EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2015/0035

BETWEEN:

B.B. INC

Appellant

and

LEWIS HAMILTON

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Alban John, Ms. Thandiwe Lyle and Mr. Sasha Courtney for the Appellant
Mr. James Guthrie, QC and Ms. Linda Dolland for the Respondent

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2016: June 22;
2017: April 7.

Civil Appeal – Contract for sale of land – Formalities pursuant to section 4 of Real and Personal Property (Special Provisions) Act of Grenada CAP 273 – Agreement or memorandum or note required to be in writing and signed by person to be charged – Whether email correspondence capable of satisfying requirements of section 4 – Applicability of Electronic Transactions Act of Grenada – Agreement on certain essential terms – Whether agreement valid and binding

The appellant, a company wholly owned by Mr. Bernardo Bertucci, sought to develop its land in Morne Rouge, Grenada by subdividing it and constructing villas for sale. On 6th March 2013, Mr. Bertucci met with the respondent, Mr. Hamilton to discuss the sale of one of the villas ("Villa 5") to him. The parties thereafter exchanged several emails in relation to the sale.

In July 2013, Mr. Hamilton informed Mr. Bertucci that he was no longer interested in purchasing Villa 5. Mr. Bertucci responded indicating that there was already a binding contract between the parties since 8th April 2013. The appellant instituted proceedings in which it claimed among other reliefs, damages for breach of contract. The appellant relied on the emails between Mr. Bertucci and Mr. Hamilton to establish the contract.

Mr. Hamilton, in his defence, denied that he had entered into a contract with the appellant and he further contended that there was no agreement, note or memorandum in writing signed by him as required by section 4 of the Real and Personal Property (Special Provisions) Act Cap. 273 ("the Act"). Mr. Hamilton subsequently made an application to strike out the claim and/or for summary judgment. The learned master granted the application for summary judgment and ordered the appellant to pay the respondent's costs. The learned master found that "signed" in section 4 of the Act must be given its ordinary literal meaning.

The appellant, dissatisfied with the learned master's finding, appealed the decision on several grounds but in submissions learned counsel Mr. John, summarised them as follows: (i) the learned master erred in her interpretation of section 4 of the Act when she found that an electronic signature did not meet the requirements of section 4; and (ii) the learned master erred in opting to grant summary judgment and not determining the application to strike out the claim and further she did not give any reasons for doing so. The respondent filed a counter notice contending that (i) the documents that the appellant relied on to establish a contract were all emails and therefore the requirements of section 4 were not satisfied, and (ii) the emails exchanged by 10th April 2013 or at all, do not contain the requirements to establish a binding contract for the sale of land and therefore there was no agreement in writing within the meaning of section 4 which could be enforced.

Held: dismissing the appeal and awarding 75% of 2/3 of the costs in the court below to the respondent, that:

1. Section 4 of the Real and Personal Property (Special Provisions) Act CAP.153 ("the Act") of Grenada contains two requirements which must be satisfied in order to maintain an action in relation to the sale of land or an interest in land. These are: (i) the agreement must be in writing, or there must be some memorandum or note of the agreement in writing; and (ii) the written document must be signed by the party against whom the action is brought. Thus, contracts for sale of land are unenforceable unless there is some written evidence of a contract which is signed by the person against whom enforcement is sought.

2. Section 4 of the Electronic Transactions Act of Grenada expressly excludes from its application any law which requires writing, signatures or original documents for among other things, the conveyance or transfer of an interest in real or personal property. The effect of this provision is not that electronic documents cannot satisfy the requirements of section 4 of the Act as it does not prohibit electronic documents and signatures from being a 'writing' or "signature" within the meaning of section 4. Therefore, in relation to conveyancing and

transfer of any interest in real or personal property, the well-established rules of statutory interpretation would continue to apply in interpreting those provisions.

3. Section 4 of the Act has its genesis in section 4 of the UK Statute of Frauds (1677). The purpose of section 4 is essentially to protect persons from fraud by requiring a written record of transactions involving the transfer of land and interests in land rather than mere oral evidence. Section 2 of the Interpretation Act of Grenada defines "writing" in very wide terms to include printing lithography, typewriting, word processing, photography and all other modes of representing or reproducing words in visible form. This definition is wide enough to include electronic documents such as emails. Accordingly, email correspondence would not be contrary to the purpose of section 4. The learned master therefore erred when she adopted a very restricted approach and gave a literal interpretation to the meaning of the word "signed".

   Joseph Mathew and Another v Singh Chiranjeev and Another [2009] SGCA 51 applied; Aquis Estates Ltd v Minton and another [1975] 3 All ER 1043 applied; Harriet Caton v R. R. Caton and T. B Caton (1867) L.R. 2 H.L. 127.

