IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SLUHCV2011/0547

BETWEEN:

RONICLES LIMITED

CLAIMANT

AND

1. **DCG PROPERTIES LTD.**
2. **STEWART TITLE EASTERN CARIBBEAN LTD.**

DEFENDANTS

APPEARANCES:

Sardia Cenac of Counsel for the Claimant

Suzan Gryspeerdt Director of the First Defendant in Person

Leevie Herelle of Counsel for the Second Defendant

2012: June 29th

2013: February 4th

DECISION

V. GEORGIS TAYLOR-ALEXANDER, M

[1] The court can try certain issues preliminarily at the case management conference, if this will assist in illuminating what are the real issues in dispute between the parties. Such

was the determination made at the case management conference in these proceedings held on the 26th October 2011. The court order read thus:-

" the parties try as a preliminary issue the following:-

[a] the obligation of the defendants to the claimant under the purchase and sale agreement and escrow agreement in relation the deposits made to the escrow account. In particular whether there was an obligation on the defendants to hold the deposit paid by the claimant in furtherance of the Sale and Purchase Agreement until closing or substantial completion of the first defendant's obligation to the claimant.

[b] under whose authority were disbursements to be made from the escrow account".

The Facts in Summary

[2] The following are in broad outline, the facts relevant to these interlocutory proceedings.

[3] The first defendant, is a company undertaking the development of "Le Paradis" a resort hotel and condominiums on Saint Lucia.

[4] The second defendant, is registered in Saint Lucia as an external company, but is organised and exists under the Companies Act, Revised Statues of Anguilla, and is enjoined in these proceedings having assumed the responsibility of title guarantors and escrow agent under the Sale and Purchase Agreement between the claimant and first defendant and under the Service Agreement and Escrow Agreement.

[5] On the 4th June 2007, the claimant and the first defendant entered a Sale and Purchase Agreement (SPA), for the sale to the claimant of a unit known as Unit No. 12-3-R, within the "La Paradis" development, the purchase price of which was US$945,000.00. The claimant at the time was interested in becoming an owner of one such condominium.

[6] The SPA contained various addenda including a financial addendum executed on the 4th June 2007. Scheduled to the SPA was a service agreement executed as between the two defendants and Escrow Agreement (EA) which appeared to be a set of escrow

instructions and procedures. Both by reference were incorporated into and formed part of the SPA.

[7] Under the SPA, the claimant was to have purchased the condominium unit by instalment payments, which payments were triggered by specific events. The SPA also detailed the recourse available to the claimant should the first defendant not meet its obligations under the agreement.

[8] The first defendant encountered difficulties and delays affecting its timely completion of "Le Paradis", whereon the claimant sued the first defendant pursuant to article 1387 of the Civil Code of Saint Lucia for liquidated damages for breach of contract in the sum of US $94,500.00 or EC $256,747.05 and both defendants for the return and replenishment of the escrow account in the total sum of US $283,500.00 or EC $770,241.15.

[9] It transpired that the monies paid by the claimant to the second defendant as escrow agent had been disbursed to the first defendant by the second defendant. In particular the claimant has sued the second defendant for purportedly failing to honour its legal obligations as escrow agents. These proceedings are to determine the interpretation of the obligation of the second defendant as escrow agent.

The Agreements

[10] The obligations of the parties are contained in the SPA, EA, Service Agreement and addenda and it is necessary to gather an appreciation of their effect.

[11] The **Service Agreement** governs the contractual relationship between the first and second defendant and governs the obligations of the second defendant as underwriters to provide title guaranty and to offer services of an escrow agent of the deposits paid by the claimant to the first defendant, including the timely receipt and disbursement of funds to the developer and other required parties under the SPA; enforcement of all contractual terms with regard to payment procedures; timely deposit reports; and preparation of buyer and seller pre closing statements.

The conditions and obligations of the escrow agent are fully described in the EA.

Escrow Agreement (EA): This is a schedule A to the SPA and reads as instructions on how to open an escrow account with the second defendant; the manner in which funds may be transmitted to the escrow account; and the procedures that regulate the obligation of the escrow agent to a third party depositor.

The Sale and Purchase Agreement SPA governs the contractual relationship between the claimant and first defendant and includes the date and manner of payments for the purchase of the condominium, the obligations of the first defendant which include the timelines for the delivery of the condominium to the claimant. The SPA contained a number of clauses relevant to this application.

The Submissions

[12] The claimant and the second defendant on the court's direction filed submissions on the preliminary issue and the court accommodated the oral submission of the first defendant who appeared without the benefit of counsel. All parties were afforded the benefit of a reply by oral submissions. The following represents a synopsis of the submissions advanced.

