

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE  
(CIVIL)**

**CLAIM NO. ANUHCV 2016/0154**

**BETWEEN:**

**PETREA LIMITED**

Claimant

**and**

**ANTHONY MC VEIGH**

Defendant

**Appearances:**

Mr. Justin L. Simon Q.C for the Claimant

Ms. E. Ann Henry Q.C for the Defendant

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2018: March 26<sup>th</sup>  
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**ORAL JUDGMENT**

[1] **WILKINSON J.:** Petrea Limited (“the Company”) has its registered office c/o Grant Thornton at 11 Old Parham Road in the parish of Saint John. It is the registered proprietor of a parcel of land upon which is erected a house (“the Property”). The Property is registered as **Registration Section:**

**South West, Block 55 1186A Parcel 782.** It is within a residential development at Jolly Harbour in the parish of Saint Mary.

- [2] The Company pursuant to a sale agreement executed on 12<sup>th</sup> January 2014, agreed to sell and Mr. McVeigh agreed to buy the Property. The sale was scheduled to be completed on or before 15<sup>th</sup> April 2015. The sale agreement provided for extension of completion date at clauses 2 and 5(ii), however, the Court saw no pleadings or evidence that the automatic extension clause had been invoked by either Party. Mr. Mc Veigh by his Counsel's letter of 6<sup>th</sup> July 2015, expressed the view that due to the Company's failures to comply with certain terms of the sale agreement that the sale agreement was rescinded and "performance thereof terminated".
- [3] The Company some 8 days later asserted that it had complied with the terms of the sale agreement and some 17 days later after the termination called on Mr. Mc Veigh to complete the sale transaction.
- [4] The matter has gone thru case management and the Parties have filed their witness statements.
- [5] On 23<sup>rd</sup> May 2017, Mr. McVeigh filed an application for summary judgment to be entered for him:
- i. in respect of the claim brought by the Company wholly; and
  - ii. in respect of the defence to the counter-claim filed by the Company.

The grounds of the application were:

- i. the Company has no real prospect of successfully defending its claim;
- ii. the Company has no real prospect of successfully defending the counterclaim;
- iii. there is no other compelling reason for the claim and or the counterclaim to be disposed of at trial.

The application further set out the issues which it proposed that the Court deal with at the hearing and they were:

- i. whether there is a pleading or evidence presented by the Company that demonstrates that it has, during the subsistence of the contract been in a position to specifically perform the obligations of the contract particularly clauses 1, 8, 11 and 14 of the sale agreement entered between the Parties;

- ii. whether there is any pleading or evidence presented by the Company that Mr. McVeigh was not entitled to terminate the contract by virtue of the Company's inability to perform the obligations of the contract particularly in clauses 1, 8, 11 and 14 of the sale agreement entered between the Parties;
- iii. whether there is any real prospect that, at the hearing, the Company would be able to demonstrate that it is entitled to the relief sought in its claim or that Mr. McVeigh is not entitled to the relief sought in his counterclaim;
- iv. whether Mr. McVeigh is entitled to a refund of the deposit as counterclaimed in these proceedings.

[6] Counsel for Mr. McVeigh went into great detail about the pleadings of the Parties and the witness statement of Mr. Keith Weightman made on behalf of the Company. Bearing in mind the nature of the application and submissions made, it was helpful for the Court to follow suit.

[7] The pertinent documents that go to the root of the application are (a) the sale agreement, (b) the letter of Mr. McVeigh's Counsel, Mr. Nicholas Fuller dated 6<sup>th</sup> July 2015, and (c) the letter from Caribbean Developments (Antigua) Ltd. (CDAL) dated 14<sup>th</sup> May 2015.

[8] The pertinent provisions of the sale agreement are:-

“Whereas:

1. The Vendor is the Registered Proprietor with Absolute Title thereto of a parcel of land with a residential house thereon in Jolly Harbour, Antigua more particularly described in the Land Registry as Registration Section: South West; Block: 55 1186A Parcel: 782 (hereinafter called “the Property”) together with all singular rights, easements and appurtenances pertaining thereto and all rights, title and interest in and to any and all easements and rights of way bounding the said land and also together with all rights of ingress and egress unto the said land;