4. Although section 4 requires a memorandum or note in writing, it is not necessary that every term agreed by the parties be included in the note or memorandum. It is imperative however that all the essential terms of the agreement except terms implied by law be included. The contents of the memorandum or note must show that a binding contract was concluded. Where essential terms agreed are omitted from the memorandum or note, the requirement of section 4 would not have been satisfied as the contract evidenced by the memorandum or note would not be the contract the parties entered into. The case at bar involved the sale of a plot of land and the construction of a villa within a communal property which placed additional obligations (such as conclusion of agreements with third parties) and restrictions on property owners. In those circumstances, the minimum terms of parties, property and price, as drawn from the emails, would not be sufficient to establish a binding contract. The language of both parties shows that they were still in negotiation. There were still several matters to be agreed and these matters cannot be classified as merely some minor details to be worked out. Therefore, the emails on which the appellant relied do not satisfy the requirement of section 4. It was open to the learned master to grant summary judgment on this basis.

   Beckett v Nurse [1948] 1 KB 535 applied; Tweddell v Henderson [1975] 1 WLR 1496 applied; Megarry & Wade: The Law of Real Property 5th edn., Sweet & Maxwell 1984, p. 580 cited.

5. The summary judgment procedure and strike out procedure are two distinctly different procedures. The learned master having determined the application on the summary judgment procedure cannot be criticised for not also determining the strike out application. Even if the claim was not one which should have been struck out because it was not plainly bad in law, there was nothing to prevent the

learned master from entering summary judgment on the ground that while it may not have been plainly bad in law, there was no reasonable prospect of success.

Dr. Martin Didier et al v Royal Caribbean Cruise Ltd SLUHCVAP2014/0024 (delivered 6th June 2016, unreported) followed.

JUDGMENT

[1] THOM JA: This appeal concerns the interpretation of section 4 of the Real and Personal Property (Special Provisions) Act ("the Act")[1] and the Electronic Transactions Act.[2]

[2] The appellant is a company wholly owned by Mr. Bernardo Bertucci. It is the owner of certain lands in Morne Rouge, Grenada. The appellant sought to develop its land by subdividing it and constructing villas for sale. To this end, Mr. Bertucci determined that work on the foundation for the construction of one of the villas ("Villa 5") would commence in January 2013. He therefore held discussions in December 2012 with Ms. Sheila Harris, an attorney in Grenada, who arranged for Mr. Bertucci to meet with the respondent, Mr. Hamilton, to discuss the sale of Villa 5 to him. Mr. Bertucci met with Mr. Hamilton on 6th March 2013 and thereafter they exchanged several emails in relation to the sale of Villa 5 to him.

[3] In July 2013, Mr. Hamilton informed Mr. Bertucci that he was no longer interested in purchasing Villa 5. Mr. Bertucci responded indicating that there was already a binding contract between the parties since 8th April 2013 and his company instituted proceedings in which it claimed among other reliefs, damages for breach of contract. The appellant relied on the emails between Mr. Bertucci and Mr. Hamilton to establish the contract.

[4] Mr. Hamilton, in his defence, denied that he had entered into a contract with the appellant and he further contended that there was no agreement or note or memorandum in writing signed by him as required by section 4 of the Act.

[1] Cap.273, Laws of Grenada 2010.
[2] Act No. 13 of 2013, Laws of Grenada.

Mr. Hamilton subsequently made an application to strike out the claim and/or for summary judgment.

[5] The learned master granted the application for summary judgment and ordered the appellant to pay the respondent's costs. She made no finding in relation to the application to strike out the claim.

[6] The appellant, being dissatisfied with the learned master's finding, appealed the decision on several grounds, but in submissions learned counsel Mr. John, summarised them as follows: (i) the learned master erred in her interpretation of section 4 of the Act when she found that an electronic signature did not meet the requirements of section 4; and (ii) the learned master erred in opting to grant summary judgment and not determining the application to strike out the claim and further she did not give any reasons for doing so.

[7] Mr. Hamilton filed a counter notice, the grounds of which can be summarised as follows: (i) the documents that the appellant relied on to establish a contract were all emails and therefore the requirements of section 4 were not satisfied; and (ii) the emails exchanged by 10th April 2013 or at all, do not contain the requirements to establish a binding contract for the sale of land and therefore there was no agreement in writing within the meaning of section 4 which could be enforced.

Summary Judgment/Strike Out Application

[8] I will deal with the second issue raised by the appellant first since it could be disposed of very briefly and Mr. John did not press this issue at the hearing.