[13] The claimant contends that the common intention of the parties in the agreements and addenda is to be construed by the natural meaning of the clear and unambiguous words used by the parties, such that, the second defendant was obligated to disburse the escrowed funds in accordance with either; the SPA if a copy had been provided to the second defendant or; on written disbursement instructions if a copy of the SPA had not been provided.

[14] Where the second defendant had been provided with a copy of the SPA, Counsel Ms. Sardia Cenac submits, disbursement was to have been in accordance with the SPA namely:

> (a) upon written request from the first defendant/seller to the second defendant/ escrow agent, together with (b) written confirmation that the milestones had been

satisfied to the effect that an architect had certified the unit to be substantially complete.

[15] It was the common objective of the parties the claimant submits, that deposits would be held in escrow until substantial completion. Additional support for this contention is to be found in the financial addendum, which is to prevail over the SPA and which provides for the first named defendant to finance construction at its sole costs. Where the condominium documents were not settled at substantial completion the deposits were to be held in escrow until these documents were settled at closing.

[16] The first defendant admits that clause 4 of the SPA provides for the obligations of the escrow agent in relation to deposits made and that, upon written request from the first defendant/seller together with confirmation of certain milestones, payments could have been disbursed. The first defendant submits however that the milestones in clause 4 were erroneously documented as construction milestones instead of financial milestones. The true interpretation and therefore construction of the intention of parties in relation to clause 4 contextually required an appreciated of the obligations of the claimant and the first defendant under clauses 5,6,7 and 8 of the financial addendum.

[17] The first defendant submits that the financial addendum erroneously states that the buyer is not obligated to pay any additional deposits, interest or fees until closing where the buyer waives the financing contingency, or obtains a financing commitment **such that** the first defendant/seller is obligated to finance the unit at its sole costs. Clause 8, the first defendant submits ought properly to read instead " in the event the buyer waives, with written notice to Seller, the financing contingency or obtains a Financing Commitment and does not terminate the Purchase Agreement, buyer shall be under no obligation to pay any additional deposits, interest or fees until closing. Seller shall be obligated to fund ***further*** construction of the Unit at its sole cost, including any interest charges incurred during the construction period".

[18] Its submission therefore is that there was no obligation on the first defendant under the SPA including the financial addendum to withhold the deposits until substantial

completion, and no such obligation existed even where the buyer obtains a financing commitment.

[19] The second defendant's submission was in substance similar to that of the first defendant. It acknowledged the provisions of section 4 of the SPA and the identification at clause 5 in the EA of the obligations of the second defendant. Its principal submission was that the transaction being a mortgage transaction, the agreement ought to have been interpreted having regard to section 3 of the SPA and clause 3 and 5 of the financial addendum, and once that is done the unquestionable conclusion would be that the claimant was to have made only two payments and the drawn down on these payments by the developer did not have to coincide with the milestones at section 2 of the SPA.

Contractual Interpretation

[20] The vexing issues are the differing interpretation and import given to the clauses of the conjoined agreements by the various parties to it.

[21] The interpretation of their contractual obligation is to be derived from the objective common intention of the parties to the contract, which counsel for the claimant submits, on the authority of **Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570 at 574** is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

[22] I agree with counsel for the claimant that the cardinal rule on the intention of parties to contractual agreements is first derived by reference to the clear and unambiguous words used in the contract[i]. Chitty on contract provides thus:-

"*The cardinal presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand, that is to say the meaning of a document or of a particular part of it is to be sought in the document itself. One must consider the words used, not what one may guess to be the intention of the parties. However this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In principle the courts will*

look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man".

[23] It is with caution that the court must imply any terms into a written agreement, as to do so would make the terms thereof binding on an unsuspecting party and change the nature of the contractual relationship. If the court were to imply any such term it would be on satisfaction of the requirements contained in **BP Refinery (Westernport) Pty Ltd v Shire of Hastings**[1], namely that :—

a. It must be reasonable and equitable;
b. It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
c. It must be so obvious that it goes without saying;
d. It must be capable of clear expression; and
e. It must not contradict any express term of the contract.

