EASTERN CARIBBEAN SUPREME COURT

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2019

CLAIM NO. SKBHCV 1993/0084

BETWEEN:

Wycliffe H. Baird

Claimant

and

[1] David Goldgar, Paul B. Coburn,
[2] Caribe (Realties) Canada Limited
[3] Immeubles Caribe Canada Ltee
[4] Betts Realty Limited
[5] S.P.A.S. Limited and First Security Bank of Utah

Defendants

Before:
Marlene I. Carter — High Court Judge

Appearances:
Mr. James Guthrie Q.C. with Mr. Terence Byron and Ms. Talibah Byron for the Claimant
Mr. Randsford Graham Q.C. with Mrs. Angelina Sookoo- Bobb and Ms. Rénal Edwards for the 5th Defendant
Mr. Murray Rosen Q.C. with Mr. Damien Kelsick for the 1st – 4th defendants

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2016: 4th, 5th May;
2019: 30th July.

JUDGMENT

[1] **CARTER J**: The claimant filed an action based on an agreement with the defendants [defendants 1-4 for the purpose of this judgment are linked] for an

option to purchase part of an area of land located in Major's Bay in St. Kitts [hereinafter 'the lands']. The claimant alleged that he exercised the option to purchase, however the 3rd defendant breached the agreement. The claimant therefore claims that he has an equitable interest in the land arising from that option. His claim, filed on the 7th May 1993, sought specific performance or damages for breach of contract, declarations that he was the owner of the land and various injunctions preventing the defendants from dealing with the land.

[2] In 2009, upon the claim coming before Belle J for hearing, the court dealt with the matter by way of preliminary issue. On the 24th November 2009, Belle J. found, inter alia, that it was the Claimant who had failed to close the agreement.

[3] At the outset of the instant hearing, the parties made submissions to the Court on whether the decision of Belle J of 24th November 2009 should stand and the consequences for the instant trial upon such determination. After hearing arguments both for and against the issue of Belle J's decision, the court ruled that the decision should stand and the trial proceeded.

[4] At the outset of the trial there remained an issue of whether the 5th Defendant was entitled to Lot No. 2 as a matter of fact and/or law, Lot No. 2 being part of the lands, the subject of the present action. Counsel for the claimant indicated to the Court that that he intended to call no evidence in relation to and was not in a position to contradict that SPAS is owner of the Lot. The claim against the 5th defendant was dismissed, and an order made for damages and costs to be assessed. The 5th defendant therefore took no further part in the proceedings.

[5] As a result, the following issues remained for the court's consideration:

(a) Was the agreement between the parties terminated as a result of the Claimant's failure to close as determined by Belle J?

(b) Was there at any time a repudiatory breach by Dr. Baird of the agreement and/or an acceptance of such a repudiatory breach by the Defendants?

(c) Whether Dr. Baird retained an equitable interest in the land, i.e. the right to specific performance?

(d) Whether such equitable interest continued beyond the compulsory acquisition of the land by the Government?

(e) What is the effect of the payments made under the agreement by Dr. Baird which are retained by the Defendants?"

[6] Upon the Court's decision on the preliminary issues, Counsel for the claimant advised the court that he did not intend to call the claimant to give evidence and neither would they call any other witness on the claimant's behalf. Counsel also advised that the claimant raised no issue as to the admissibility or the defendant's ability to refer to the documents in the Court's bundle for trial.

[7] The first defendant confirmed his witness statement in evidence. Counsel for the defendants in his closing submissions has invited the court to find that: "The only possible inference from this change of position is that he [the claimant] could and would not support the claim and would be unable to deal with the cross-examination on the documents as analysed below to that purpose. For similar reasons and with a similar effect, there was no cross-examination at all of Dr. Goldgar, whose evidence is unchallenged…"

[8] The claimant's closing submissions put his decision to adopt this course in the following way: "The Claimant must reluctantly conclude that on the basis of the Court's Rulings it will not make a finding in his favour that he is entitled to an Order as sought in the Statement of Claim". In effect the claimant has not defended his claim. It is for the claimant to prove his claim on a balance of probabilities by evidence before this court. There is no counterclaim filed which would put the

defendant to proof. In any event this court will look to the issues which it has found for its determination. Given that much of the background is not in dispute, in fairness to the claimant, the submissions set out in his opening submission/skeleton arguments are before the court and will be considered in coming to a determination on the identified issues.