[9] The Court quite recently in the case of Dr Martin Didier et al v Royal Caribbean Cruise Ltd[3] addressed this issue. There the learned Chief Justice emphasised that the two procedures are distinctly different and outlined the test and legal effect of each.[4] In summary, in determining a summary judgment application, the court would first consider whether it is an appropriate case to engage the summary

[3] SLUHCVAP2014/0024 (delivered 6th June 2016, unreported).
[4] At paras. 20-29.

judgment procedure. This is a case management decision. In the event that the court determines that it is an appropriate case for the summary judgment procedure, the court would consider the pleadings and affidavit evidence of the parties. Thereafter, applying the test of whether the claimant or defendant as the case may be has no real prospect of succeeding, the court may do one of three things: (i) enter summary judgment on a particular issue; (ii) enter summary judgment on the entire claim; or (iii) order that the claim proceed to trial. However, in considering an application to strike out, the court would only consider the parties pleaded case. No additional evidence is considered by the court. The pleaded facts are presumed to be true. The court would only strike out a claim where the statement of case discloses no reasonable cause of action or in the words of the learned Chief Justice "is plainly bad in law".

[10] The learned master having determined the application on the summary judgment procedure cannot be criticised for not also determining the strike out application as contended by the appellant, since, even if the claim was not one which should have been struck out because on the pleading it was not plainly bad in law, there was nothing to prevent the learned master from entering summary judgment on the ground that while it may not have been plainly bad in law, there was no reasonable prospect of success. There is no merit in this ground of the appeal.

[11] Before leaving this issue, it must be noted that the Privy Council in Hallman Holding Ltd v Webster and Another[5] emphasised that the summary judgment procedure should be employed to dispose of short points of law and construction of simple contracts where there are no factual issues in dispute so as to necessitate a trial. Where however the legal issues are more complex and there are no factual disputes, the court endorsed the view of the Honourable Chief Justice that in such circumstances they should be determined on an application to determine a preliminary issue.

[5] [2016] UKPC 3.

Section 4

[12] I will deal with the first issue raised by the appellant and Mr. Hamilton together, since they both concern whether an electronic document meets the requirement of "writing" within the meaning of section 4 of the Act.

[13] Section 4 of the Act reads as follows:

> "No action shall be brought whereby to charge any person upon any contract for sale of lands, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorised."

[14] The learned master found that "signed" in section 4 must be given its ordinary literal meaning. In support of her finding, the learned master referred to several cases including Universal Caribbean Establishment v James Harrison;[6] Charles Savarin v John Williams;[7] and the definition of "sign" in several dictionaries.

[15] In the learned master's opinion, it was not the intention of Parliament when section 4 was enacted in 1897 to include electronic signatures within the meaning of the word "signed" in section 4. The learned master also relied on the case of Nelson Lewis et al v Dirk Burkhardt et al[8] and concluded:

> "While the Court did not make an express statement that electronic signatures did not fall within the meaning of signed in the Act, in my view, the evidence relied upon by the court to find that there was a sufficient written document signed by the party to be charged or a person authorised by him to satisfy section 4 indicates that the court did not consider than (sic) an electronic signature fell within the definition of "signed" used in the Act."[9]

[16] Mr. John contends that the learned master erred in her interpretation of "signed" within the meaning of section 4 of the Act. He referred to the cases of Golden

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[6] ANUHCVAP1993/0021 (delivered 24th November 1997, unreported).
[7] (1995) 51 WIR 75.
[8] GDAHCVAP2006/0007 (delivered 28th March 2007,unreported), at paras. 13-16.
[9] At para. 58 of the lower court judgment.

Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd and another;[10] Evans v Hoare and Another;[11] and John S. Halley v Thomas O'Brien and Francis Woods[12] and Megarry & Wade: The Law of Real Property[13] and submitted that these authorities all show that "signed" within the meaning of section 4 of the Act is not restricted to a manual or hand written signature.

[17] Mr. John also urged the Court to find that the statement of Gordon JA in Lewis v Burkhardt on which the learned master relied did not have the effect given to it by the learned master, and in any event it was obiter, since the Court was not there determining whether the signature on the writing relied on had met the requirement of section 4 of the Act. Rather, the issue before the Court was identified by Gordon JA as follows: "The principal issue in this appeal is whether the finding of the trial judge that there was a completed contract between the parties can be supported by the facts and in law."

[18] Mr. Guthrie, QC in response submitted that the emails being electronic, there was therefore nothing in writing signed by the respondent that was capable of satisfying the requirement of section 4. He referred to Lewis v Burkhardt and submitted that the case decided that email communication did not satisfy the requirements of section 4. Mr. Guthrie, QC argued that it was the solicitor's letter which was in writing and signed by the solicitor and which referred to the email that led the Court to consider the email and be satisfied that the requirements of section 4 were met.

