EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: AXAHCV2012/0045

BETWEEN:

HALLMAN HOLDING LIMITED

Claimant

and

[1] JAMES RONALD WEBSTER
[2] CLEOPATRA LEOLA WEBSTER

Defendants

Appearances:

Mr. William Hare with him, Mr. Alex Richardson and Ms. Sinead Harris for the Claimant
Ms. Joyce Kentish-Egan with her, Mr. Kerith Kentish for the Defendants

---

2013: January 28;
March 22.

DECISION

[1] CENAC-PHULGENCE M [AG]: This decision concerns a notice of application with supporting affidavit and certificate of exhibits filed by the claimant on 1st October 2012 for the entry of summary judgment against the defendants.

Background Facts

A. The Claim

[2] The claimant, Hallman Holding Limited ("Hallman") is a limited liability company registered under the Laws of Anguilla. The defendants ("the owners") are the registered owners of Block 99315 Parcel 71.

[3] By an Agreement in writing dated 30th July 1984 ("the Agreement"), Hallman and the owners agreed as follows:

1. That Hallman would enter into immediate possession of the said land for a period of 50 years from the date hereof on the payment of the sum of Forty Thousand Dollars United States currency (US$40,000.00) (the receipt of which was acknowledged by the owners).

2. That the owners will grant to Hallman the option to purchase the said land at any time within the said period of 50 years upon payment of the sum of Ten thousand dollars United States currency (US$10,00.00).

3. That the owners would upon the exercise of the option cause the said land to be registered in the name of Hallman.

In the preamble to the agreement it states: "AND WHEREAS the Company is desirous of purchasing the said land".

[4] The claimant, Hallman avers that it was an implied term of the contract that the owners would not part with ownership of the land or allow it to become encumbered during the 50 year period which they have termed the Option Period so as to frustrate the acquisition and exercise of the Option and/or if the land should become encumbered, the owners would remove the said encumbrance on demand.

[5] Hallman says that the owners in breach of the Agreement, allowed or permitted a third party to register a judgment against the land resulting in the land now being encumbered by a charge in the sum of US$158,666.66 in favour of Hotel de Health (Caribbean) Inc. The charge was registered on 12th September 2005.

[6] By letters dated 9th July 2007 and 11th August 2011, Hallman avers that it wrote to the 1st defendant and the defendants requesting inter alia confirmation that the defendants would cause the Charge to be removed which they have failed to do.

[7] Hallman says that it *wishes to exercise* the Option to purchase and *is willing and able to pay* the purchase price which they say is the further US$10,000.00 mentioned at clause 2 of the agreement.

[8] Hallman filed a claim form on 19th June 2012 in which it claims against the defendants specific performance of the Agreement and to the extent that the owners may not be able to perform the agreement within 14 days, Hallman seeks an order that it is entitled to remove the charge by paying the charged sum on behalf of the owners, that upon such removal, it be registered as the legal owner of the land and damages be awarded against the owners for the sum of US$148,666.00 representing the sum paid to discharge the Charge less the purchase price.

B. The Defence

[9] The defendants filed their defence on 30th July 2012. The defendants admit that they entered into the Agreement dated 30th July 1984. The defendants say that it was not an implied term of the Agreement that they would not allow the land to become encumbered during the option period, so as to frustrate the acquisition of the option and that if the land did become encumbered they would remove the encumbrance on demand. The defendants state that they were under no contractual duty to guard the land register to prevent the entry of encumbrances by a third party.

[10] The defendants deny that they allowed or permitted a charge to be registered against the land as the amount of the charge represents an amount awarded as prescribed costs to Hotel de Health (Caribbean) Inc. on a claim against the defendants for specific performance.

[11] The defendants admit that they received the letters from Hallman but deny that they breached the Agreement.

[12] The defendants further assert that Hallman has shown no interest in and took no steps to exercise the option.

[13] The defendants say that the claimant failed to exercise the option and therefore the defendants deny that the claimant is entitled to specific performance of the Agreement.

The Application for Summary Judgment

[14] The claimant filed a notice of application supported by the affidavit of Ana Bryan and Certificate of Exhibits on 1st October 2012.

