GRENADA

IN THE COURT OF APPEAL

HCVAP2007/027

BETWEEN:

BRADFORD NOEL

Appellant

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Respondent

Before:

The Hon. Mr. Denys A. Barrow, SC	Justice of Appeal
The Hon. Mde. Ola-Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mde. Indra Hariprashad-Charles	Justice of Appeal [Ag.]

Appearances:

Mrs. Celia Edwards, QC, and with her Ms. Claudette Joseph and Mr. Ian Sandy for the Appellant

Mr. Richard Williams and Ms. Rebecca Stubbs for the Respondent

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2008: November 11;
2009: March 23.

Civil Appeal – Agreement for sale of a property – offer and acceptance of purchase price – financing by way of mortgage – commitment letter - resubmitting an offer under a sealed bid process – whether releasing the bank from prior legal or moral obligation except financing constitutes a waiver of rights under the agreement – specific performance – breach of contract – damages – Counter Notice of Appeal – whether there was a valid or binding contract – prescribed costs –

The appellant made a written offer of US$650,000.00 to purchase a property from the respondent which was accepted on the 25th November 2003, with the agreed term that the respondent approved a mortgage to the appellant in the equivalent of 95% of the purchase price. Subsequently, financing of 100% was approved. The commitment letter was signed on 2nd January 2004. On or about 14th January 2004, the bidding process was re-opened and a request was made that the appellant resubmit an offer under a sealed bid process for the purchase of the property. The appellant did so on 20th January 2004, and

confirmed his position by letter stating that he released the respondent from any prior legal or moral obligation to him, except the financing arrangement. The respondent's solicitors informed the appellant that the mortgage was ready to be signed on 27th January 2004, which he did the next day. On that very same day, he was told that his resubmitted bid was not successful and the respondent refused to sell to him. The appellant's case is that the mortgage was executed before he had been informed of his unsuccessful bid and it was therefore a representation that his resubmitted bid was accepted. The respondent denies this and argues that the mortgage had been executed after the appellant was informed of his unsuccessful bid. The appellant sought specific performance of the sale agreement and damages for breach of contract. The trial judge dismissed his claim and awarded prescribed costs to the respondent, this decision the appellant now appeals.

Held: affirming the decision of the lower court and dismissing the counter appeal and affirming costs in the court below and awarding costs of this appeal at two-thirds of the costs in the lower court.

1. That the learned judge correctly held that although the appellant had a binding contract for the sale of the property with the respondent, his subsequent representations to the respondent discharged that contract of sale.

2. That even if the second bidding process was done in bad faith, that would not have the effect of re-creating the contract of sale or entitle the appellant to the relief that he is seeking.

3. That the appellant has not advanced a good reason to show why this court should interfere with the exercise of the judge's discretion on costs.

JUDGMENT

[1] HARIPRASHAD-CHARLES, J.A. [AG.]: This appeal concerns an agreement for the sale of a property referred to as "the Barclays Bank Manager's Residence" ("the property") between the appellant, Dr. Bradford Noel (the claimant in the court below) and the Respondent, First Caribbean International Bank (Barbados) Ltd. ("the Bank").

Background facts

[2] On or about 19th November 2003, Dr. Noel submitted a written offer to Terra Caribbean, a real estate agency, which acted as realtor and estate agent for the Bank, to purchase the property for US$600,000.00. Elise Evans, a sales agent for

Terra Caribbean, informed Mark Sayers, the Bank's Property Programme Manager in Barbados of Dr. Noel's offer. Mr. Sayers said that the offer was too low but if it were increased to US$650,000.00, it would be accepted, (provided the sale was quick).[1] Ms. Evans informed Dr. Noel about this and he agreed to increase his offer to the desired amount.

[3] On 25th November 2003, the Bank sent a letter to Dr. Noel informing him that it had accepted his offer to purchase the property at the price of US$650,000.00 ("the acceptance letter"). The terms, as stated in this letter, were that a 5% deposit was to be paid to the Bank's solicitors upon execution of a sales agreement; the balance of the purchase price was to be paid to the Bank upon execution of the conveyance in favour of Dr. Noel and that the sales agreement was to be dependent on the Bank approving a mortgage to Dr. Noel in the equivalent of 95% of the purchase price, (this subsequently changed when the Bank agreed to give Dr. Noel 100% financing).[2]

[4] On 27th November 2003, Dr. Noel made arrangements and submitted his proposal for a mortgage to Mr. Valentine Fraser, the Relationship Manager of the Bank, but for 100% financing. On 23rd December 2003, Mr. Fraser forwarded Dr. Noel's application to the Head Office of the Bank for consideration. The application for 100% financing was approved. On 2nd January 2004, Dr. Noel and the Bank signed a "commitment letter" which set out the purpose of the mortgage loan and overdraft facility.[3]

[5] On or about 14th January 2004, Mr. Sayers, on behalf of the Bank informed Dr. Noel that the Bank had decided to re-open the process of bidding for the purchase of the property ("second bidding process") and on 16th January 2004, requested in writing that Dr. Noel resubmit an offer under a sealed bid process for the purchase of the property, in the light of other expressions of interests.