2. The Vendor wishes to sell and the Purchaser wishes to purchase the Property.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. (i) The Vendor will sell and the Purchaser will buy the vacant unencumbered absolute title to the Property subject to the covenants, easements, stipulations and rights already registered in the Incumbrances Section of the Land Register to the Property as entry No.1 Instrument no. RLNC- 20090019 together with the contents listed in Schedule A herein (hereinafter called the “contents”) and the right and licence to exclusive and perpetual occupation and use of five (5) meters of that storm drain sea wall which adjoins the Property all at a purchase price of SEVEN HUNDRED AND NINETY THOUSAND DOLLARS UNITED STATES CURRENCY (US\$790,000.00) (hereinafter called the “Purchase Price”) the said purchase price being allotted US\$740,000.00 to the purchase of the Property, US\$10,000.00 to the purchase of the storm drain sea wall and US\$40,000.00 to the purchase of the contents.

(ii) The Purchaser shall upon the signing hereof pay to Stuart Lockhart of Jolly Harbour, Antigua as Stakeholder a deposit of 10% of the purchase price for the Property in the sum of SEVENTY NINE THOUSAND DOLLARS UNITED STATES CURRENCY (US\$79,000.00) (hereinafter called “the Deposit”). The Stakeholder shall retain the deposit pending completion of the sale.

2. The completion of the transaction herein outlined shall take place on or before the 15<sup>th</sup> day of April 2015 (or on the Extended Completion Date as defined herein, if applicable) and the Purchaser shall have the right to close this sale prior to the said date by giving to the Vendor three (3) days advance written notice (email notice being acceptable) of his intention to close and complete the sale on the day after the expiration of the third day of the notice period (hereinafter called the “Completion Date”). The balance of the purchase price of the Property in the sum of SEVEN HUNDRED AND ELEVEN THOUSAND DOLLARS UNITED STATES CURRENCY (US\$711,000.00) shall be paid by the Purchaser to the Vendor on the Completion Date.

3....

4....

5. (i) The Purchaser is a Non-Citizen of Antigua and Barbuda and is applying for citizenship of Antigua and Barbuda.
- (ii) ....
- (iii) If on the Completion Date the Purchaser's application for citizenship of Antigua and Barbuda is neither granted nor refused then the Completion Date shall be automatically extended by forty-five (45) days (The "Extended Completion Date"). If on the Extended Completion Date the Purchaser's application for citizenship of Antigua and Barbuda is neither granted nor refused then either of the parties hereto may terminate this Agreement in writing and the Deposit shall forthwith be returned in full to the Purchaser. In the alternative, the parties may, if they agree in writing, further extend the Completion Date.
6. (i) If any default on the part of the Vendor causes the non-completion of this transaction, the Purchaser shall be entitled to receive the return of the Deposit in full within seven(7) days of written demand and the Purchaser shall be entitled to all remedies available in law.
7. ....
8. On the Completion Date and upon receipt of the balance of the purchase price the Vendor will provide the Purchaser inter alia:
  - (i) ....
  - (v) Documentary proof that the Vendor has acquired the enforceable and assignable legal right/licence from Caribbean Development (Antigua) Limited to exclusive and perpetual occupation and use of five (5) meters that storm drain sea wall which adjoins the Property, the said five (5) meters of sea wall commencing and being measured from the common boundary between the Property and the storm drain. This perpetual licence/right of use of the storm drain sea wall must be paid in full in advance and must be legally capable of being assigned by the Vendor to the Purchaser without the consent of Caribbean Developments (Antigua) Limited.

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(vi) A duly executed and valid assignment of the Vendor's license to exclusively and perpetually occupy and use five (5) meters of the adjoining storm drain sea wall.

9. ....

11. The Vendor warrants that (i) the Property is not subject to any boundary encroachment or public or private easement of right of way of any type ....  
(ix) the Vendor will by the closing of this sale have acquired the right and licence to exclusive and perpetual occupation and use of five (5) meters of that storm drain sea wall which adjoins the Property, the said five (5) meters of sea wall commencing and being measured from the common boundary between the Property and the storm drain. This perpetual licence/right of use of the storm drain sea wall shall be paid in full in advance and must be legally capable of being assigned by the Vendor to the Purchaser ....

14. For the avoidance of doubt, in the event that the sale of the sea wall is not completed due to (the) breach by the Vendor of paragraph 8(v) herein, the Purchaser hereto shall not be obligated to complete the sale of the Property and the contents. In the same manner, the completion of the sale of the sea wall shall be dependent upon the completion of the sale of the Property and the contents.”