[9] The dispute between the parties arises from an Option Agreement (hereinafter "**Option Agreement**") executed by the parties on 6 February 1989 wherein they agreed, inter alia that the claimant had an option to purchase approximately 150 acres of land, subject to final survey. The claimant agreed to pay the sum of US$380,000.00 in installments in consideration for being granted the option to purchase the land. It was further agreed that if the claimant sought to exercise the option that he was to serve written notice of same, not more than 60 days prior to the closing date, which closing date had to occur within 18 months of the date of the Option Agreement. That date was therefore the 6th July 1990. The price for the land under the option agreement was set as US$2,500,000.00 and it was a term of the agreement that time was of the essence in the performance of the terms and conditions of the Option Agreement.

[10] The claimant sought an amendment to the Option Agreement which was agreed by the 1st defendant. An Amended Agreement dated 7th March 1990 (1st **Amended Agreement**") increased the price for the option to US$560,000.00 and extended the time for its exercise from 6th July 1990 to 6th February 1991. The purchase price for the land was also increased to U$2,666,666.66. The land area was also increased from 150 to 163 acres.

[11] On the 5th December 1990 the claimant exercised his option and the closing date was fixed as 6th February 1991.

[12] After Further discussions, the 1st defendant agreed a further amendment to the Option Agreement (2nd Amended Agreement) on the 18th January 1991. The

letter in which the 2nd Amended agreement was set out was countersigned by the claimant. Again, the terms of the Option Agreement were varied. The price for the option was increased to US$816,666.00 and the time for its exercise extended from 6th February 1991 to 21st February 1991. The land area was increased from 163 to 175.6 and the closing date was extended to 19 February 1991.

[13] It is not in dispute that the claimant paid the sum of $560,000.00 in respect of the option price and a further $814,855.00 on account of the purchase price.

[14] The closing did not take place on the 19th of February 1991. The claimant gave no notice or other indication to the defendants after this date that he wished to close on 21 February 1991, the date set by the 18 January 1991 letter as the date on which the option period expired.

[15] It is apparent that even after the 21 February 1991, the parties continued to negotiate. From the correspondence this negotiation appeared to take place on a "without prejudice" basis. In a letter from solicitors for Dr. Goldgar, dated 8th March 1991, the following is set out:

> "…[Dr. Baird] has defaulted under the terms of the original option agreement as amended and has forfeited all option payments heretofore made by him. However, our clients are prepared to continue towards the closing of this transaction on a without prejudice basis, reserving all of their rights including their right to consider all of the option payments made by your client to be forfeited, if a mutually satisfactory conclusion can [sic] be reached by the parties."

[16] By 29th March 1991 however the claimant's solicitors sought the repayment of the $814,855.00 monies paid by the claimant to the defendant Goldgar on the 6th February 1991. A significant portion of the demand amount of was returned, some US$760,000.00 with the solicitors for Goldgar stating:

> "…without prejudice and does not constitute any implicit or explicit admission of any liability in regard to any transaction between yourself and Caribe Realties and Betts Realty. The remainder of the funds paid under the option agreement and its amendments retained by us amounting to US$614,885.00 will be credited against the purchase price

> assuming the transaction goes forward under the terms previously negotiated between the parties."

Issue 1 – Was the agreement between the parties terminated as a result of the Claimant's failure to close as determined by Belle J?

