THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: AXAHCV2013/0023

Between

ANGUILLA DEVELOPMENT CORPORATION LTD

Claimant

And

CREDIT SUISSE A.G. CAYMAN ISLANDS BRANCH

Defendant

Before:
Justice Cheryl Mathurin

Appearances:

Ms. Tara Carter and Ms. Jacinthe Jeffers for the Claimant

Mr. Gerhard Wallbank and Ms. Rayanna Dowden for the Defendant.

2016: April 25th; 26th; May 6th

July 22nd

JUDGMENT

[1] MATHURIN, J.; Flag Luxury Properties Golf Course Project (Temenos) was originally intended to be a world class resort destination comprising an 18 hole golf course designed by world renown golfer Greg Norman, 32 suites and 66 residences. Regrettably, Temenos fell into financial difficulties and in 2010, a Receiver (Mr. Tacon) was appointed by Credit Suisse AG Cayman Islands Branch (Credit Suisse) to sell the project and the sale was to be by way of public auction.

Mr. Tacon also worked with the real estate brokers of Credit Suisse, CB Richard Ellis Inc and Smiths Gore BVI (the brokers) in preparation for the sale.

[2] The property comprised 36 acres of fee simple land and 239 acres of land under 125 year leases to several owners. At the time of Mr. Tacon's appointment the golf course and club house were completed and the resort and residences were in various stages of construction. There was a completed Reverse Osmosis/Desalination Water Plant which supplied water for irrigation of the golf course and landscaping, a Central Energy Plant which was substantially completed and a Central Laundry and Housekeeping Building which was partially constructed.

[3] To facilitate interested buyers, the brokers launched an internet data room comprising documents relative to the sale. These documents included sales agreements, copies of agreements, summaries of leases, land registers and other relevant sales information and brochures. In the Glossary in the Sales Brochure, Sales Brochure is defined as comprising the Offering Memorandum, Notice of Sale by Public Auction, Glossary, Auction Conduct Conditions, Conditions of Sale, Special Conditions of Sale, Written Bid Form and Sales Memorandum including any supplement to it.

[4] The property was eventually advertised for sale by Public Auction which took place on 7th June 2011 and the Claimant, Anguilla Development Corporation Ltd (ADC) placed the successful bid and closed the sale on the 25th August 2011. The representatives of the Credit Suisse and ADC executed the Sales Memorandum after the bidding. Several issues arose out of the sale between the parties culminating in this claim by ADC for damages for breach of contract, gross negligence and acting in bad faith.

Outstanding Rent due to Viola Richardson

[5] ADC alleges that Credit Suisse failed to disclose in documents available to interested purchasers in the data room, the existence of outstanding lease payments to Ms. Viola Richardson for the period 2007 to 2011. Ms. Richardson made a claim for unpaid rents to ADC through her lawyers in February 2012. This claim was paid by ADC in the sum of US$67k. ADC states that the Ground Lease Abstracts, the data room and the Sales Brochure with terms and conditions all materially misrepresented the facts. ADC also alleges that other landlords were paid outstanding rents.

[6] ADC says in this regard that Credit Suisse owed it the following duties

(a) a duty to inquire and disclose in the Data Room, Ground Lease Abstracts or sale documents, the fact that Viola Richardson had been owed rent from 2007 to 2011 during the period of the Receivership which commenced in February and March 2010.

(b) a duty to give notice to all lessors during the period of Receivership to determine outstanding rents

(c) a duty to ensure that such outstanding payments were made to settle the outstanding rents of Viola Richardson.

Counsel also submits that the Receiver appointed by Credit Suisse, Mr. William Tacon was under a duty to discover whether there were any rents outstanding and to discharge them in accordance with the duties of a receiver under Registered Land Act; section 73(8(a) requiring him to apply all money received by him in discharge of all rents affecting the charged property. The requisite section states that other than insurance money;

> *"the receiver shall apply all money received by him in the following order of priority-*
>
> *(a) in discharge of all rents, rates, taxes and outgoings whatever affecting the charged property;"*

[7] It is ADC's view that the Data room was a comprehensive and all-inclusive data base of every detail touching and concerning the property and auction and consequently, they were entitled to rely on the database as a reliable source of information with respect to the status of the leases and their payments. ADC states that as such Credit Suisse failed to disclose all the pertinent documentation with regard to the leases and rents owed to lessors.