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[1] Witness Statement of Mark Richard Sayers, paras. 14 and 15.
[2] According to a loan commitment letter dated 2 January 2004.
[3] See corrected Record of Appeal, Volume 1, Tab 1, page 12.

[6] On 20th January 2004, upon the request of Mr. Sayers, Dr. Noel voluntarily resubmitted his bid of US$650,000.00 and confirmed his position by sending a letter dated 20th January 2004, to Mr. Sayers, purporting to "release" the Bank from any prior legal or moral obligation to him, except the financing arrangement.

[7] In the meanwhile, the Bank's solicitors continued with the processing of the mortgage. On 27th January 2004, the solicitors for the Bank informed Dr. Noel that the mortgage was ready to be signed which he signed the next day thereby executing the mortgage to the Bank. On the same day, the Bank informed Dr. Noel that his resubmitted bid was not successful and refused to execute the conveyance to him. Dr. Noel contends that the mortgage was executed before he had been informed of his unsuccessful bid and therefore, it was a representation that his resubmitted bid was accepted. The Bank insists that the mortgage had been executed after Dr. Noel was informed of his unsuccessful bid.

[8] As a result, Dr. Noel instituted these proceedings seeking specific performance of the agreement for the sale of the property, further or alternatively, damages for breach of contract.

The judgment of the court below

[9] The matter came for trial before Henry J. On 23rd October 2007, the learned judge gave judgment dismissing Dr. Noel's claim for specific performance and damages for breach of contract. The first issue which confronted the court was whether there was a valid contract for the sale of the property between Dr. Noel and the Bank. The learned judge considered the requirements for the formation of a contract of sale and concluded that the parties had a binding agreement for the sale of the property as evidenced by Dr. Noel's offer of US$650,000.00, the acceptance letter and the commitment letter of 2nd January 2004.

[10] The next issue which the learned judge considered was whether Dr. Noel, by his acts and conduct, waived his rights under the agreement. She found that Dr. Noel agreed to give up his rights under the agreement and to be bound by a second

bidding process but he did not agree to release the bank from its commitment to provide a mortgage.[4] The learned judge further found that the Bank did not represent to Dr. Noel that his bid was successful but in fact, notified him in writing of his unsuccessful bid. The judge concluded that Dr. Noel was not entitled to the claims for specific performance and damages for breach of contract.

[11] In coming to her decision, the learned judge considered several important factors, including the alleged contract; the acceptance letter; the 5% deposit; the authority of the agent; the alleged breaches of the terms of the acceptance letter; the alleged release/waiver and the rights accruing after 20th January 2004, with respect to the executed mortgage.

The appeal

[12] Dr. Noel has appealed to this Court against the decision of the learned judge on a multiplicity of grounds, not all of which were raised in the lower court. Ground 8 was withdrawn prior to the hearing.[5] Dr. Noel has challenged the learned judge's decision on both findings of fact and findings of law. He contended that the learned judge was wrong to find that: (1) the Bank proceeded with the bidding process in reliance on his representations; (2) in requesting him (Dr. Noel) to execute the mortgage, the Bank did not represent to him that his resubmitted bid was successful; and (3) the Bank had come to equity with clean hands. He criticised the judge's approach in analyzing the evidence and eventually coming to her conclusion. Dr. Noel also challenged the finding of law made by the judge that he was not entitled to challenge the efficacy in the bidding process.

[13] The Bank issued a Counter-Notice of Appeal, which mainly challenges the learned judge's finding that there was a valid or binding contract.

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[4] See paragraph 53 of the Judgment.
[5] See paragraph 42 of the Appellant's skeleton argument filed on 20th June 2006.

Findings of facts

[14] On an appeal challenging the trial judge's findings of fact, the appellate court operates on the presumption that the decision of the court below was right and, therefore, the court is cautious in interfering with the trial judge's findings. In Colonial Securities Trust Ltd. v Massey[6] Lord Esher MR stated:

> "That is the rule of conduct which we ought now to apply in this Court. The judge in the Court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. Where witnesses are not examined before the judge, but the case is determined on evidence taken on affidavit, or examination not before the judge, or partly on one and partly on the other, the Court of Appeal is not hampered by the consideration that the judge in the Court below has seen the witnesses, whilst the Court of Appeal has not, and the rule of conduct would not apply so strongly, but still this Court would not reverse the judgment and give a different one, unless satisfied that the judge was wrong."