[9] Mr. McVeigh's Counsel, Mr. Nicholas Fuller's letter of termination read:

“

06<sup>th</sup> July, 2015

Mr. Stuart Lockhart  
Lockhart Legal Services  
Jolly Harbour  
St. Mary's  
Antigua

Dear Mr. Lockhart,

Re: Petrea Limited/Mc Veigh

I write to you concerning this sale. You will be aware that my client last week closed the sale of the Beach Plot with Mr & Mrs. Gollmer and you have since sent me communication requesting that my client now close this sale with Petrea Limited.

....

Again on April 24<sup>th</sup>, 2015 I wrote to you by email requesting documented proof that your client had been granted exclusive use of the seawall as you had previously stated by email to me that Mr. Ron Maginley had granted this to your client. I had previously received from you only a letter from Caribbean Developments (Antigua) Limited dated December 18<sup>th</sup>, 2014 wherein they confirm that they are "willing" to sell the right of use to five meters of seawall adjacent to the Boat House for the purpose of mooring boats at a cost of US\$7500.00.

....

The sale agreement at paragraph 8(v) requires the vendor to obtain from Caribbean Developments (Antigua) Limited the enforceable and assignable right in law for my client to have EXCLUSIVE and perpetual occupation of the seawall. With this barrier in place, it is not possible for my client to have use of the seawall much less exclusive use. It has now been two and a half months since we notified your office of this issue but nothing has been done to rectify it. We have heard nothing further from you on this matter.

My client is not willing to purchase the Boat House and the seawall and then get into a dispute, legal or otherwise, with the owner of the neighbouring dock in relation to the removal of the wooden barrier. That is tantamount to buying into a fight.

In the premises, we consider that your client has not met the closing conditions described above and set out in the sale agreement. Your communications and text messages to me in respect of the sale over the last few days have requested that my client close the sale without mention of the foregoing issues. These issues are integral to the closing of this sale and my client has instructed me that, in the circumstances, he will not close this sale.

My client considers that the sale agreement is rescinded due to the failure of your client to meet the closing conditions therein on its part as vendor. That sale agreement and performance thereof is terminated.

....

Yours faithfully,  
(signed)  
Nicholas A. Fuller.

[10] In reply to Mr. McVeigh's Counsel's letter of 6<sup>th</sup> July 2015, under cover of letter dated 14<sup>th</sup> July 2015, to Mr. McVeigh's Counsel, the Company's lawyer disclosed a copy of CDAL's letter dated 14<sup>th</sup> May 2015, this being 2 months after issue. The letter of 14<sup>th</sup> May 2015, read as follows:

"May 14, 2015

TO WHOM IT MAY CONCERN

This letter serves to confirm that Caribbean Developments (Antigua) Limited received the sum of Eight Thousand, One Hundred and Twenty-Five United States Dollars (US\$8,125.00) from Mr. Keith Weightman for the purchase five (5) metres of seawall located at plot 307 A1.

The payment for the seawall bestows on the purchaser the right to uninterrupted use of the seawall for the purpose of mooring boats and other seagoing vessels and associated purposes over the portion of the seawall measuring five metres in length in perpetuity.

The payment does not grant the right to build on the seawall nor do anything to weaken the seawall. The payment does not grant the right to use the land that the seawall borders, and nothing which blocks the potential flow of water over the said land should be erected.

Alterations of any kind and for any purposes must first be approved by the CDAL Planning Committee.

Yours sincerely,  
(signed)  
Wim Berends  
Technical Director."



[11] On 1<sup>st</sup> April 2016, the Company filed its claim form and statement of claim. By its claim form it sought the following relief:

- i. specific performance of a sale agreement made on 12<sup>th</sup> January 2014, between the Company as vendor and Mr. McVeigh as purchaser of a parcel of land with a residential house thereon in Jolly Harbour;
- ii. damages in addition to or in lieu of specific performance;
- iii. further or other relief as the Court deems fit;
- iv. costs.