[8] Mr. Tacon countered in cross examination that it was not the duty of the Receiver to seek out arrears of or amounts due to creditors if they are invited to make claims. He also stated that he invited all known creditors to submit claims and he also advertised his appointment. He stated that all the rents he was aware of were discharged and he could not discharge amounts due to persons he was not aware of. Mr. Tacon added that as receiver he took all reasonable steps to ensure that all creditors of Temenos were identified by the publication of his position, the significance and public knowledge of the sale and additionally liaising with Ms. Juliana Gumbs who was the person responsible for keeping the accounts at Temenos. Mr. Tacon said he was only made aware of the outstanding rents to Ms. Viola Richardson in November 2012 some 15 or 16 months after the auction. He agreed that also that on the eve of the auction in June 2011, Ms. Valerie Banks made a claim for outstanding rent and the claim was investigated and settled.

[9] Credit Suisse states that it owed no duty of care to the Claimant when there were several clauses in the Sales Brochure requiring that any buyer do their own investigation. Mr. John Benjamin QC who was legal counsel for ADC for over 10 years agreed that in several places in the Sales Brochure, Credit Suisse disclaimed the sellers' responsibility and put the burden on the buyer to conduct due diligence. He however also stated that certain things ADC could not investigate as they were totally under the seller's control. While he also stated that rents were not disclosed and there was no way of finding out rents due and owing, he admitted that it would have been prudent for a buyer to ask for an estoppel certificate; this is a document that could be signed by a lessor affirming that there are no outstanding rents.

[10] Mr. Benjamin QC in his evidence indicated that he was also aware of the general disclaimer in the Sales Brochure which stated as follows;

> "*We obtained this information from sources we believe to be reliable, however, we have not verified its accuracy and make no guarantee, warranty or representation about it. It is submitted subject to the possibility of errors, omissions, change of price, rental or other conditions, prior sale, lease or financing, or withdrawal without notice. We include projections, opinions, assumptions or estimates for example only and they may not represent current or future performance of the property. You and your tax and legal advisors should conduct your own investigation of the property and transaction. This offering memorandum is subject to the terms outlined in the confidentiality agreement."*

[11] Mr. Benjamin QC also indicated his awareness of Clause 5.4 of the Sales Brochure which stated;

> *"The Charged Property is also sold subject to such of the following as may affect it, whether they arise before or after the Contract Date and whether or not they are disclosed by the Seller or are apparent from inspection of the Charged Property or from the Documents…*
>
> *(f) outgoings and other liabilities;*
>
> *(h) matters that ought to be disclosed by the searches and enquiries a prudent buyer would make, whether or not the Buyer has made them;*
>
> *(i) anything the Seller does not know and could not reasonably know about."*

[12] "*Charged Property*" is defined the Conditions of Sale in the Sales Brochure as *"The parcels described collectively in the Special Conditions (at paragraph 6.7) as the Charged Property which is offered for sale "as is", "where is" and "with all faults", without any warranties, express or implied. By bidding for the Charged Property, Buyer represents that he has personally inspected it and accepts it "as is"," where is', "with all faults" and without any warranties."*

[13] Clause 6.7 lists all the properties which comprise Temenos together with all rights of way and easements appurtenant thereto.

[14] Clause 6.8 of the Brochure provided that;

> *"By bidding for the Charged Property, you represent that you have either personally inspected and understood the contents of the Data Room and its contents and have made all such other enquiries and investigations as would be undertaken by a prudent purchaser or that counsel qualified to advise you has done so on your behalf."*

[15] I am not persuaded by ADC's assertion that there was no means of finding out about whether or not any rent was outstanding on the ground leases and I am not satisfied that due diligence would not have revealed this to a prudent buyer. A cursory perusal of the Land Register would have revealed the existence of a lease agreement which was open to inspection by all. Further, ADC as proprietor, is also deemed to have notice of every entry in the register relating to the lease. In my view, prudence and diligence, given the significant value of the transaction and the specific disclaimers in the Sales Brochures and other documents, ought to have dictated further enquiry by any prudent buyer. It is difficult to see how no one thought in circumstances where a significant portion of Temenos was leasehold property, that the issue of rent needed further inspection or that it couldn't reasonably be known about in circumstances where Anguilla has a registered land system. From the evidence, most of the ground leases were with the Government of Anguilla with only three or four other landlords including Viola Richardson having registered leases in accordance with the Registered Land Act.