[15] By the said notice of application, the claimant applies for an order and declaration pursuant to Part 15 of the Civil Procedure Rules 2000 ("CPR") that:

(1) The defendant be required to cause the removal of a charge in the sum of US$158,666.66 in favour of Hotel de Health (Caribbean) Inc. from the land registered as Block 99315 B, Parcel 71.

(2) The defendants be required specifically to perform the Agreement in writing dated 30th July 1984 for the purposes of the granting of an option to purchase the land.

(3 If the defendants fail to cause the charge to be removed within 14 days, the claimant shall be entitled to cause the removal of the charge, tender the purchase price i.e. US $10,000.00 and be entered in the land Registry as the legal owner of the land.

(4) There be judgment on liability against the defendants with damages to be assessed.

(5) Costs to be assessed if not agreed.

[16] The grounds of the application are stated as being that (1) the defendants have no real prospect of defending the claim, (2) the facts upon which the claimant relies have been admitted by the defendants and/or proved by the claimant and (3) the only matters in dispute are straightforward matters of law, which the court may justly and appropriately decide upon hearing brief submissions from both parties.

Affidavit In Support of Application

[17] In its affidavit in support at paragraphs 13-28 the claimant deals with the defence. The claimant says that the defendants have no prospect of successfully defending the claim. They say that the defendants have admitted receiving the correspondence referred to in the statement of claim requesting inter alia confirmation that the defendants would cause the charge to be removed.

[18] The claimant says that the assertion by the defendants at paragraph 10 of their defence that they neither admit or deny that the claimant wishes to exercise the option to purchase and is willing and able to pay the purchase price to the defendants and further that for the past 28 years the claimant has not entered into possession of the land, has shown no interest in it and took no steps to exercise the option is contradicted by the defendants' own correspondence.

[19] The claimant says that all the issues of fact which make up the claim have been admitted by the defendants and/or are easily provable by the claimant and the defendants have no prospect of disputing the facts.

[20] The claimant says further that the defence contains bare denials of the claimant's legal rights and/or the claim.

[21] The claimant at paragraph 27 of the affidavit of Ms. Bryan filed in support of the application says that there is no possible construction of the Agreement by which the Court could surmise that the claimant's entitlement to exercise the option was dependent on its having entered into possession of the land. Accordingly, it is of no relevance to the claim whether the claimant in fact entered into possession of the land.

[22] The claimant suggests at paragraph 27 of the affidavit that the defendants do not have a real prospect of success in disputing the existence of the implied terms to the Agreement. The law they say implies a term into the contract where the term to be implied represents the obvious, but unexpressed, intention of the parties and/or the implied term is necessary to give business efficacy to a contract. An agreement to grant an option over land exercisable during a certain period must, the claimant says, imply that the owner of the land cannot sell the land or otherwise encumber the land in such a way as to frustrate the purchaser from exercising his option to purchase the land. The defendants they say have no realistic prospect of being able to rebut this.

The Principles Applicable to Summary Judgment Applications

[23] CPR 15.2 deals with summary judgment. It states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the –
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
> (b) defendant has no real prospect of successfully defending the claim or issue".

[24] Rule 15.5 details the court's powers on an application for summary judgment. This rule states that the court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end. If the proceedings are not brought to an end the court must treat the hearing as a case management conference.

[25] An application for summary judgment is decided applying the test whether the defendant/respondent has a real prospect of success, which is considered having regard to the overriding objective of dealing with cases justly.[1]

[26] In Swain v Hillman,[2] Lord Woolf said that the words 'no real prospect of succeeding' did not need any amplification as they speak for themselves. The

[1] Blackstone's Civil Practice 2011 at para. 34.10, p. 490.

word 'real' directed the court to the need to see whether there was a realistic, rather than a fanciful, prospect of success. The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is 'bound to be dismissed at trial' Nor does it require compelling evidence, but simply enough evidence to raise a real prospect of a contrary case.[3]

[27] In St. Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste, George-Creque JA put it this way:

> "…the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether the claim or defence has a real prospect of success"[4]

[28] Summary judgment applications have to be kept within their proper role. They are not to dispense with the need for a trial where there are issues which should be considered at trial. In other words, such applications should not be mini-trials.[5]

[29] Saunders CJ [Ag.] in Bank of Bermuda Ltd. v Pentium (BVI) Limited,[6] said that a matter should not be allowed to proceed to trial where the defendant has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defending the claim brought by the claimant. In response to an application for summary judgment a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untriable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.