[24] Clause 2 and 4 of the SPA and clause 8 of the financial addendum are the provision over which much of the controversy between the parties rests. The relevant parts of the clauses reads as follows:-

Clause 2 SPA

"Payment of the Purchase Price: Buyer agrees to make the following payments against the purchase price:

Payment	***Due Date***	***Amount***
Priority Reservation Deposit USD$2500	*Paid/Refunded*	

[1] (1978) 52 ALJR 20 at 26

Initial Deposit USD$20,000	*Upon execution of the Reservation Agreement or this Agreement by Buyer PAID*	
30% of Purchase Price (less the Deposit previously paid by Buyer)	*Within 7 days after execution of this agreement by Buyer*	*USD$263500*
0	*Upon completion of foundation pouring for the building within which the Unit will be located*	*$ 0*
0	*Upon commencement of the roofing for The building within which the Unit will be Located*	*$ 0*
Balance of Purchase Price plus all remaining sums due by Buyer under this Agreement	*At Closing (as defined in Section 10)*	*USD$661500*

All deposit payments are collectively referred to as the "Deposit" or "Deposits". Deposits must be made by wire transfer to the escrow agent. The balance due at closing must be paid by wire transfer in United States. Unless otherwise agreed if the buyer fails to pay any deposit obligated to do, buyer will pay a late funding charge equal to interest on such deposit at a rate equal to 8% plus the prime lending rate per annum then applicable in St.Lucia....."

Clause 4 SPA

"….buyer acknowledges and agrees that all the Deposits will be released from the escrow agent to the seller upon receipt upon a written request from the seller to the escrow agent together with written confirmation that the respective construction milestones set forth in section 2 have been satisfied, provided however that at all times at least 5%of the Purchase Price shall remain in escrow with the escrow agent. At closing any deposits not previously disbursed to the seller, will be released to the seller. Any interest earned on the deposits shall accrue solely to the benefit of the seller, and shall not be credited against the Purchase Price of the unit. No interest will assume to be earned.

Clause 8 Financial Addendum

"In the event Buyer waives with written notice to seller, the financial contingency or obtains a financing commitment and does not terminate the purchase agreement, the buyer shall be under no obligation to pay any additional deposits, interest or fees until closing. Seller shall be obligated to fund the construction of the unit at its sole costs including any interest charges incurred during the construction period".

[25] I am not persuaded that either of the defendants have overcome the requirements of **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** *(ante)* to allow the court to imply into the agreements terms other than what is provided. I am satisfied that the words of the agreements read clearly and unambiguously, such that there is no need to read into it any clarifying words.

[26] To give the agreements the meaning that the defendants have ascribed to it will produce a commercially absurd result, removing any obligation or contractual responsibility of the second defendant/escrow agent to the claimant, which could not be the intention of the parties or the comfort and assurance the EA intended to give the claimant.

[27] I am satisfied having read the SPA, EA and Service Contract that:—

(a) The broad objective of the escrow agent, provided at clause F of the EA, was for the purpose of enhancing the depositor's real estate transaction;

(b) Provided the buyer with written notice to the seller waived the financing contingency or obtained a financing commitment and did not terminate the Purchase Agreement, the buyer under the financial addendum was under no obligation to pay any additional deposits, interest or fees until closing. The seller was obligated to fund the construction of the unit at its sole costs, including any interest charges incurred during the construction period.

(c) Where the buyer had provided no such notice, clauses 2 and 4 of the SPA would prevail which clauses provided for the deposits to be released from the escrow agent to the seller (1) upon a written request from the seller together with (2) written confirmation that the construction milestones set forth in clause 2 had been met.

(d) I am satisfied that the fact that this was a mortgage transaction was relevant to these proceedings, as it was because it was a mortgage transaction with secured financing that the parties agreed there would not have been a need, until closing, for additional disbursements other than those already made.

[28] In conclusion I find :−

(a) That provided the buyer with written notice to the seller waived the financing contingency or obtained a financing commitment and did not terminate the purchase agreement, the financial addendum provided that such buyer was under no obligation to pay any additional deposits, interest or fees until

closing. The seller was obligated to fund the construction of the unit at its sole costs, including any interest charges incurred during the construction period.

(b) With regard to the deposits already paid, disbursements on them to the developer were to have been made consistent with clause 4 of the SPA namely; upon written request and confirmation of construction milestones.

(c) I find that the second defendant/escrow agent would have been taken to have had knowledge of the SPA when by reference the service agreement was made to form part of the SPA.

(d) I therefor find merit in the submissions of the claimant and direct that clause 2 and 4 of the SPA and clause 8 of the Financing Agreement be read in their natural and ordinary meaning.

(e) Further I award costs to the claimant in the sum of $750 to be paid on or before the 10th April, 2013, at which time the court will undertake further case management of the proceedings.

V. Georgis Taylor-Alexander

[i] Chitty Law of Contract (Volume 1 , 2004) at 12-043