[16] That being said, the Sales Agreement and other documents indicate that the Agreements were entered into with the clear intention that the Buyer should conduct its own searches to verify the information included in the Sales Agreement and Data Room. It does not appear that this was done. As Mr. Benjamin QC Counsel for ADC admitted, a prudent buyer could have sought and obtained an estoppel certificate. They did not do so. Moreover, ADC has led no evidence that the clear disclaimers of liability in the Agreements are invalid or were displaced. I am therefore not of the view that in all the circumstances, there is any evidence to support the Claim herein for breach of contract, gross negligence or bad faith.

Generators

[17] ADC also claims that during a tour of the charged property in 2009, representations were made that 4 generators, valued at US$350k each were being sold with the project but when they took possession of the property at closing in August 2011, the generators were not on the property. ADC claims that Credit Suisse breached its duty in representing that the generators would be sold with the property and selling them instead to another party in advance of the auction. ADC asserts that there was a reasonable expectation that the sale included the generators that were seen on the tour.

[18] ADC relies on the evidence of Mr. Stephan Zaharia, (General Manager and Vice President of ADC). Mr. Zaharia stated that he knew that the generators were for sale because of representations that were allegedly made by a Mr. Rosmund Davis when Mr. Rizzuto (Director and Owner of ADC) and himself conducted a tour of the property at some time in January 2010. ADC contends that Mr. Davis held himself out to be the representative of the receiver. Mr. Zaharia stated further that during the tour, Mr. Davis showed him 4 generators and he understood from Mr. Davis that the generators were critical to the golf course and reverse osmosis plant which supplied water for the golf course. Neither Mr. Davis nor Mr. Rizutto however, gave evidence at the trial.

[19] Mr. Tacon to the contrary, stated Mr. Davis had worked for Temenos as Financial Director before he (Mr. Tacon) was appointed as Receiver. Mr. Tacon on cross examination, stated that Mr. Davis was not involved in the sale process beyond the sale of the Generators about which Mr. Davis had been approached by an interested party. Mr. Tacon states that he authorized Mr. Davis to negotiate that sale of the generators. He also stated that he authorized Mr. Davis to take interested persons on tours of the property. In essence he stated that Mr. Davis was not an agent of Credit Suisse or Mr. Tacon, except to the extent of selling the generators and taking interested parties on tour of the property. In any event, Mr. Tacon states if this did occur, it would have been before he was appointed as receiver.

[20] This is substantiated by a Deed of Appointment over the Charged Assets of Temenos dated the 1st February 2010 and a Deed of Appointment over the Charged Property of Temenos on the 30th April 2010.

[21] Additionally, Mr. Tacon states that on the 14th May 2010, ADC through its Vice President, Mr. Margulies entered into a Confidentiality Agreement as a precursor to the Sales Brochure and Data Room becoming available to them. Clause 7 of the Confidentiality Agreement states that the Broker (in this instance, CB Richard Ellis Inc. and Smiths Gore BVI) " *is the only party authorized to represent the Receiver with respect to the marketing and sale of the Property".*

[22] Further Clause 9 of the said Confidentiality Agreement states as follows;

> *"Prospect acknowledges that Broker has no power or authority to in any way bind the Receiver with respect to any sale or other transaction involving the Receiver. Neither the submission of the Confidential Information to Prospect nor any discussions, negotiations or other communications (whether written or oral) shall constitute any offer with respect to the Property. The Receiver shall in no way be bound or be deemed to have agreed to any such sale or transaction or be under any legal obligation to enter into a sale or transaction until such time (if any) as Receiver has executed and delivered a final written agreement to enter into any sale or transaction involving the Property under terms and conditions that are acceptable to him in his sole discretion. Accordingly, until such an agreement might be so executed and delivered (if ever), any such negotiations, discussions or communications shall be nonbinding,…"*

[23] In signing the Confidentiality Agreement, Mr. Margulies also agreed at Clause 10 that;

> *"This Agreement constitutes the entire agreement among Prospect, Broker and Receiver (Receiver being an intended beneficiary of this Agreement) relating to the matters set forth herein and supersedes any and all prior or contemporaneous understandings among the parties hereto with respect to the subject matter hereof. This Agreement shall not be amended, modified or supplemented except in writing executed by the parties hereto and shall be binding upon the parties hereto and their successors and assigns."*

[24] Based on the clear terms of the Confidentiality Agreement that established the relationship between ADC and the brokers in relation to the Charged Property, it seems to me that any terms relating to the sale of Temenos resided in the hands of the Receiver in his sole discretion after his appointment. All parties who signed the Confidentiality Agreement and thereby gained access to the Data Room and sales documents, agreed that any previous discussions and negotiations were superseded by that agreement. It is difficult in these circumstances to see how any representations made to anyone prior to the appointment of the Receiver could stand as binding on Credit Suisse. This is especially so in this case as it is accepted that these representations were made before the Receiver was appointed.