[17] The Claimant had always maintained that once the claimant exercised the option, by notifying the defendants that closing would take place on the 6th February and then again on the 19th February, 1991 that by dint of so doing, that such notification converted the agreement for the option into an agreement for sale and therefore the land itself was to be treated as converted from the date of the exercise of the option. It also meant, according to the claimant, that this exercise of the option created the relationship of seller and buyer from the date of the expiry of the notice exercising the option. For these reasons, the claimant's position was that "the claimant thus acquired the beneficial interest in the land by the exercise of the option granted under the Option Agreement as amended and as subsequently agreed by the Caribe Defendants."[1]

[18] The claimant accepts that the closing did not take place on the 19th of February or at all but maintains that the contract continued to exist. The claimant maintains that the agreement subsisted, that the claimant's right to sue for specific performance of the agreement for sale persisted at least up to the point where there was compulsory acquisition of the property.

[19] The claimant drew to the court's attention the fact that it became known after the date of closing that the defendants may not have been in a position to close at all. The claimant pointed to the contents of a letter from the defendants' solicitors dated 12th April 1991 in which counsel expressed that:

> "Our clients instruct us to indicate that they too wish to consummate this transaction and without prejudice proposals in this regard follow. We are instructed to state the following in preface to the proposals:

[1] See page 8-9 of the claimant's opening statement/skeleton submissions.

(1) Our clients maintain their position as set out in our letter to you of 8th March, 1991 that your client was not in a position to close on 19th February 1991.

(2) As has now become apparent neither was Betts Realty Limited in a position to close on that date a fact which was not at the time known to Dr. Goldgar."

[20] Given that indication, the claimant states that at that stage either party could have sought to have the contract specifically enforced. In support of that proposition they refer the court to **King et al v Urban & Country Transport Ltd et al**.[2] I have carefully reviewed this authority from the Canadian court. It is clear that the facts in that case are not quite on par with the facts in the instant case. The court itself expressed the view that on "the broader questions of the effect of default that the authorities could not be said to be "consistent and satisfactory."

[21] It is here that the parties diverge as the defendants go further to state that the failure to close was a repudiatory breach of the Option agreement as amended and that such breach was accepted by the defendants, bringing the agreement to a close. For this reason, the defendants' position on issue one is that its determination is dependent upon a finding of whether there was a repudiatory breach and whether the repudiation was accepted.

[22] The exercise of the option communicated by the claimant on the 6th February 1991 converted the Option Agreement into an agreement for sale. The claimant's failure to close on the 19th of February 1991 did not in and of itself terminate the agreement for sale. The ultimate effect of such failure is tied to the determination of the Issue 2.

Issue 2: Was there at any time a repudiatory breach by Dr. Baird of the agreement and/or an acceptance of such a repudiatory breach by the Defendants?

[2] [1974] 1 O.R. 449.

[23] The defendant's submit that the finding that the claimant failed to close on the 19th February 1991 clearly establishes that the claimant thereby committed a breach of the Option Agreement, and that this breach was a repudiatory breach by virtue of clause 7 of the Option Agreement which made time of the essence in the performance of the Option Agreement as amended

[24] The defendants' position is that time was of the essence of the Option agreement as amended. They point to Clause 7 of the Option Agreement and submit that the subsequent amendments did not alter that clause, nor can it be presumed that any of the subsequent changes were intended to do anything but to amend the agreement as stated and not to abrogate its terms. They contend that the time provision was never waived and, on this basis, that there was a repudiatory breach of the contract by the claimant.

[25] The defendants argue further that breach of a term as to time, where time is of the essence, is a repudiatory breach of contract. The defendants referred to ***Hakimzay Limited v. Swailes***[3] in which by Judge Keyser QC stated as follows:

> "…To say that time is of the essence of a contract is not to make a metaphysical statement. It is to identify the fact that a failure to comply with a contractual requirement as to time of performance, whether that requirement be a provision of the contract itself or arise pursuant to a valid notice making time of the essence**, will itself amount to a repudiatory breach**…"

[26] The defendants submit that the course of the transaction between the parties immediately after 19 February 1991 support their view. In particular the defendants point to the following:

(i) the claimant demanded and received back monies paid on account for the purchase of the land; the defendants repaid US$760,000, the bulk thereof;

[3] *[2015] EWHC B14 (Ch) at para. 24*

(ii) the Defendants forfeited the option payments made by Dr. Baird and sought to negotiate without prejudice for a new agreement until they eventually declared themselves free to deal with the land however they wanted;

(iii) the claimant did not, at any time after 19 February 1991, purport to serve any notice of a new closing date; or tender or offer to tender the purchase monies.