[12] By its statement of claim the Company pleaded amongst other matters the sale agreement which is cited prior. At paragraph 2, it pleaded that by the sale agreement made on 12<sup>th</sup> January 2014 between the Parties and Mr. Stuart Lockhart as stakeholder, that the Company agreed to sell and Mr. McVeigh agreed to buy the vacant and unencumbered absolute title to the Property along with the contents and the right and license to exclusive and perpetual occupation and use of five (5) meters of the storm drain sea wall which adjoins the Property. The total purchase price on the contract was US\$790,000.00 with allotments for the Property, storm drain and contents.

[13] It was also pleaded that while Mr. McVeigh paid the requisite deposit on 12<sup>th</sup> January 2015, and the sale was to be completed on or before 15<sup>th</sup> April 2015, or on the extension provided for, he refused to complete the sale and by letter of 23<sup>rd</sup> July 2015, he informed the Company's attorney-at law that the Company had failed to meet the closing conditions and so the sale agreement was rescinded. By letter of 12<sup>th</sup> August 2015, he demanded return of the deposit within 14 days of the letter.

[14] The Company pleaded that it denied any such failure and stated that it was at all material times and even up to now was ready and willing to perform its obligations under the sale agreement. In the result the Company refuses to instruct the stakeholder to return the deposit to Mr. McVeigh.

[15] Mr. McVeigh filed his defence on 6<sup>th</sup> July 2016. He denied that the Company was entitled to specific performance of the sale agreement or any other relief sought. He pleaded that it was the Company that was in breach of the sale agreement and so it was he who was entitled to terminate the same according to its terms.

- [16] Mr. McVeigh after pleading clauses 1, 8 (v), 11 and 14 of the sale agreement pleaded that in or about April 2015, he became aware of a wooden structure erected on an adjacent property which would effectively bar the use of any occupier of the Property from full use of the dock for the Property. By email of 24<sup>th</sup> April 2015, it was communicated to the Company via its Counsel the potential for a dispute with a neighbor. By the said email a question was raised about access to the sea wall. By return email of same date the Company provided a letter dated 18<sup>th</sup> December 2014, issued by CDAL to Mr. Keith Weightman about the sea wall but never addressed the matter of the wooden structure blocking the full use of the dock nor was there any mention made that any discussions had ensued with the neighbor who had erected the wooden structure.
- [17] Mr. McVeigh further pleaded that at early July 2015, the wooden structure was still in place and there was no proof that clause 8(v) had been achieved. In the premises, having regard to the Company's inability to comply with the terms of the sale agreement, in particular clauses 8(v) and 11, by letter dated 6<sup>th</sup> July 2015, he gave notice of termination of the sale agreement and terminated same. The Company by letter dated 14<sup>th</sup> July 2015, responded enclosing for the first time copy of a letter from CDAL dated 14<sup>th</sup> May 2015, and which it asserted demonstrated compliance with clause 8(v) of the sale agreement but which on the face of it did not evidence compliance. By its letter, the Company also called upon him to complete the sale. By email of 23<sup>rd</sup> July 2015, the Company asserted a readiness to complete and invited him to respond.
- [18] Mr. McVeigh pleaded that by his Counsel's letter of 23<sup>rd</sup> July 2015, he repeated his assertion that as at the completion date, the Company was unable to meet the terms of the sale agreement and so he was entitled to terminate.
- [19] Mr. McVeigh also filed a counterclaim and therein he stated that he relied on the matters set out in his defence and sought:
- (a) a declaration that he was entitled to terminate the sale agreement by reason of the failures of the Company as at the completion date to:
    - i. provide documentary proof that it had acquire the enforceable and assignable legal right from CDAL to exclusive and perpetual occupation and use of five(5) meters of that storm drain and sea wall in accordance

with clause 8(v) of the sale agreement between the Parties on 12<sup>th</sup> January 2014, and

ii. that it had failed to establish that the dispute with the neighbor had been completely resolved and settled.

(b) a declaration that Mr. McVeigh was entitled to a refund of the deposit paid by him to the stakeholder pursuant to the sale agreement.

And Mr. McVeigh counterclaimed on the following ground:

(c) that Mr. McVeigh relies on and repeats paragraphs 4 to 23 of his defence in support of his claim for relief under his counterclaim.

[20] The Company filed a reply to the defence and a defence to the counterclaim. By its counterclaim, the Company said that save for paragraphs 5 thru 11 of the defence, it took issue with the defence and denied that Mr. McVeigh was entitled to terminate the sale agreement, and so is not entitled to a refund.

