographical survey of the land, paragraph 4 of the Defence is denied

[65] In his Rely also the Claimant denies paragraph 3 of the Defence and contends that there was never any agreement regarding the delay of the second deposit until the survey was completed. It is his further contention that while the contract provided for a survey of the buildings identification of the boundary pins and the testing of the systems servicing the property, there was no provision for a survey to determine whether the land was suitable for any proposed real estate development. It is however admitted by the Claimant that the Defendant did inform him that the Defendant and his business partner wanted to undertake a "full topographical survey.

[66] The Defendant for his part admits paragraph and goes on to plead the following:

> "Clause 6.4 of the contract provided that the offer to purchase was subject to the Defendant being given sixty (60) days from the date of the execution of this agreement to have a structural survey done on the buildings, identify the boundary, survey pins test, test the systems servicing the property. The results would be subject to the Defendant's sole approval and all the work was to be done at the expense of the Defendant."

[67] Then at paragraph 4 of his said defence the following is further pleaded:

> "The Defendant admits paragraph 6 of the Claimant's Statement of Claim. The Defendant further states that upon completion of the study on the property the Defendant met with the Claimant in or about December 2005[7] and advised that he and his business partner would require a full topographical survey (hereinafter referred to as the 'survey') to be conducted on the property in order . The Claimant has maintained a consistent line in terms of the pleadings and the evidence. He maintains that he did not agree to any topographical survey as a requirement of clause 6.4 of the contract. He maintained further that he merely agreed to provide assistance in getting the survey done. And in cross-examination the Claimant re-stated that the topographical survey was not necessary for the completion of the contract. The further evidence which the Defendant points to concern the various e-mails between both parties.

[68] On the other hand, the Defendant's, main thrust in this regard is an alleged agreement with the Claimant regarding the topographical survey. In this connection the Court does not accept as a fact that the Defendant's evidence that there was an agreement. Rather, the Court accepts the Claimants' evidence that the Claimant merely undertook to facilitate the survey which the Defendant revealed to him was required by him and his business partner. In this regard the Court finds the following email to George and Jeff illuminating:

> "Dear George and Jeff, if you would like to have the land cleared for the topo we need to have a backhoe. I'm happy to have one on your behalf."

[69] The following aspects of the evidence and submissions are accepted by the Court as pointing to the non-existence of a collateral contract or a variation of the existing contract: The Claimant merely going to the Land to show the parcel to the surveyor is not evidence of an agreement for the conduct of a topographical survey; the fact that the Defendant was to bear all of the expense of the survey negates the contention that there was an agreement between the two parties with respect to the said topographical survey; there is nothing in clause 6.4 to extend the clause beyond a survey of the buildings, the boundary

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[7] At paragraph 6 of the Claimants Statement of Claim the payment of the second deposit of US$39,000.00 by the Defendant on 22nd March 2006 is pleaded.

pins and the systems servicing the property; there is no evidence to indicate that the contract had to be extended until the conclusion of the topographical survey, the fact that the alleged collateral contract arose after the main contract had been signed,[8] in re-examination the Claimant testified that the fact that the surveyor was sought after the 60 days had expired is of no moment and as the topographical survey had nothing to do with the contract, it cannot be said that there was a variation of the contract in light of the absence of any written document evidencing any change of the express terms of the contract which in this case was mandatory since the sale of land is involved.[9]

[70] At another level the purported assignment of the contract by the Defendant to Carib Capital Partners is a nullity since the Claimant was never informed of such an assignment and correspondingly did not consent thereto.[10] In this regard it is submitted on behalf of the claimant that:

> "The authenticity of the purported assignment was never admitted and the Defendant was given notice on 12th February 2009 pursuant to Part 28.18 of CPR 2000 to prove the document at the trial. Despite the notice no evidence was adduced in this regard."

Conclusion

[71] Given the Court's finding of fact that there was no agreement between the Claimant and the Defendant regarding the topographical survey, it follows that the basic ingredient of a collateral contract is absent. In like manner while the variation of a contract is permissible, it cannot be unilateral. The relevant principle being that the variation must possess the characteristics of a valid contract. Again, at the very basic level there was no agreement to give rise to a variation of the existing contract.