[19] In relation to the authorities of Evans v Hoare, and Halley v O'Brien which were relied on by the appellant, Mr. Guthrie, QC submitted that those authorities only addressed the issue of alternative means of signature because there was a written document in all of the cases which satisfied section 40(1) of the UK Law of

[10] [2012] 3 ALL ER 842.
[11] [1892] 1 QB 593.
[12] [1930] IR 330.
[13] 5th edn., Sweet & Maxwell 1984, p. 584.

Property Act 1925[14] which is in similar terms to section 4. He also sought to distinguish the case of Golden Ocean on the following grounds: (i) it concerned a contract of guarantee, not sale of land; (ii) a sequence of negotiations by email is common place in ship chartering, it is not in the case of sale of land; and (iii) it was common ground that electronic signature was sufficient, no doubt because of section 7 of the UK Electronic Communication Act 2000.

[20] Mr. Guthrie, QC also submitted that the Legislature of Grenada having considered electronic transactions and having chosen to expressly exclude transactions in relation to an interest in land in the Electronic Transactions Act,[15] the Court should not seek to give section 4 a strained interpretation to include electronic signatures.

Discussion

[21] Section 4 contains two requirements which must be satisfied in order to maintain an action in relation to the sale of land or an interest in land. These are: (i) the agreement must be in writing, or there must be some memorandum or note of the agreement in writing; and (ii) the written document must be signed by the party against whom the action is brought. I agree with Mr. Guthrie, QC that Mr. Hamilton's case before the learned master encompassed both limbs of the section.

[22] It is not disputed that section 4 of the Act has its genesis in section 4 of the UK Statute of Frauds (1677) and is in substantially the same terms as section 40 (1) of the UK Law of Property Act 1925. Therefore, cases decided pursuant to section 4 of the UK Statute of Frauds 1677 and section 40 of the UK Law of Property Act 1925 provide useful guidance on the interpretation of section 4 of the Act.

[14] Section 40 has since been repealed and replaced by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which now requires that contracts for sale of land or other disposition of an interest in land must be in writing).
[15] Section 4(1)(b).

[23] The following propositions of law relating to the requirement of section 4 of the Act arise from the several cases where the UK Law of Property Act 1925 and section 4 of the UK Statute of Frauds (1677) were applied:

(1) The agreement to be enforced need not be in writing. There could be a memorandum or note in writing which contains all of the material terms of the agreement.

(2) The memorandum or note need not be a document which was prepared to satisfy the statutory requirement, what is critical is that the memorandum or note must be in existence before the commencement of the action: Grindell v Bass.[16]

(3) The agreement could be contained in several documents. Where the writing relied on consists of more than one document, but only one document is signed by the defendant or on his behalf, then if the document that is signed by the defendant contains some express or implied reference to the other document(s), oral evidence is admissible to identify the other document(s) and they may be read together: Timmins v Moreland Street Property Co Ltd.[17]

(4) The signature need not be at the foot of the document or at any particular place, provided that it authenticates the document: Harriet Caton v R. R. Caton and T. B Caton;[18] Golden Ocean.

[24] The aim of the legislation is essentially to protect persons from fraud. Lord Simon of Glaisdale in delivering the judgment in the case of Steadman v Steadman[19] after referring to the preamble to the UK Statute of Frauds (1677) which reads 'For prevention of many fraudulent practices, which are commonly endeavoured to

[16] [1920] All ER Rep 219.
[17] [1957] 3 All ER 265.
[18] (1867) L.R. 2 H.L. 127.
[19] [1976] AC 536, at 558.

be upheld by perjury and subornation of perjury' stated the aim of the statute as follows:

> "The "mischief" for which the statute was providing a remedy was, therefore, that some transactions were being conducted orally in such a way that important interests were liable to be adversely affected by a mode of operation that invited forensic mendacity. The remedy was to require some greater formality in the record of such transaction than mere word of mouth if it was to be enforced. The continuing need for such a remedy for such a mischief was apparently recognised as subsisting when the law of landed property was recast in 1925."

The law in Grenada remains the same. Thus, contracts for sale of land are not enforceable unless there is some written evidence of a contract which is signed by the person against whom enforcement is being sought.