[21] The Company's defence to the counterclaim, stated that the wooden structure was permanently removed around 2<sup>nd</sup> July 2015, by CDAL and that there was no dispute with the neighbour occupier. Further, it pleaded that at 24<sup>th</sup> April 2015, the Company had written to CDAL about removal of the wooden structure. The Company pleaded that the wooden structure was of a temporary nature and denied that it effectively barred an occupier of the Property from use of the dock and neither was it a potential issue with the neighbor.

[22] The Company further pleaded that by CDAL's letters of 18<sup>th</sup> December 2014, and 14<sup>th</sup> May 2015, there was indicated a willingness to sell to the Company the "right of use" and this was subsequently confirmed on 8<sup>th</sup> May 2015, by payment of US\$8,125.00.

[23] The Company pleaded that Mr. McVeigh was well aware that the legal title to the storm drain and sea wall were vested in CDAL and could not be transferred to him and that only a licence of exclusive use and occupation of the 5 metres could be had and same could be transferred to him.

[24] The Company pleaded that the CDAL letter of 14<sup>th</sup> May 2015, constituted an enforceable and assignable licence to the exclusive and perpetual use and occupation of the sea wall, as obtained

by the Company and which at all material times the Company was willing and in a position to transfer to Mr. Mc Veigh upon receipt of the balance of the purchase price.

[25] The Company pleaded that on or about 18<sup>th</sup> July 2015, and at all material times thereafter, it was ready to complete the sale per the sale agreement but Mr. Mc Veigh without reasonable cause refused to pay the balance of the purchase price and terminated the sale agreement.

[26] The Company further pleaded that to date Mr. McVeigh had not advised whether his application for citizenship of Antigua and Barbuda had been granted or that he was ready and able to complete the sale.

[27] It was also pleaded that Mr. Mc Veigh had a 6 month lease of the Property to run from 18<sup>th</sup> February 2015, and that he terminated it early at June 23<sup>rd</sup> 2015, in circumstances that were unreasonable.

[28] The Company denied that Mr. Mc Veigh was entitled to the relief sought in his counterclaim.

[29] One (1) of the Company's witness statements was made by Mr. Keith Weightman, a director of the Company. For accuracy, the Court cites in full:

1. I received an offer for the purchase of the Boathouse in October 2014, from Anthony McVeigh for a consideration of US\$790,000.00, comprising US\$740,000.00 for the house, US\$40,000.00 for furnishings and US\$10,000.00 for that portion of the seawall adjoining the Boathouse which runs throughout the Jolly Harbour Development owned and managed by CDAL. Mr. McVeigh had also requested the sea wall rights. There is a continuous sea wall, which runs through the entire Jolly Harbour property, and is vested in CDAL and in common usage as far as I am aware.
2. I was informed by Stuart Lockhart Esq. (acting as my conveyancing lawyer) by email that the duplicate sale/purchase contracts were signed and exchanged and that the deposit of USD 79,000.00 was en route to his client's account. The sale agreement is dated January 12 2014, and is Claimant's Exhibit 1. The deposit was received by Mr. Lockhart enclosed in a letter dated January 13 2015.

3. I received a letter from CDAL dated December 18 2014, penned by Ron Maginley, the Managing Director, stating CDAL was willing to sell 5 metres of the seawall for the sole purpose of mooring for the sum of US\$7,500.00.
4. Payment was made on May 8 2015, and I received a letter from CDAL confirming the purchase of the seawall and the rights bestowed to me.
5. On 27<sup>th</sup> March 2015, it was discovered that my previous lawyer Nicholas Fuller Esq. had missed some paperwork on my original purchase of the boathouse thereby delaying the Certificate of Compliance which is necessary before I could obtain my Non-citizen Landholding License for registration of my Transfer Instrument as the new registered proprietor of the Boathouse property.
6. Mr. Stuart Lockhart then received an email from Mr. Nicholas Fuller who was now acting for Mr. McVeigh on the transaction on April 24<sup>th</sup> 2015, regarding a the wooden protrusion. Mr. Stuart Lockhart informed CDAL and requested that they remove the wooden plank, which was affixed to the neighbouring property's jetty and protruded over the sea entry to the seawall adjoining my Property.
7. On April 29<sup>th</sup> 2015, Mr. Nicholas Fuller emailed the Certificate of Compliance for the Boat House and stated that his client Anthony McVeigh was ready to close the sale as soon as Mr. Lockhart had furnished them with a Certificate of Compliance for the other sale which would allow Mr. McVeigh to complete and therefore receive his citizenship.
8. On 16<sup>th</sup> June 2015, Stuart Lockhart informed me that the funds for the beach plot were enroute and Mr. McVeigh would be in a position to gain his citizenship and complete the purchase of the boat house.
9. Shortly thereafter, Stuart Lockhart was informed that the transfer of funds had in fact been routed in error to a bank in Poland.
10. As part of the sale agreement, Mr. McVeigh rented the Property from February 18, 2015 on a 6 months lease agreement although I had a full time tenant (whom I had to pay compensation for early vacating of the Property).