[72] In view of the Court's rejection of the Defendant's contentions regarding the collateral contract this effectively defeats the Defendant's submissions. It is therefore the conclusion

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[8] See: Wells (Mersham) Ltd & Buckland Sand and Silica Co. Ltd [1964] 1 All ER 41

[9] See: Halsbury's Laws of England, Vol. 42 at para. 33

[10] See: Halsbury's Laws of England, Vol. 9 (1) at para 757

of the Court that the Defendant was in breach of the clause: 2.4 of the contract by failing to pay the second deposit 60 days after contract had been signed; 2.7 by failing to complete the contract by 5:pm on 31st March 2006; 5.13 by failing to use his best endeavours to obtain a non-citizen land licence; and 6.4 by failing to complete the survey within 60 days after the signing of the contract.

[73] Accordingly, by virtue of clause 7 of the contract the Claimant was entitled to rescind and did rescind the said contract by letter to the Defendant dated 4th September, 2006.

ISSUE NO. 2

[74] Whether the Claimant is liable on the Defendant's counterclaim

[75] In his counterclaim the Defendant seeks specific performance, or alternatively damages in the sum of $356,240.00 for breach of contract. This is however premised on breach of contract by the Claimant which is not a finding of this Court.

[76] It follows that since it is the Defendant who is in breach the Claimant cannot be liable on the Defendant's counterclaim.

[77] **The measure of damages**

The rule regarding the award of damages is that it is awarded in order to put the injured party in the position he would have been in but for the breach. Had the Defendant completed the contract the balance of the purchase price, being US$360,000.00, would have been paid. This must be the measure of damages in this case. This amount of US$360,000.00 is therefore awarded as damages.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance and/or the national interest of Antigua and Barbuda and in the Commonwealth of Dominica arose and as such were given priority. Further, this judge was transferred to another jurisdiction, where a single judge presides, with effect from 1st

September 2010 with the foreseeable consequences. This accounts for the delay. Despite the foregoing a deep and sincere apology is tendered for the delay.

ORDER

[78] **IT IS HEREBY ORDERED AND DECLARED AS FOLLOWS:**

1. The second deposit on the property was not made 60 days after the signing of the contract on 20th October, 2005, as required by clause 2.4 of the contract.

2. The contract signed on 20th October, 2005 was not completed at 5pm on 31st March, 2006 as required by clause 2.7 of the contract.

3. The Defendant did not obtain a non-citizen land holding licence; nor did he use his best endeavours to obtain such a licence, as required by clause 5.1B of the contract.

4. The structural survey of buildings, identification of the boundary survey pins and testing of the systems servicing the property were not completed within 60 days of the execution of the contract as required by clause 6.4 of the contract.

5. There was no collateral contract between the Claimant and the Defendant regarding a topographical survey of the property.

6. The fact that the topographical survey was not completed 60 days after the signing of the contract has no bearing on the terms of the said contract.

7. The Claimant has rescinded the contract entered into with the Defendant on 20th October, 2005.

8. The sum of US$40,000 being the deposits, are forfeited to the Claimant.

9. The Claimant is entitled to give a good receipt and discharge for the sum of US$39,000 paid by the Defendant to Stacey Richards of Richards & Associated by way of deposit and the said Stacey Richards must pay over the said sum of US$39,000.00 to the Claimant forthwith.

10. The Claimant is entitled to give a receipt and discharge for the sum of US1000.00 paid to English Harbour Realty by the Defendant by way of deposit; and said English Harbour Realty must pay over the said sum of US$1000.00 to the Claimant forthwith.

11. The Defendant must pay the Claimant the sum of US$360,000.00 as damages.

12. The Defendant must pay the Claimant interest at the rate of 10% on the said sum of $360,000.00 with effect from 1st April, 2006.

13. The Defendant must pay costs to the Claimant in accordance with Part 65.5 of CPR2000.

Errol L. Thomas
High Court Judge