[25] In keeping with the aim of the legislation, the courts have consistently given a very wide interpretation to what amounts to "writing" and "signed" within the meaning of the legislation. This is evident from cases such as Caton v Caton where in considering section 4 of the UK Statute of Frauds (1677), Lord Westbury stated "..signature in the popular sense of putting pen to paper was not necessary – typewriting or print might suffice. What was required was that the person signing had to have shown in some way that he recognised the document as an expression of the contract." Similarly in Goodman v J Eban Ltd[20] a stamp was held to be sufficient; and in Leeman v Stocks[21] where the auctioneer wrote the initials and name of the vendor on the printed agreement, that was held to be sufficient. Also, in Aquis Estates Ltd v Minton and another,[22] a signature included in a telex which contained the terms of the contract was held to be sufficient writing for the purpose of the legislation. This flexible approach was summarised in Megarry & Wade: The Law of Real Property as follows:

> "Signed. The word "signed" has been given an extended meaning by the courts. Provided the name of the party to be charged appears in some part of the document in some form, whether in writing, typewriting, print or otherwise, there will be a sufficient signature if that party has shown in

[20] [1954] 1All ER 763.
[21] [1951] 1 Ch 941.
[22] [1975] 3 All ER 1043.

some way that he recognises the document as an expression of the contract."[23]

[26] Much reliance was placed by the appellant on the Golden Ocean case where the Court considered whether the provisions of section 4 of the UK Statute of Frauds (1677) was complied with where it was alleged that the terms of a guarantee were contained in several emails and the final email was not signed by the respondent. As Mr. Guthrie, QC pointed out, in that case it was common ground before the lower court and the Court of Appeal that an electronic signature was sufficient and that a first name, initials and perhaps a nickname would be sufficient. The discussion in the Court of Appeal therefore focused on whether the legislation required that the terms of the contract of guarantee must be in a single document, (which the Court found was not necessary as the signed document could refer to other documents which contained the terms) and whether the manner in which the signature was placed on the document satisfied the section. In my view, the case of Golden Ocean does not advance the appellant's case.

[27] In Lewis v Burkhardt, Gordon JA identified the principal issue on the appeal to be whether the trial judge's finding that there was a concluded contract could be supported on the facts and in law. The Court of Appeal having upheld the judge's finding then considered whether there was a memorandum or note in writing evidencing the contract of sale in compliance with section 4. The Court of Appeal in finding that there was, applied the principle in Timmins v Morland Street Property Co. Ltd[24] that the terms of the contract may be in more than one document even though only one document is signed provided that the signed document contains some implied or specific reference to the other document then oral evidence may be admitted to identify the other document and the two could be read together. This principle was applied by the Privy Council in Elias v George Sahely & Co (Barbados) Ltd.[25] In applying this principle, Gordon JA who delivered the judgment of the court referred to the letter of the solicitors and the

[23] 5th edn., Sweet & Maxwell 1984, p. 584.
[24] [1957] 3 All ER 265 at p. 275, paras. D-G.
[25] [1982] 3 All ER 801.

emails and found that when read together they constituted a sufficient memorandum in writing which contained the terms of the agreement and was signed by the appellant. He also made reference to the witness statement of the second appellant. Gordon JA did not consider whether emails and the signature on emails would have satisfied the requirement of section 4. That issue was simply not before the court. In my opinion, Lewis v Burkhardt is not authority for the proposition that emails do not constitute "writing" or that signature on an email does not meet the requirement of "signed" for the purpose of section 4. Indeed Mr. Guthrie Q.C. has not referred us to any authority where the court so found.

[28] This issue was also considered by the Court of Appeal of Singapore in the case of Joseph Mathew and Another v Singh Chiranjeev and Another.[26] In that case, the Court considered whether an email which was alleged to have contained the terms of a contract of sale of a property satisfied the requirements of section 6(d) of the Singapore Civil Law Act[27] in view of the provisions of section 4 of the Singapore Electronic Transactions Act[28] which excludes the application of the Act to transactions in relation to land. The Singapore legislation is in substantially the same terms as the Grenada legislation. The Court of Appeal in upholding the finding of the lower court that the emails met the requirement of the legislation endorsed the view expressed by the lower court that there is no distinction between a typewritten signature and a signature that was typed onto an email and sent to a recipient.

[29] The Electronic Transactions Act does not in any way advance Mr. Hamilton's case. It came into effect on 3rd October 2013. Section 4 of the Electronic Transactions Act expressly excludes from its application any law which requires

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[26] [2009] SGCA 51.

[27] Cap. 34, Revised Laws of the Republic of Singapore, 1999. Section 6(d) states : "6 No action shall be brought against -
(d) any person upon any contract for the sale or other disposition of immovable property, or any interest in such property;
….
Unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him."

[28] Cap. 88, Revised Laws of the Republic of Singapore, 2010.

writing, signatures or original documents for among other things, the conveyance or transfer of an interest in real or personal property. The effect of this provision is not that electronic documents cannot satisfy the requirements of section 4. The Electronic Transactions Act does not prohibit electronic documents and signatures from being a "writing" or "signature" within the meaning of section 4. The effect of the Electronic Transactions Act is simply that in relation to conveyancing and transfer of any interest in real or personal property, the well-established rules of statutory interpretation would continue to apply in interpreting those provisions.