11. On 11 June 2015, Mr. McVeigh's personal assistant June Green asked for permission to deal with CDAL directly so as to allow Mr. McVeigh to pay the outstanding utility bills and avoid disconnection and also to obtain all utility invoices for the Property from February. To current date, I duly gave permission (via e mail to CDAL and Mr. McVeigh's personal assistant) on 11<sup>th</sup> June 2015.
12. However, on June 23, 2015 Mr. McVeigh IRREVOCABLY terminated his lease agreement due to the electricity being disconnected on June 18, 2015, which was then his (as the current tenant) responsibility. Mr. McVeigh left reneging on the rest of his tenancy agreement with considerable arrears still owing on the rent for the remainder of the contract lease in the sum of US\$7,514.54(00) plus additional dock construction fees for his Trimaran of US\$2,000.00.
13. Shortly afterwards on 6 July 2015, Stuart Lockhart received a letter from Nicholas Fuller pulling out of the sale completion due to the offending piece of wood.
14. On 10 July 2015, the temporary piece of wood was removed. It was not placed there by me and, it was not of a permanent nature, given its construction and how it was affixed to the neighbouring property. Mr. Stuart Lockhart spoke to Mr. Nicholas Fuller and advised him accordingly by letter dated July 14 2015.
15. Emails were exchanged between Mr. Stuart Lockhart and Mr. Nicholas Fuller who wrote on July 23 2015, confirming Mr. McVeigh's rescinding the sale agreement.
16. Mr. Fuller's letter stated that the seawall was not assigned to the Property purchased by Mr. McVeigh even though the seawall had in fact been purchased by me.
17. By letter dated August 12 2015, Mr. Fuller requested the return of the deposit paid by his client, Mr. McVeigh.
18. I have not returned the deposit and remain of the view that I have fulfilled all the conditions of sale legally required and I am advised by Counsel and verily believe that Mr. McVeigh is in breach of the contract for sale of the Boathouse."

## The Law

[30] An application for summary judgment is made pursuant to **CPR 2000** rule 15. Rule 15 provides:

“15.2 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 the issue.

15.6 (1) 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.

(2) If the proceedings are not brought to an end the court must also treat the hearing as a case management conference.”

[31] In **The Caribbean Civil Court Practice 2011**, Note 12.3 “real prospect” is defined as:

“The Court should interpret ‘real’ as the opposite of fanciful and should not conduct a mini-trial in order to establish whether a summary disposal was appropriate: *Swain v. Hillman* [2001] 1 All ER 91 CA.

The test under Part 15 (ENG CPR 24) is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial – or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to a trial (namely the balance of probabilities). See ***Royal Brompton Hospital NHS Trust v. Hammon*** (No.5) [2001] EWCA Civ. 550, [2001] BLR 297.

The rule ‘... is designed to deal with cases which are not fit for trial at all’; the test of ‘no real prospect of succeeding’ requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary

exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt.24 is not one of probability; it is the absence of reality.' *Three Rivers District Council v. Bank of England (No.3)* [2001] UKHL 16, [2001] 2 All ER 513 (Lord Hope at paras. 95 and 158)

Where there is no admissible evidence to support pleaded case then this is a most significant factor for the judge to take into account. In *Smikle v. Nunes* (CL1999/S243) (judgment 9 March 2007): Skyes J considered the speech of Lord Hobhouse in *Three Rivers District Council v. Bank of England (No.3)* (see above) and stated that:

'First, his Lordship stated that merely pleading a legally sufficient case is not the end of the analysis. Second, pleading is based on legally admissible evidence. This second point cannot be over emphasized because some attorneys are resisting enquiries by the case management judge of the evidence they intend to call to support the case. They think that when the judge makes these enquiries they are giving away too much. However, as Lord Hobhouse is saying, a pleaded case assumes that the evidence is indeed available to make good the allegation and that can only be done if the proposed evidence is legally admissible. The pronouncements by Lord Hobhouse, logically cannot be restricted to cases of fraud or dishonesty since all civil cases are required to be established by legally admissible evidence. Third, even if the evidence is legally admissible, a judge in clear and obvious cases may and should make a decision on the prospects of success. Fourth, when the judge is making this assessment the judge must consider whether the case can be strengthened by requests for information. Fifth, if after taking into account the pleaded case and the possibility of gaining further information if the judge concludes that there is no real prospect of success then the judge should act accordingly and give summary judgment for the other party. Summary judgment is not a device to avoid trial but one of the powerful tools of case management which is designed to eliminate hopeless cases.'



[32] The sale agreement called for the acquisition of a right and licence to exclusive and perpetual occupation of 5 metres of the storm drain sea wall which adjoins the Property. Important for the Court's consideration is a full understanding of what a licence is. According to **Black's Law Dictionary**<sup>1</sup> a licence is defined as:

“A permission, usually revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit à prendre) that is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game.

‘[A] license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the statute of frauds. 2 James Kent, Commentaries on American Law.’ ”

### **Findings and Analysis**

[33] After submissions were completed, the Court posed 3 questions to Counsel for the Company. The first was whether the document of 14<sup>th</sup> May 2015, was sufficient to cover an assignable licence since there was no provision for assignment within it? Counsel admitted that there was no provision for assignment but said that once the licence was granted to the owner of a villa and in perpetuity, then he respectfully submitted that it would run with the Property and so could therefore be assigned to any purchaser of the Property. Counsel for Mr. Mc Veigh responded that she disagreed with Counsel's response for 2 reasons. First, the licence was only given to the grantee, Mr. Weightman and he was not the vendor. Secondly, for any other party to benefit it would have to run with the land and the licence did not meet the requirements for a right running with the land. There was no provision for assignment and the assignment was not created in the manner required by the law.

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<sup>1</sup> 8<sup>th</sup> edition

- [34] The Court's second question was would the licence be enforceable between CDAL and the Company when the owner of the land is the Company and not Mr. Weightman? Counsel responded that this is why the sale agreement per clause 8(vi) was to be given on completion date.
- [35] The Court's third question was that given that Mr. Weightman had chosen to purchase the Property in the legal entity of a company, why should the Court now conveniently accept that Mr. Weightman and the Company were one and the same? Counsel responded that CDAL would not have given the licence to Mr. Weightman unless Mr. Weightman had the title interest to the Property.
- [36] At this juncture pleadings are closed, case management has occurred, disclosure has been made and witness statements of the Company making reference to the documents disclosed filed. The evidence of the Company in the form of its witness statement is before the Court. Given the nature of the application, the Court can look to these matters to see if the Company has any real prospect of success or whether summary disposal is appropriate – **Swain v. Hillman**.
- [37] By Mr. McVeigh's letter of termination of 6<sup>th</sup> July 2015, there are 2 matters of complaint to support termination (a) the matter of the wooden structure, and (b) failure to secure an assignable licence for exclusive and perpetual occupation and use of 5 metres of the storm drain sea wall adjoining the property.
- [38] The Court deals first with the wooden structure which allegedly had some impact on any occupier of the Property using the dock assigned to the Property.
- [39] Here the Court observes that Mr. Mc Veigh in his pleadings state that up to early July 2015, the wooden structure was still in place. The Company in its reply to defence state that the wooden structure was removed at 2<sup>nd</sup> July 2015. Mr. Weightman in his witness statement said that the wooden structure was removed on 10<sup>th</sup> July 2015. Mr. Weightman's witness statement therefore confirms Mr. McVeigh's position that the wooden structure was in place up to early July 2015.
- [40] Further, Mr. McVeigh was only informed by the Company of the removal of the wooden structure in its letter of response dated 14<sup>th</sup> July 2015. This being 8 days after the letter of termination.
- [41] Mr. McVeigh's position, was that the wooden structure across the dock was a signal of a potential dispute with the neighbor who had constructed it.