[27] The defendants referred the Court to the case of **Vitol v Norelf**[4] in further support of their position that the court could find that they had accepted the repudiatory breach even by their inaction. Per Lord Steyn:

> "For present purposes I would accept as established law the following propositions:
>
> (1) Where a party has repudiated a contract the aggrieved party has an election to accept the repudiation or to affirm the contract: Fercometal SARL v Mediterranean Shipping Co SA [1989] AC 788.
>
> (2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end.
>
> (3) It is rightly conceded by counsel for the buyers that the aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention, e.g. notification by an generalized broker or other intermediary may be sufficient: Wood Factory Pty Ltd v Kiritos Pty Ltd [1985] 2 NSWLR 105 at p. 146, per McHugh J; Majik Markets Pty Ltd v S & M Motor Repairs Pty Ltd (No. 1) (1987) 10 NSWLR 49 at p. 54, per Young J; Carter and Harland, Contract Law in Australia (3rd edn, 1996), pp. 689–691, para. 1970.
>
> ...

[4] [1996] AC 810-812.

> One cannot generalize on the point. It all depends on the particular contractual relationship and the particular circumstances of the case. But, … I am satisfied that a failure to perform may sometimes signify to a repudiating party an election by the aggrieved party to treat the contract as at an end."

[28] **In King et al v Urban & Country Transport Ltd et al**[5] it was stated that:

> "Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable, and stating that time is to be or the essence with respect to the new date."

[29] It appears to this court that the facts of the instant case are against the claimant. There is no indication that the claimant sought to reinstate time as being of the essence to the agreement for sale. His actions in demanding the repayment of the monies which had been advanced by him relating to the purchase of the land, and not the payment for the option, all go to the inference that he too was treating the agreement for sale as at a close. These actions caused and entitled the defendants to believe that the claimant recognized the effects of his failure to close and accepted the consequences of his breach of the agreement for sale. The fact that the defendants were treating the agreement as at a close is also to be inferred from the without prejudice discussions between the parties following the close of the option. There was a repudiatory breach of the contract. The defendants accepted this breach.

Issue 3: Whether Dr. Baird retained an equitable interest in the land, i.e. the right to specific performance?

[30] As outlined earlier in this judgment, the claimant's position was that upon the exercise of the option, "the claimant thus acquired the beneficial interest in the land by the exercise of the option granted under the Option Agreement as amended and as subsequently agreed by the Caribe Defendants."[6]

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[5] Supra at note 2.

[6] See page 8-9 of the claimant's opening statement/skeleton submissions.

[31] The claimant's further submission is that this beneficial interest gave the claimant the right to sue for specific performance of the agreement and that this right subsisted up to the compulsory acquisition by the government when any claim for specific performance would have become unenforceable as against the defendants.

[32] The claimant referred to a number of authorities in support of this proposition including **Hillingodon Estates Co. v Stonefield Estates Ltd**[7]**; King et al v Urban & Country Transport Ltd et al**[8] and **Bethco Ltd et al v Elateco Canada Ltd**[9]

[33] The defendants agree that the exercise of an option under an option agreement can create an equitable interest in property. Where the defendants differ from the claimant on this issue is with regard to the extent of the claimant's interest in the property. The defendants submit that the fact the claimant may have had an equitable interest in the property does not equate to him becoming the equitable owner of the property. The defendants argue instead that:

> "The foundation of the equitable interest claimed must therefore be a right to specific performance, as appears to now be conceded by Dr. Baird in the formulation of the issue now under consideration."