[25] Additionally, without repeating the Clauses in the Sales Brochure, the potential buyer was required to do his own inspections of Temenos. With no evidence that any tour or inspection of the property was done before the public auction in June 2011 over two years later, it is in my view, especially surprising seeing that the sale was on an "as is" basis. It is also significant that there is no mention of generators in the Sales Brochure or other documents.

Clause 4.17 of the Sales Brochure states that *"Reasonable care has been taken in the preparation of the Special Conditions to describe the Charged Property correctly. You should check that the description of the Charged Property in the Special Conditions is correct and note that neither we nor the Brokers nor the Seller are responsible for the accuracy of such information and you acknowledge that you are bidding based solely upon your own inspections, discoveries and other due diligence procedures…"*

[26] In these premises, I find it hard to see how ADC can rely on a view of the generators almost 2 years before, previous to the appointment of the receiver and indeed before the signing of the Confidentiality Agreement, to form an expectation that the generators formed part of the property up for public auction 2 years later. Further and importantly, the generators are not reflected as being part of the Charged property for sale. This is telling. Had the said generators that were of such critical importance to ADC as they allege and for which they claim a value of $1,400,000.00 been part of the intended sale, a prudent buyer have not only ensured that any pre-Receiver representations still stood, or at the very least, would have inspected the property to ensure that they were there before bidding.

[27] There being no evidence that any of these steps were taken, ADC cannot now state in the face of the established facts and terms of the diverse agreements, without more, that they relied on the representations of Mr. Davis as binding upon Credit Suisse. Similarly, the allegations that Credit Suisse was in breach of the Sales Agreement or acted in bad faith are also untenable. It was the Buyer's responsibility to ascertain whether the generators formed part of the Sales Agreement. The evidence is that they were sold well before the public auction in June 2011.

Additional Expenses

[28] ADC also alleges that immediately before the closing, Credit Suisse submitted a claim for a sum of US$917,853.00 for the period 7th June (the date of auction) to 24th August 2011(the closing date), in addition to the agreed auction price of US$15,000,000.00. ADC states they paid this sum under duress and with the belief that the sale would not have been concluded. That sum included charges for equipment repairs and other expenses, water production costs and electricity accrued between the auction date and closing date for the continued operation of the golf course. ADC also states that it was agreed Credit Suisse and ADC would each pay half of the costs of operating the golf course between auction and closing date.

[29] Credit Suisse contends that the Sales Brochure states that the agreed closing date was not to be earlier than five business days after the Aliens Land Holding Licence (ALHL) had been obtained. The closing date had been agreed at the 15th July 2011. The ALHL therefore needed to have been obtained on or before the 8th July 2011. By that date ADC had not obtained the ALHL and the sale could not be closed by the Buyer. Credit Suisse states further that failure to obtain the ALHL could have resulted in them terminating the agreement to sell to ADC.

[30] With respect to the expenses, the evidence in an email dated July 1st 2011 exchanged between Mr. Tacon, Mr. Margulies, Mr. Zaharia and Counsel in Mr. Benjamin QC's Chambers discloses that there was some understanding that the costs of the golf course would be shared for the period 1st July to the 15th July 2011 which was the anticipated closing date. This is not disputed by Credit Suisse.

[31] Credit Suisse also relies on the email of July 21st 2011 from Mr. Wiggin to Mr. Margulies, Mr. Zaharia, and Mr Benjamin QC wherein which Mr. Wiggin put forward the position of Credit Suisse as follows;

> *"3. If you do need additional time to complete your purchase as you have requested, we would assume such expenses would be paid commencing as of 15th July 2011. There are two reasons for this:*
>
> *(a) Firstly, any agreement by our client to meet any costs between contract and closing is a concession, since such costs are, under the terms of the sales contract, otherwise for your account (see Clause 5.40)*
> *(b) Secondly, your present prospective timetable for closing is already extended way beyond that contemplated by the sales contract and it is therefore reasonable to expect you to meet the continuing costs."*

Mr. Wiggin went on to add;

> *"For the avoidance of doubt, our clients' right to terminate the contract at any time, pursuant to clause 5.37(d) of the Contract, has already arisen. All our clients rights under*

that clause, and indeed under the Sale Contract as a whole, are reserved and are at this juncture in no way waived, modified or impaired by any agreements or understandings contained in this or any prior communications. Any variation will need to be the subject of a separate and specific agreement."