[30] Adopting a purposive approach, bearing in mind the purpose of section 4 of the Act is to prevent fraud by requiring a written record of transactions involving the transfer of land and interests in land, rather than mere oral evidence if they are to be enforced, correspondence by emails would not be contrary to the purpose of section 4; rather it is a reliable method of achieving the purpose of the legislation. While they are electronic, emails can be readily transmitted to paper without in any way compromising the integrity or authenticity of the contents. Further, section 2 of the Interpretation Act[29] defines "writing" in very wide terms, it reads:

> " "writing", and expressions which refer to writing, include printing lithography, typewriting, word processing, photography and all other modes of representing or reproducing words in visible form".

In my opinion this definition is wide enough to include electronic documents such as emails.

[31] In my view, the learned master erred when she adopted a very restricted approach and gave a literal interpretation to the meaning of the word "signed". I find that the appellant is successful on this ground. This is however not the end of the matter as Mr. Hamilton in his counter-notice contended that the learned master should also have granted summary judgment on another ground.

[29] Cap. 153, Laws of Grenada 2010.

Terms of the contract

[32] I will deal now with the second issue raised by Mr. Hamilton in his counter notice that there is no written record of a concluded contract containing the terms that the appellant alleges to have been agreed and therefore the requirement of section 4 was not satisfied.

[33] The learned master did not make a finding on this issue in view of her earlier finding that the signature of Mr. Hamilton on the emails being electronic did not meet the requirement of section 4. Both sides in their written and oral submissions addressed the issue.

[34] Mr. Guthrie, QC submitted that the learned master should have also granted summary judgment on this basis because: (i) terms alleged to have been agreed were not included in the emails or any memorandum or note signed by Mr. Hamilton; and (ii) when the emails relied on by the appellant are read together, they do not establish a binding contract between the appellant and Mr. Hamilton. Therefore, the requirement of section 4 that the agreement be in writing was not satisfied.

[35] In relation to the first issue, Mr. Guthrie, QC argued that the terms such as payment by instalments referred to by Mr. Bertucci in his email dated 18th July 2013 were not contained in any email signed or referred to by the respondent. He relied on the cases of Munday v Asprey[30] where a letter referring to a draft conveyance which recited the agreement was held to be insufficient; Tiverton Estates Ltd v Wearwell Ltd;[31] Tweddell v Henderson[32] and Megarry and Wade: The Law of Real Property.[33]

[36] Mr. John in response submitted that the appellant did not rely on Mr. Bertucci's email of 18th July 2013 or an oral contract so the case of Tweddell v Henderson

[30] (1880) 13 Ch. D 855.
[31] [1975] Ch 146.
[32] [1975] 1 WLR 1496.
[33] 5th edn., Sweet & Maxwell 1984, p. 571.

is not applicable. However, if the court were minded to consider the email of 18th July 2013, then the court would also be required to consider the draft agreement which document was prepared in consultation with counsel on both sides, and which contained the terms in relation to the payment by instalments.

Discussion

[37] As stated earlier, the purpose of section 4 of the Act is to prevent fraud and perjury in relation to, among other things, the transfer of land or an interest in land. Therefore, section 4 requires what was agreed by the parties to be included in writing or a memorandum or note. However, the authorities show that in order to satisfy section 4, it is not necessary that every term agreed by the parties must be included in the note or memorandum. What is to be included are all of the essential terms of the agreement except terms implied by law. Where essential terms agreed are omitted from the memorandum or note, the requirement of the section would not have been satisfied as the contract evidenced by the memorandum or note would not be the contract the parties entered into. In Megarry and Wade: The Law of Property, the learned authors stated the requirement of section 40 of the UK Act as follows:

> "It is essential that the memorandum should contain all the terms of the contract which have been agreed… The omission of a single term, even though a subsidiary one, is fatal: for then the contract evidenced by writing is different from the contract actually made… It is wrong to suppose that a memorandum is sufficient merely because it specifies the parties, the property and the price; only if no other terms were expressly agreed to will it be an adequate memorandum. Thus actions have failed where the memorandum did not mention the conditions of which had been agreed on, or a stipulation about the date for vacant possession, or a promise to transfer deposits on advance bookings along with the property, or a term that the purchase price was to be paid by instalments, or some chattels which were to be included in the sale."[34]

This is illustrated in the cases of Beckett v Nurse[35] where it was held that oral evidence was admissible to show that terms agreed were not included in the memorandum and therefore the statutory requirement was not fulfilled, and

[34] 5th edn., Sweet & Maxwell 1984, p. 580.
[35] [1948] 1 KB 535.