[34] However, the defendants submit the claimant now has no such right to specific performance because of his failure to close on the 19 February 1991 when time was of the essence of the contract. The fact that it was the claimant in default was significant and notably the other factor, that the land had been compulsorily acquired by the Government, meant that specific performance was not available. The defendants referred to the dicta of the court in **Urban 1 (Blonk Street) Ltd v Ayres**[10]

> "It would be inequitable for there to be a grant of specific performance to the contract-breaker if the parties have expressly stated in the contract

[7] [1952] 1 Ch. 627
[8] [1973] 1 O.R.(2d) 449
[9] (1985) 53 O.R. (2d)
[10] [2013] EWCA Civ 816 at para 44

> that the contract can be terminated forthwith upon breach of the time provision or if it is to be implied from all the circumstances that they so intended …. . Accordingly, if, on the proper interpretation of the contract, the time provision is a condition in the technical sense I have mentioned, it is difficult to imagine that the court would grant the contract breaker specific performance. I respectfully agree, in this regard, with the doubt expressed … as to whether equity, as a distinct species of legal principles, now has anything to add in the context of contractual terms of fundamental importance."

[35] The defendants therefore submit that on the basis of the foregoing the Claimant has no equitable interest in the land, that any payments made by the claimant in relation to the land were not capable of giving rise to any proprietary interest save on the basis that he was and remained entitled to buy the land under contract and that any such entitlement was repudiated by his failure to close on 19 February 1991. Further and in any event, specific performance is impossible as the land was acquired by the Government.

[36] I agree with the defendants' submissions. The claimant was, upon exercise of the option, entitled to an equitable interest in the land. He did not thereby acquire the beneficial ownership of the land. Based upon the court's findings at Issue 2 above, the claimant ceased to be entitled to enforce his equitable interest by way of specific performance after the 19th February 1991, when his failure to close resulted in a repudiatory breach of the contract which was accepted by the defendants. Even if it could be argued that the nature of the breach was not repudiatory, the claimant did not attempt to extend the option even to the 21 February 1991 to which, arguably, he may have been entitled. His demand for repayment also solidifies this court's view that the claimant well knew that his equitable interest in the land and any right to specific performance was at an end.

Issue 4: Whether such equitable interest continued beyond the compulsory acquisition of the land by the Government?

[37] Having found that the claimant does not hold an equitable interest in the lands, there is no need to address this issue further. It is accepted by both parties that the Government compulsorily acquired the lands.

Issue 5: What is the effect of the payments made under the agreement by Dr. Baird which are retained by the Defendants?

[38] The defendants accept that the sum of $1,375,855.00 was paid by the claimant in relation to the option agreement and purchase of the lands. They contend that the payment for the price of the option is not repayable because the consideration had wholly failed. The claimant was reimbursed most of the $815,855.00 paid as an extension of the option. The defendants retained the sum of $55,855.00

[39] The defendants contend that they have no legal liability to repay this sum to the claimant although they were at one point willing to credit him with this balance since it had only been held toward any new sale-and-purchase contract to be negotiated between the parties after 19 February 1991.

[40] This was confirmed in the affidavit of the defendant Goldgar at paragraph 74 where he stated:

> "By letter dated April 30, 1991 I wrote to Baird indicating, amongst other things, that I would be returning the bulk of the US$814,000 which return was without prejudice to Betts' and Caribe's legal rights. The balance was to be credited to the purchase price if the transactions were to proceed."

[41] The claimant is entitled to the return of this sum it having been the remnant of the payments for what was an abortive purchase of the lands.

Court's Orders

[42] The Court's Orders are as follows;

(i) The agreement between the parties was terminated as a result of the Claimant's repudiatory breach of the 2nd Amended agreement, in failing to close on the 19th February 1991 and the defendants' acceptance of such breach.

(ii) The claim against the defendants is dismissed.

(iii) The Freezing Order granted on 25th November 2015 is hereby discharged.

(iv) The defendants are entitled to their costs, such costs to be assessed if not agreed.

Marlene I. Carter
High Court Judge

By the Court

Registrar