As Mr. Wiggin intimated in the July 21st 2011 email, any variation of the Sales Contract was required to be by specific written agreement executed by the parties. The evidence shows that there was only one written variation of the Sales Agreement on the 25th August 2011. This variation had the effect of omitting Clauses 5.36 and 5.37 from the Sales Agreement which relieved the buyer of the requirement to obtain the ALHL before closing. There are a few other variations; they do not impact on this matter or alter the position with respect to the costs between contract and closing.

[32] Credit Suisse submits that it subsequently found that the ALHL was delayed beyond the 15th July because of certain failures on the part of ADC. As such Credit Suisse reverted to the terms of the Sales Agreement whereby ADC would pay all costs of the golf course between auction and closing. They rely on the email of 26th July 2011 between Mr. Wiggin and Mr. Marguilis and copied to Mr. Zaharia where it was stated that;

"2. It appears clear to us that your client's failure hitherto to obtain an Alien Land Holding Licence is a consequence of, inter alia, your client's failure to accede to the terms known in advance of the sale by you, to the government's requirements. We reserve our right to maintain that position and to stand by the consequences that would flow from it in the event of termination of the contract, including forfeiture of the deposit.

3. All costs of the golf course since the contract date will fall to be reimbursed at closing pursuant to clause 5.40."

Clause 5.40 states as follows;

"Income and outgoings (including costs properly attributable to the Charged Property incurred from the Contract Date to the Closing Date which shall be borne by the Buyer) are to be apportioned as at the actual closing date."

[33] I note that there was not response from ADC in evidence to the 26th July 2011 email from Mr. Wiggin. The evidence however shows that the next time the closing costs were addressed was in an email dated 20th August 2011 from Mr. Wiggin to Counsel for ADC. Therein he wrote;

"Schedule of costs incurred since the contract date. The total shown on this schedule will need to be added to the amount payable on closing pursuant to sections 5.14 and 5.38 to 5.41 of the Contract….

Once I have sent this email I will telephone you to alert you to its arrival. I am happy to make myself available at any time over the weekend with a view to discussing any aspect of the above."

Additionally in this email, a draft of the Variation agreement was attached for the consideration of Counsel for ADC.

[34] Further, on the 24th August Mr. Griffin from Zolfo Cooper sent an email to Mr. Benjamin QC at 10:02AM with reference to the Closing costs in which he said;

"Further to our earlier telephone conversation, I attach the schedule detailing the income and outgoings which will be due from the purchaser at Closing. Assuming we close today, the amount due will be US$872,360.

In addition, interest is due between the Agreed Closing Date and the Closing Date. If we close today, the interest due will be US$45,493.15 (ie $13.5mm x 3.00% x41/365)

In summary, the total amount due if we close today will be US$917,853.15 plus the US$13.5mm."

On the 25th August 2011, a Manager's Check in the sum of US$14,417,853.15 was paid into Webster Dyrud Mitchell on behalf of ADC.

[35] The evidence in my view, the emails of 21st and 26th July from Mr. Wiggin to ADC make clear that the costs sharing was no more than a concession Credit Suisse was prepared to make and one which they clearly resiled from based on the conduct of ADC. Further the evidence establishes that the only valid variation to the Sales Contract dated 25th August 2011 did not provide for an adjustment of the responsibility of the costs between contract and closing. This is significant as this variation was executed about one month after the last email from Mr. Wiggin outlining the position of Credit Suisse with respect to the costs of operation.

[36] The evidence therefore accords with the contentions of Credit Suisse and I am not persuaded in the absence of any evidence by ADC to refute its acceptance of the reversion back to the terms of Clause 5.40 that required it to meet all closing costs, that there was any subsisting agreement for those costs to be shared equally between the period of the 1st to the 15th July 2011.

[37] I cannot therefore agree with the position of ADC that the sales contract should be set aside for unconscionable conduct based on the issues raised by ADC or that the liability clauses are wide and biased towards Credit Suisse. It cannot, based on the evidence, be said that the Sales Contract was brought about in an unfair manner. On the same basis it cannot be advanced that it was unfair because there was a contractual imbalance arising from undue influence or some other form of victimisation in the sense laid down by Lord Brightman in Hart v O'Connor (1985) 2 AER at page 882. To the contrary, this was a purchase by an entity fully and roundly advised and negotiated by Counsel.

[38] In conclusion, the claim must fail and judgment is hereby entered in favour of the Credit Suisse with prescribed costs to apply if not otherwise agreed by Counsel within 14 days hereof.

Cheryl Mathurin

High Court Judge