---

[2] [2001] 1 All ER 91.
[3] Blackstone's Civil Practice 2011 at para. 34.10; Korea National Insurance Corporation v Allianz Global Corporate and Specialty AG [2007] EWCA Civ. 1066, LTL 30/10/2007.
[4] St. Lucia Civil Appeal No. 8 of 2009 at paragraph 21, (delivered 11th January 2010.
[5] See Lord Woolf in Swain v Hillman; Blackstone's Civil Practice 2011 at para. 34.10, p. 491.
[6] BVI Civil Appeal No. 14 of 2003, delivered 20th September 2004 at paragraph 17.

The Submissions and Analysis

[30] Hallman identifies two main issues for discussion. The first of these is the construction of clause 2 of the Agreement. Clause 2 is set out at paragraph 3 above. The claimant's construction of this clause is that it grants an option to purchase the land which may be exercised by further payment of the US$10,000.00. The claimant submits that the defendants' construction of clause 2 is that it "grants an option to purchase an option to purchase the land, which may be exercised by the further payment of US$10,000.00". The defendants, in their submissions both written and oral, say that they have never made the suggested construction as proffered by the claimant as regards the construction of clause 2. Whether there is a fundamental difference between the two constructions is open to discussion.

[31] The claimant speculates in its submissions that what the defendant appears to be contending is that the Agreement envisages three transactions: (1) a licence for occupation (acquired for US$40,000.00); (2) the grant of an option to purchase (not yet acquired but available for US$10,000.00) and (3) a purchase of the land if the option is exercised. The defendants have however not put any such interpretation or construction forward.

[32] The claimant refers to the dicta of Lord Hoffmann in Investors Compensation Scheme Ltd. v West Bromwich Building Society[7] and the rules of construction stated therein. The claimant also relies on the case of Rainy Sky SA and others v Kookmin Bank[8] where Lord Clarke stated that 'if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other …' At paragraph 43 of the judgment, Lord Clarke went on to say that if the language is capable of more than one construction, it is not necessary to conclude that a particular construction would produce an absurd or irrational result having regard to the commercial purpose of the agreement. He further stated that it is quite possible that neither

[7] [1997] UKHL 28.
[8] [2011] UKPC 50 at para 21.

meaning will flout common sense, but that, in such a case, it is much more appropriate to adopt the more, rather than the less, commercial construction.

[33] Paragraphs 12 and 13 of the claimant's submissions I believe encapsulate the gravamen of the claimant's contentions as regards this issue. They say:

> "12. … On the Defendants' analysis, therefore, any option granted pursuant to the Agreement would have no definite period for its exercise and no defined price. The Agreement does not contain any mechanism to determine the terms of the option, such as price and period for exercise. Consequently, the Defendants appear to be contending for an interpretation of clause 2 of the Agreement by which it would be a wholly unenforceable "agreement to agree". The Defendants' construction would deprive clause 2 of any sensible commercial purpose and would run contrary to the principles of contractual interpretation.
>
> "13. …it was the clear and obvious intention of the parties that clause 2 should grant an option to the Claimant to purchase the land at any time within a fifty year period on the payment of a further sum of US$10,000.00. Clause 3 creates an obligation on the part of the Defendant to register the transfer of the land *should the Claimant wish to exercise that option*. …the parties could not have intended to enter into an unenforceable agreement to agree and to interpret the Agreement in that manner would have the effect of removing any commercial sense from these clauses …" (emphasis mine)

[34] The defendants admit (1) that the Agreement is a contract of option; (2) that as a contract of option the Agreement is sui generis; (3) the option in the Agreement amounts to an offer that cannot be withdrawn to purchase Parcel 71; (4) the option in the Agreement does not constitute a contract for the sale of Parcel 71; (5) a contract for the sale of Parcel 71 is constituted when the claimant accepts the offer by exercising the option and (6) a grantee of an option must comply strictly with the conditions stipulated for its exercise. The claimant they say has failed to exercise the Option in accordance with clause 2 of the Agreement and by this default has failed to trigger a binding contract for the sale of Parcel 71.