Tweddell v Henderson. In Tweddell, the Court found that there was no memorandum of the contract in writing in compliance with section 40 of the UK Law of Property Act, 1925 where the letter signed by the defendant, which was the memorandum relied on, did not contain the terms agreed relating to payment by instalments. The court found this to be a material term of a contract for a sale of land with a bungalow to be constructed.

[38] In this case unlike Tweddell, Mr. Hamilton does not contend in his pleadings nor in the affidavit in support, that terms which were agreed by himself and the appellant were not included in the memorandum relied on. In particular, Mr. Hamilton does not contend that he and the appellant agreed to pay the purchase price in instalments. Indeed Mr. Guthrie, QC's argument is that it is an allegation of Mr. Bertucci in his email of 18th July 2013. In my view, section 4 of the Act relates to terms which were agreed by the parties, not where one party is alleging a term was agreed. This is borne out in both the case of Tweddell and the learning in Megarry and Wade: The Law of Real Property referred to earlier. However, the matter does not end here as Mr. Guthrie, QC further argued that there was no written record of a concluded contract between the parties.

[39] In support of his argument that there were material terms still to be agreed by the parties, Mr. Guthrie, QC referred to several legal documents attached to Mr. Bertucci's email of 21st April 2013. These included a draft management agreement between a company, Miami Blu Inc. and Mr. Hamilton which required Mr. Hamilton to, among other things, become a registered member of Laluna Villas Owners Association and also to pay an annual management fee of US$11,400.00 and 1/7 of the common expenses of the communal property; a rental agreement (Mr. Bertucci confirmed that the rental agreement was not mandatory); a Deed of Adherence to the Owners Association By Laws and Regulations, a licence agreement for the berth, the berth was still to be defined; a draft sale agreement which contained material terms not yet agreed such as restrictions on the resale of the villa, no penalty for delay of the construction of the building, but if a payment of instalment is not made within 60 days of demand the agreement may be

terminated by the appellant and the appellant would be permitted to keep all instalments already paid, the right of the appellant to unilaterally assign the agreement without any notice to the Purchaser, bearing in mind the agreement related to the construction of a house and the reputation of the developer would be an important factor, the technical specifications provided stated they were subject to change and were for information purposes only and did not form part of the contract.

[40] Mr. John in reply submitted that when the emails on which the appellant relied (being the emails ending on 10th April 2013) are read together the essential terms of property, price and parties are clearly established. There was nothing to suggest that the parties did not intend to be bound until a single written agreement containing all of the usual terms of a formal contract were put in a single document and signed. Further, the evidence does not show that the parties did not reach agreement or that what was agreed was subject to contract.

[41] As stated earlier, it is not necessary for all of the terms of the contract to be included in the memorandum or note. What is required is that the contents of the memorandum or note must show that a binding contract was concluded and the essential terms agreed must be included.

[42] The general principles to be applied in determining whether there is a binding contract were summarised by the English Court of Appeal in Pagnan SpA v Feed Products[36] as follows:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole…(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed…(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled…(5) If the

[36] [1987] 2 Lloyd's Rep 601 at 619.

> fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over.
>
> This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant.
>
> It is the parties who, are in the memorable phrase coined by the judge…"the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement"."

[43] The UK Supreme Court in endorsing these principles in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)[37] stated that these principles are applicable whether the contract was concluded in correspondence or by oral communications and conduct. Essentially the court is required to consider the nature of the contract and what was agreed by the parties.

[44] This is a good point to examine the emails on which the appellant relies to establish that there was a written record containing the essentials terms of a contract between the parties.

[45] The pleaded case of the appellant is that by 10th April 2013 there was a concluded contract between the parties as evidenced by the emails exchanged by the parties.

[37] [2010] 1 WLR 753 at para. 49.

[46] The relevant emails commence from 26th March 2013. Mr. Hamilton in his email of 26th March 2013 indicated that there was a need for changes to be made to the drawing sent to him by Mr. Bertucci on 10th March 2013.

[47] On 30th March 2013, Mr. Bertucci responded to Mr. Hamilton and attached what he described as final drawings for the approval of Mr. Hamilton. The email reads in part:

> "…If you approve the final drawings and we are able to finalize an agreement, we can deliver the house by June 2014.
> As you know, we did few changes and enlarged and added more sq ft to the main building, we also added a new building.
> I am offering you Villa 5, with all the new inclusions and changes for usd. 4,200,000…"

[48] On 7th April 2013, Mr. Hamilton wrote:

> "Dear Bernardo
> Regarding the Price, I do not want to go over 4 million as already the studio and gym will cost so much more not to mention the furniture. Can we agree on 4?"

[49] On said April 7, Mr Bertucci responds:

> "Dear Lewis,
> I would agree on the 4 mil if you are willing to endorse laluna estate project and I can use your name for marketing and pr."