- [42] The common law requires every purchaser of a property to examine and be vigilant about any property that he is purchasing because unless a matter is covered by agreement, statute, or common law, then a purchaser is deemed to have notice of any defect or issue that could arise.
- [43] Addressing now the licence, it is clear that the right and licence for exclusive and perpetual occupation and use of 5 meters of the storm drain sea wall which adjoins the Property was a pertinent part of the sale agreement between the Parties. This is made clear by it being set out in clause 1(i) and its repetition in clauses 8(v), 8(vi), 11 and 14.
- [44] The Court on perusing the witness statement of Mr. Weightman notices that aside from describing himself as director, that he never makes statements in terms of the Company but always in the form of his person.
- [45] This brings the Court to examination of CDAL's letter of 14<sup>th</sup> May 2015, and which the Company says is its enforceable and assignable the licence. The Court had an issue with form, but leaves that aside and will accept it as proffered.
- [46] Against the background of what a licence is deemed to be, the Court observes that the licence states that the payment was made by Mr. Keith Weightman. Who gets the benefit of the purchase? It fails to say that the payment was made on behalf of the Company. So the Court is left with the view that Mr. Weightman is the sole beneficiary of the licence.
- [47] Again against the limitation of what a licence is, the Court observes that there is no provision for assignment of the licence. It would appear that it could not even be assigned to the Company far less a third party such as Mr. Mc Veigh. The Court recalls here the personal nature of a licence as cited in **Black's Law Dictionary**.
- [48] Further while the licence speaks of the purchaser and purchase of 5 metres of seawall, there is clearly no purchase per se given the limitations of (a) no right to build on the seawall, or do anything to weaken the seawall, (b) no right to use the land that the seawall borders, and (c) nothing must be done to block the potential flow of water over the land adjoining the seawall. There is no purchase.
- [49] In regard to the first question posed by the Court, the Court has observed that even at 23<sup>rd</sup> July 2015, after being alerted as to Mr. McVeigh's position on the licence, there was not disclosed at

least a draft copy of the licence with assignment to Mr. Mc Veigh. How much longer could Mr. McVeigh be expected to wait to see whether the licence benefitted him?

[50] A further issue, the Company stated that Mr. McVeigh had not indicated his own readiness to close. However, this is contradicted by Mr. Weightman in his witness statement when he says that on 29<sup>th</sup> April 2015, Mr. Fuller told him that Mr. McVeigh was ready to close the sale as soon as Mr. Lockhart furnished the Certificate of Compliance in connection with the other sale. Indeed there was disclosed a Certificate of Compliance dated 29<sup>th</sup> April 2015, authorizing the transfer and registration of the Property from the Company to Mr. McVeigh.

[51] Reverting to the third question posed by the Court, the Court is not able to accept without more the lifting of the corporate veil per *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 and the line of cases that have followed to find that Mr. Weightman in who appears to be the sole beneficiary of the licence since he made payment, that he and the Company should be accepted as one and the same. He chose to conclude his purchase of the Property by way of the Company, a separate legal entity and so the Court must accept the Company as the true owner of the Property.

[52] The Court having regard to the principle of whether there is a real prospect of success and looking at the pleadings of the Parties and the witness statement for the Company, is of the view that this is a case where the Company has no evidence to support its pleaded case of being ready to complete the sale. The Company was not in a position to complete because up to 6<sup>th</sup> July 2015 and beyond, it never having acquired the licence in its own name, it was not in a position to assign a right and licence to the exclusive and perpetual occupation and use of 5 metres of the storm drain sea wall adjoining the Property to Mr. McVeigh.

[53] The Court will enter summary judgment for Mr. McVeigh and order a refund of the deposit.

[54] Court's order:

1. The Company's claim is struck out.
2. Judgment is entered for Mr. McVeigh on his counterclaim.
3. The Company and the stakeholder, Mr. Stuart Lockhart are to pay over the deposit within 7 days of this judgment and should same not be paid it will attract interest at

the rate of 6 percent from the 8<sup>th</sup> day until payment. The Company and the stakeholder will be equally liable for the payment of the interest.

4. Prescribed costs is awarded to Mr. McVeigh.

**Rosalyn E. Wilkinson**  
High Court Judge

**By the Court**

**Registrar**