[35] The defendants reject the classification made by the claimant of the US$40,000.00 as the 'Option Price' and the US$10,000.00 as the 'Purchase Price'. On a proper construction of the Agreement, the sum of US$40,000.00 they say, was the

consideration to be paid by the claimant for the grant of a right to enter into immediate possession of Parcel 71 for 50 years. They say that the language of clause 1 is clear and unambiguous and does not argue for a contrary interpretation. This appears they argue to be in essence an agreement for a lease of Parcel 71 for a term of 50 years on an accelerated lease payment with an option to purchase the land at any time during the 50 years.

[36] The defendants submit that the US$10,000.00 referred to at clause 2 of the Agreement is precise and unambiguous and conveys clearly that the parties intended that sum to be the Option Price and intended the Option to be exercised on payment of US$10,000.00. If that is the case, they argue, the claimant never exercised the Option by the payment of the US$10,000.00 (a fact which is evident from paragraph 7 of the statement of claim) and therefore a contract for the sale of Parcel 71 has not been constituted. They further submit that if they are wrong and the US$10,000.00 represents the purchase price, the claimant has still not exercised the Option to purchase Parcel 71 by payment of the purchase price. The Option they say has not been exercised.

[37] Blackstone's Civil Practice 2011 sets out the rules of construction of contracts as follows[9]:

> "The main rules of construction [of written terms] are:
> (a) the ordinary meaning should be given to the words unless:
> …
> (b) words should be construed so as to avoid absurd or inconsistent provisions as the parties cannot have intended that the contract should be absurd or inconsistent;
> (c) the whole contract will be considered so that individual words and phrases are considered in their context, and any recitals may be used as a guide to the interpretation of the operative parts of a contract;
> (d) …
> (e) …"

[9] At para 86.22, pp. 1399-1400.

[38] The function of the court is to decide the objective intention of the parties. The question is not what the parties understood the words or document to mean but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[10]

[39] Applying the applicable rules of construction and starting by applying the ordinary meaning of the words in the Agreement, I agree with the submission of the defendants that there is no ambiguity in the words expressed therein. The Agreement at clause 1 grants the claimant a right to enter into possession of Parcel 71 for 50 years on payment of US$40,000.00 which as stated in the Agreement had been paid by the claimant. Clause 2 is very clear as it stipulates that on payment of the further sum of US$10,000.00 at any time during the 50 years, the defendants would give the claimant the option to purchase Parcel 71. There is no ambiguity in this clause. Clause 3 is also clear in that upon the exercise of the option, i.e. on payment of a further US$10,000.00, the claimant is entitled to have the land registered in its name and the defendants would cause this to be done. It may not be the most elegant draft but the Agreement in my opinion is clear as to how the option is to be exercised and once exercised, what should occur.

[40] The issues which such an interpretation would raise are (1) the nature of the Agreement, whether it is contract for the sale of land or whether a lease with an option to purchase with the contract for sale becoming effective on the exercise of the option to purchase. It further raises the issue as to whether the claimant has exercised the option to purchase. This is not a matter which should be decided summarily. I therefore do not agree with the claimant's submissions that the only dispute is what the Agreement means and that this can be decided summarily without a trial.

[10] Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896.

[41] Although the issue of the construction of the terms of the Agreement is clear as to how the Agreement is to operate, there is a need to look at the nature of the Agreement, on which the claimant and defendants differ and this cannot be done summarily on a summary judgment application.

Implied Term

[42] The second issue identified by the claimant is that of the implied term. The claimant contends that it is an implied term of the Agreement that the defendants would not part with ownership of the land or allow it to become encumbered during the Option Period i.e. the 50 year period, so as to frustrate the occupation and exercise of the option to purchase the land and/or that if the land becomes encumbered would remove the said encumbrance on demand.

[43] In Blackstone's Civil Practice 2011,[11] it states that a term is implied into a contract (a) to reflect the actual intention of the parties and (b) to give business efficacy to the agreement – the terms which the court presumes the parties would have expressed if they had considered the position and (c) by law-not as a result of the actual or presumed intention of the parties, but as a result of general considerations of policy.

[44] The claimant submits that the law readily implies a term into a contract where the term to be implied represents the obvious, but unexpressed, intention of the parties and/or if the implied term is necessary to give business efficacy to a contract. They say that an agreement to grant an option over land exercised during a certain period of time must necessarily imply that the owner of the land cannot sell the land or otherwise encumber the land in such a way as to frustrate the purchaser from exercising his option to purchase the land with good title. The claimant refers to Re Crosby's Contract[12] as support for the position advanced.