[50] On 8th April 2013, Mr. Hamilton wrote:

> "Dear Barnardo
> I have spoken to my management and also my race team who own my rights. This is not something they will allow but I can assure you that if you do a great job I will help promote it anyway I can. I just won't be able to do an endorsement of the project due to my team controlling everything I do.
>
> I hope you can still do this for me at 4m, then we have a deal and can go ahead swiftly."

[51] On the said 8th April 2013, Mr. Bertucci replied:

> "dear Lewis i understand the management and the rights i hope we can do pr releases about you and the new villa we are building let me know if this is ok bb"

[52] On 9th April 2013, Mr. Hamilton wrote:

> "Hi Bernardo
> I hope you are well. Yes we can do this as long as we have final approval on what is written then you can do this no problem. I don't want people knowing which home is mine etc.
> Question, have the foundation of the house been laid yet? U want to see if somewhere below the house, beneath, we can put a bowling alley in. It would have to be underground and no natural lighting would be needed."

[53] On 10thApril 2013, Mr. Hamilton wrote:

> "But can it be done? There is no bowling alley in Grenada as far as I'm aware, please see if it can be done. I don't mind the extra cost for this"

[54] On 10th April 2013, Mr. Bertucci wrote:

> "dear Lewis thank you, i will ask my lawyer to prepare the sales agreement and send it to you we started foundation of the house, the problem with the additional room for bowling will be the excavation since it is rock below the foundation and it would include a substantial amount of work with excavators…."

[55] Mr. John contended that at this time there was a binding contract between the parties and this position is supported by the emails between Mr. Bertucci and Mr. Hamilton between 15th May 2013 and 26th June 2013.

[56] On 15th May 2013, Mr. Bertucci wrote:

> "Dear Lewis
>
> i hope you are well
> the construction of the house is proceeding smoothly and we almost finished the foundation phase of the main house
>
> i don't know if you decided for the new lawyer to represent you in this purchase in Grenada.
> as i mentioned to you before, the legal transaction is very straight forward since there is no bank or mortgage involved and I am 100% owner of the land (free hold) and the project.
> i am looking forward to hear from you"

[57] On 16th May 2013, Mr. Hamilton wrote:

> "Hi Bernado,
>
> I hope you are well. I have a new lawyer who is now taking care of it and will be in touch very shortly so we can get this done."

[58] On 26th June 2013, Mr. Hamilton wrote:

> "Dear Bernado,
>
> I trust you are well. How is everything going? Apologies for the difficulty of getting hold of me, have been moving around a lot.
>
> Are we nearly there with the contract?
>
> Also, I was told you are relocating to Miami, is this the case?
>
> Kind regards. …."

[59] The objective conclusion to be drawn from the emails relied on by the appellant to satisfy section 4 is that the parties did agree on the property to be villa 5 and Mr. Hamilton agreed to pay US$4 million for the property. I agree with Mr. John that there was evidenced in writing agreement in relation to parties, property and price. However, this was not a case of a simple contract for sale and purchase of a building to be constructed on a plot of land, as was the case in Tweddell v Henderson, or as in Lewis v Burkhardt where the contract related to the purchase of a house in which the purchasers were resident, but rather it involved the sale of a plot of land and the construction of a villa within a communal property which placed additional obligations (such as conclusion of agreements with third parties) and restrictions on property owners. In those circumstances, the minimum terms of parties, property and price would not be sufficient to establish a binding contract. I agree with Mr. Guthrie, QC that the various draft legal agreements sent to Mr. Hamilton in April 2013 show that there were still several matters to be agreed and these matters cannot be classified as merely some minor details to be worked out.

[60] The language of both Mr. Bertucci and Hamilton in their emails show that they were still in negotiation. Mr. Bertucci refers to "if the drawings are approved and we are able to finalize an agreement," construction could be completed within approximately 15 months. Mr. Hamilton as late as 26th June 2013 was enquiring whether they were close to closing the negotiations. It is a well settled principle of

law that the court would not impose contracts on parties where they were still in negotiations.

[61] In my view, the emails on which the appellant relied do not satisfy the requirement of section 4. It was therefore open to the learned master to grant summary judgment on this ground. Consequently, the appeal is hereby dismissed.

[62] On the issue of costs, the Court notes that there was no appeal against the learned master's order of prescribed costs pursuant to rule 65.5 of the Civil Procedure Rules 2000. In view of the basis on which the appeal was dismissed, the respondent is not entitled to his full costs on the appeal but a reduced sum being 75% of 2/3 of the costs in the lower court.

I concur
Dame Janice M. Pereira, DBE
Chief Justice

I concur
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar