SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2009/0592

BETWEEN:

BAY VIEW PROPRIETORS

Claimant

and

[1] PHILLIPE CHALANO
[2] NICOLE CHALANO (both of Hophil SA, 11 Rue Biger 97200, Fort de France, Martinique)

Defendants

Appearances:

Mr. Jonathan McNamara for the Claimant
Mr. Horace Fraser for the Defendants

2011: August 12.

JUDGMENT

[1] **GEORGES J. [AG.]**: On 28th June 2009, the claimant, Bay View Proprietors, through its agent Eldon Mathurin, filed a fixed date claim form and statement of claim claiming against the defendants, Phillipe and Nicole Chalono, an order that the said defendants carry out all structural work required to remove a wall partition subdividing the property known as Unit 13 Bay View Condominiums which is registered as Block 1255 B parcel 243 so that the property is converted back to a single dwelling unit.

[2] The claimant also sought costs and other consequential relief.

[3] The claimant applied for and received an order dated 25th January 2010 extending the validity of the claim form through to 28th June 2010. The order also granted the claimant permission to serve the claim form and related documents outside the jurisdiction by registered post. This was on account of the fact that the defendants were ordinarily resident outside the jurisdiction of St. Lucia as they resided in Martinique.

[4] On 8th March 2010, the defendants filed a defence to the claim in which they admitted being owners of Unit 13 but argued that the terms of the Condominium Declaration and the provisions of the **Condominium Act** which purported to prevent subdivision of the unit were voidable and unenforceable against them as the contract for the sale of the property and all the related documents were in English whilst their mother tongue and the only language in which they were conversant was French. They also alleged that the said contract was executed without their having the benefit of independent legal advice.

[5] The defendants admitted erecting the partition wall but averred that this did not change the nature of the unit from being a private dwelling. They alleged that because they have not parted possession of the title, occupation or ownership their partition does not and did not amount to a subdivision under the **Condominium Act** and Condominium Declaration. The defendants also contended that the management authority knew and approved of the alterations made to the unit. This approval, according to the defendants, amounted to a waiver.

[6] Finally, the defendants averred that due to the fact that the breach occurred in 1998, some eleven years before the commencement of the claim, the claim was prescribed in accordance with Article 2121 of the **Civil Code of Saint Lucia**.

[7] On 17th March 2010 the claimant filed an amended claim form and statement of claim. Essentially the amended claim form sought the same relief as the original claim but it stated in the alternative that if the defendants failed to restore the property to its original state the claimants should be empowered to carry out the

restoration free of any liability for any damage that may result to the defendants' property as a consequence.

[8] On 29th March 2010 the defendants filed a defence to the amended statement of claim in which they repeated the substance of their original defence.

[9] The central issue concerns an application by the claimant to strike out the defence filed on 14th April 2010 and a response by the defendants filed on 20th April 2010 to similarly strike out the claimant's claim.

Grounds of claimant's application

[10] The grounds for striking out the defendants' defence are as follows:

1. The defendants have no real prospect of successfully defending the claim and admit that they have erected a wall partition in the property known as Unit 13, Bay View Condominium which has resulted in a sub-division of the unit.
2. The defendants obtained independent legal advice in purchasing the property. Furthermore, in accordance with
   (i) Section 1139 of the **Civil Code of Saint Lucia** a notarial document if signed by all the parties is authentic,
   (ii) Section 1141 of the **Civil Code of Saint Lucia** an authentic writing is complete proof between the parties of the obligations expressed in it.
3. Article 2121 on prescription in the **Civil Code** of St. Lucia does not apply in that circumstance due to the fact that the maturity of the commercial transaction had not occurred.

Grounds of the defendants' application

The grounds of the defendants' application are:

"(a) The claimant cannot successfully bring and maintain these proceedings against the defendants because the terms of the Condominium Declaration are unenforceable against them.

(b) The claim has been prescribed in accordance with Article 2121 of the Civil Code of Saint Lucia.
(c) The claim is an abuse of process."

[11] The parties made oral submissions in support of the strike out applications.

The Court's Power to Strike Out

[12] Part 26.3(1) of the Civil Procedure Rules (CPR) states that:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the Court that --
> (a) There has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
> (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;
> (c) The statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
> (d) The statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

The Test on an Application to Strike Out

[13] Dennis Byron C.J [Ag.] in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** (Civil Appeal No. 20 A 1997) restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court"

In **Hector v Joseph** (Dominica Civil Appeal No. 6 of 2003) the Court stated that the reason for this cautious approach is that the exercise of this jurisdiction deprives a party of his right to a trial and the ability to strengthen his case through the process of disclosure and other procedures such as requests for further information.

In **Haughton and Haughton Executors of the estate of Alexander Haughton v Yvonne Haughton** G476/2001/ and HCV1445/2003 (Consolidated), the Jamaican

High Court employed vivid language to remind that strike out is a draconian option. There it described strike out as "the nuclear weapon in the court's arsenal and should not be the first and primary response of the court..."

[14] The Court must therefore be satisfied that a party is unable to prove allegations made against another party or that the statement of case is incurably bad or that it discloses no reasonable ground for bringing or defending a case, and has no real prospects of succeeding at trial: **Lennox Linton et al v Anthony W. Astaphan** et al Claim No. DOMACV 2008/0436 (delivered 4th June 2010). So, in **Baldwin Spencer** (supra) the learned Judge added this element to the test the court ought properly to consider:

> "...the operative issue for determination must be whether there is 'even a scintilla of a cause of action'. If the pleadings disclose any viable issue for trial then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal."

The scintilla test correctly cited by his Lordship was laid down in the Canadian case of **Operation Dismantle v the Queen** (1986) LRC (Court) 421.

[15] When a party seeks to strike out all or parts of a statement of case the burden rests on him to show that there is no possibility of a cause of action. This is well established in **Goodson v Grierson** (1908) 1 .K.B 761. For the Court to be satisfied that this burden is met it must necessarily examine the pleadings of the parties with a penetrating eye to see whether any cause of action arises therefrom.

Pleadings

[16] Essentially, the amended statement of claim and the defence to the amended statement of claim are of key importance. Because the first application to strike out was filed by the claimant, it is useful to look at the defendants' pleadings to determine if there is "even a scintilla" of a defence.

Non est factum

[17] In paragraph 2 of the defence to the amended statement of claim the defendants admitted to being owners of Unit 13. In paragraph 3 they alleged that the specific provisions preventing them from subdividing the property was not brought to their attention. They said the contract was written in English while they only spoke French. At its core this appears to be a plea of non est factum. Non est factum is a variant of mistake which negatives consent to a contract. The general rule governing the signing of a contract is stated by the learned authors of **Chitty on Contracts** Volume 1, page 416 at paragraphs 5-8 in these words:

> "a person is estopped by his or her deed viz a party of full age and understanding is normally bound by his signature to the document, whether he reads or understands it or not. If however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. In most of the cases in which non est factum had been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is not a necessary factor."

[18] I accept this as a correct statement of the law. In **Saunders v Anglia Building Society** [1971] A.C. 1004 the House of Lords stressed that a defence of non est factum was not lightly to be allowed where a person of full age and capacity signed a written document embodying contractual terms. The plea of non est factum should only be allowed, exceptionally, when the person signing the document made a fundamental mistake as to the character or effect of the document. The disparity between the effect of the document actually signed, and the document as it was believed to be must be, in the words of the House of Lords, "radical", 'essential", "fundamental" or very "substantial".

[19] Applying the law to paragraph 3 of the amended statement of claim the defendants did not make a plea that the terms in the contract preventing them from subdividing was fundamentally different from what they believed the contract to have expressed. As adults of full age and capacity who were under no compulsion undue influence or fraud they are not allowed to resile from their

bargain by merely pleading non est factum where the plea cannot be maintained. The principle that parties are free to contract is at the centre of the commercial world which if allowed to be frivolously undermined by pleas such as non est factum would run contrary to public policy; for the courts always strive to give business efficacy to the transactions of reasonable persons rather than to frustrate them: **The Moorcock** (1886-90) All ER 530 per Bowen LJ.

[20] Moreover, the defendants' plea in paragraph 3 that they did not understand English is wholly untenable. This is because the claimant exhibited a note (BW1) written in English and signed by the Chalonos. The claimant also exhibited minutes of a General Meeting of the Bayview Proprietors (BW2) held on 19th February 1994 at 9:00 a.m. at No. 18 Bay View Condominium at which Mr. Chalono was present. That meeting was in English and the court is minded to infer from that that Mr. Chalono would not have attended and participated in a meeting being conducted in a language he could not understand.

[21] The doubt which arises in respect of the defendants' claim that they could not understand English, the language of the contract, is strengthened by paragraph 7 of their defence to the amended claim which reads:

> "At all material times before the Defendants erected their partitioning wall within their unit, the first defendant spoke to the Chairman of the Management Authority of the Bay View Condominium about alteration and the Chairman indicated to him that the board would have no problem with the proposed alteration ...."

[22] By his own pleading the first defendant clearly admitted that he spoke to the Chairman of the Management Committee. He said nothing in paragraph 7 to suggest this conversation was in French. I find that the conversation must therefore have been in English. I am however loathe to accept that the Chairman would have given the defendants permission to blatantly violate the Condominium Declaration.

[23] Taking this into consideration I do not believe that the plea of non est factum can be sustained as a defence to the claim. If I am wrong in concluding that the

defendants understood English at the time that they signed the contract then they would surely have been grossly negligent in signing a document written in a language which they alleged they could not understand. In **Saunder's** case (supra) the House of Lords said definitively that no matter what class of document was in question once the person signing it was negligent or careless that would exclude the defence of non est factum.

Independent Legal Advice

[24] Having found that the defendants knew English and understood the contract at the time that they signed it, the court is not convinced that in those circumstances the claimant was under a duty to ensure they got independent legal advice. The allegation is made in paragraph 3 of the defence to the amended statement of claim. Where parties are of equal bargaining power there can be no presumption of undue influence which would require that the defendants be advised to seek independent legal advice. Neither can it be said that any fiduciary relationship existed between the parties that would make independent legal advice prudent.

[25] In **Haskew v Equity Trustees, Executors and Agency Co. Ltd** (1919), 27 C.L.R, 231 at pp 234-5, per Isaacs, J the Australian High Court said that there is no rule of law that independent legal advice must have been received if a transaction is to stand. If it is clear that even if independent advice were tendered the transactions would nonetheless have been entered into then the absence of such advice will not be material. The defendants did not state in their pleadings that the only purpose for which they occupied the property was to partition it. Neither have they suggested that if they were aware they could not have partitioned the unit they would not have bought it. In the circumstances of the relationship between the parties and the tenor of the defendants' pleadings it is my considered view that the absence of independent legal advice in these circumstances does not amount to a defence that can be sustained in law.

[26] The claimants exhibited numerous letters which confirmed that the defendants' attention was drawn to the fact that they were in violation of the terms of the contract they had signed. Clause 2 of the Deed of Sale states in no uncertain terms that the defendants were required to "perform the conditions, stipulations and obligations set out in the Act, the Declaration and Bye Laws." Sections 7 (6) and 23(2) of the **Condominium Act** prohibit partition of the units and in paragraph 4 of the defence to the amended statement of claim the defendants admitted partitioning the premises.

[27] In the premises, having examined the pleadings of the defendants and the submissions advanced I am fully satisfied that there is no prospect of establishing the defence of non est factum. Nor can the plea of lack of independent legal advice avail them in the circumstances.

[28] In sum, I am satisfied that the defendants' statement of case does not disclose any reasonable ground for defending the claim and I accordingly direct that the defendants' defence be and is hereby struck out and it is ordered that the defendants do forthwith carry out all necessary structural work to remove a wall partition subdividing the property known as Unit 13 Bay View Condominiums registered as Block 1255 B parcel 243 so that the property is restored to a single dwelling unit.

Costs to the claimant in the amount of $1000.00.

Ephraim Georges
High Court Judge [Ag.]