[11] At para 86.29.
[12] [1949] All ER 830.

[45] The claimant goes on to express an alternative view as put forward by Stephen Tromans in his article "Options: Safe as Houses" ,[13] in which Tromans essentially says that since a mortgage is a readily removable defect, the grantor of the option can raise money without being in breach of any term of the option ipso facto. Tromans goes on to say that in this case the grantor of the option must be prepared to discharge the mortgage or charge in the event the option is exercised. In other words, Tromans says, it would be difficult to imply a term against creation of a mortgage or charge into the option itself, but the continued existence of a mortgage or charge might constitute a breach of the contract of sale in the event of the option being exercised.

[46] The views expressed by Tromans in his article do not suggest implying a term into the contract or Agreement such as suggested by the claimant as he seems to make a distinction between exercised and unexercised option agreements.

[47] The claimant says that even if the alternative view is favoured, the defendants' failure to respond to the claimant's request for confirmation that the defendants would remove the charge means that the relief it seeks ought to be granted.

[48] The defendants for their part submit that such an implied term is not warranted in order to complete the bargain made and to secure to the claimant the full benefit of the rights bargained for. They further submit that whether it is necessary to imply such a term is a matter of mixed law and fact which requires ventilation at a trial. The defendants say that it is a fallacy that the charge frustrated the acquisition or exercise of the option. In oral submissions, counsel for the defendants stated that all the claimant had to do was exercise the option, pay the US$10,000.00 and then what is there to indicate that the charge would not have been removed?

[49] I agree fully with the defendants that this is not an issue which can be dealt with on a summary judgment application. In any event, if it could be, there is still the issue as to whether a breach of such an implied term would entitle the claimant to

[13] (1984) 43 CLJ 55 at 73.

specific performance and the other reliefs which it claims. This is solely a matter for trial.

The Defence

[50] The defendants' defence is premised on the main point that the claimant has failed to exercise the option to purchase and by so doing has failed to trigger a contract for the sale of Parcel 71. They contend that they have a real prospect of successfully defending the claim on this ground and also on the basis that they have committed no breach of the Agreement to give rise to a claim for specific performance. The defendants further contend that they have done nothing to revoke the option to purchase and therefore the claimant has not acquired a cause of action to sue for specific performance of the Agreement. From reading the pleadings and written submissions the claimant has not shown that it has exercised the option but instead has indicated that it is willing to exercise the option. In oral submissions, counsel for the claimant indicated that the option had not been exercised but they had expressed their interest in exercising the option on condition that the charge was removed from the land and that they were willing to exercise the option. It has to be left to trial to determine whether the claimant's expression of a willingness to exercise the option brought to the attention of the defendants sufficed for the purposes of the Agreement.

[53] On an application for summary judgment as discussed above, all the defendant is required to show is that they have a real prospect of success; enough evidence to raise a real prospect of a contrary case. I cannot say that the defendants have raised a fanciful defence or that they do not have a realistic prospect of success. The matters raised by the claimant are not the only issues which the claim raises and at least the issue of the implied term and whether the claimant is entitled to specific performance are all issues which can only properly be ventilated and dealt with at a trial.

Conclusion

[54] The nature of this case does not lend itself to summary judgment being granted and the claimant has failed to make out a case for the grant of summary judgment. In Co-operative Insurance Society Ltd. v Argyll Store (Holdings) Ltd.,[14] it was said that specific performance as a remedy requires an exceptional case and the same applies on an application for summary judgment. The mere fact that the claimant and defendants have divergent views on the interpretation of the Agreement seems to suggest that summary judgment is inappropriate at this stage.

[55] I find that this is not a case which lends itself to the grant of summary judgment as there are matters of law and of mixed law and fact which cannot be summarily dealt with without a trial on the issues.

[56] In the circumstances, the application for summary judgment is dismissed. Costs to the defendants to be assessed, if not agreed within 21 days of the date of this judgment.

[57] I am grateful to counsel for their helpful submissions.

Kimberly Cenac-Phulgence
Master [Ag.]

[14] [1998] AC 1.