[15] Rawlins JA [as he then was] in Golfview Development Limited v St. Kitts Development Corporation and Michael Simanic,[7] comprehensively sets out the approach to be adopted when an appellate court is asked to reverse a finding of fact. An appellate court will not impeach a finding of fact by a trial judge who had the advantage of seeing and hearing the witnesses except in certain limited circumstances.[8] At paragraph 24 of the judgment, his lordship said:

> "Where therefore there is an appeal against the fact-finding of a court of first instance, the burden upon the appellant is a heavy one. The appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong or, as it is sometimes elegantly stated, exceeded the generous ambit within which reasonable agreement is possible."

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[6] (1896) 1 QB 38, CA at 39, per Lord Esher MR.; See also Savage v Adam (1895) WN 109, CA Lopes LJ, Watt (or Thomas) v Thomas (1947) 1 All ER 582 HL and Whitehouse v Jordan (1981) 1 All ER 267.

[7] Civil Appeal No. 17 of 2004, Saint Christopher and Nevis; paragraphs 23-24 of the judgment.

[8] See also Edwards JA in Elena Collongues v (1) Andrey Lych (2) Olga Mirimskaya et al, HCVAP2007/001, paragraphs 12 to 19.

[16] However, where the trial judge's decision on an issue of fact was an inference drawn from primary facts and depended on the evidentiary value that the judge gave to witnesses' evidence and not on their credibility and demeanour, the appellate court is just as well placed as the trial judge to determine the proper inference to be drawn and is entitled to form its own opinion thereon.[9]

[17] Since both parties contend that the learned judge misused her advantage in arriving at certain fundamental findings of fact, it is necessary that this court carries out a critical review of the relevant findings, evidence and pleadings.

[18] The grounds of appeal raise the following issues namely: (1) whether the "release letter" of 20th January 2004, and the acts and conduct of Dr. Noel disentitled him to the relief claimed; (2) whether there were representations by the Bank and its effect (if any) on the executed mortgage; (3) whether the second bidding process was conducted in good faith; (4) whether the Bank had not come to equity with clean hands; and (5) whether the award of prescribed costs was excessive.

The "release letter" and acts and conduct of Dr. Noel

[19] Grounds (iii) and (v) deal with this issue. According to Mr. Sayers' evidence, on 14th January 2004, he spoke to Dr. Noel via a conference call to inform him of the "mutually inconsistent positions that the bank appeared to have found itself in as a consequence of steps taken to date with him and another purchaser" and that the Bank wished for Dr. Noel to go through a second bidding process and to re-submit his bid for the property. Mr. Sayers said that they had wanted to speak with Dr. Noel about the second bidding process before executing it, because they had a "moral obligation" to him, though not a legal one. Also sitting in on this conference call was Robert Weir, who acted as a bystander with Dr. Noel's consent. According to both Messrs. Sayers and Weir, Dr. Noel was pleasant and understanding after being informed of the second bidding process. The trial judge accepted this evidence.

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[9] Per Lord Wilberforce in Whitehouse v Jordan [1981] 1 All ER 269, at pages 272 para. h to page 273, para. j.

[20] The following day, Mr. Sayers stated that he sent formal invitations to submit best offer sealed bids to Dr. Noel and two other interested persons. Following this, Dr. Noel sent a letter dated 20th January 2004, (the "release letter") to Mr. Sayers, which read in part as follows:

> "Dear Mark Sayers,
>
> I'm sure you received the letter from Grant/Joseph advising that they believe they have an enforceable case and requesting that bidding be discontinued giving timescale for your confirmation of discontinuing.
>
> In the absence of your reply my lawyers are preparing an Injunction. Against legal advice, I have today uninstructed my lawyers from filing their proposed injunction…[Emphasis added]
>
> Anyway despite all that I today release you totally legally, morally and conscience-wise from any prior obligation other than the financing arrangement so you can feel free to proceed with your bidding process in good faith. [Emphasis added]
>
> I will also take this opportunity to accept your invitation to re-submit my humble bid of US$650,000.00 (the current limit of my borrowing ability) which with time if accepted will I believe lead to good fortune all around…
>
> We are hopeful it will be positive but if not we will be philosophical and put it down to experience. [Emphasis added]
>
> Yours Truly,
> Dr. Bradford Noel."

[21] Learned Queen's Counsel for Dr. Noel, Mrs. Edwards, contends that the purported release/waiver is null and void and of no effect and that it can only be enforceable if there is evidence of consideration (counsel contended that there was none). Mrs. Edwards further contends that a valid waiver must be unequivocal and the recipient must have relied upon it.

[22] According to the learned authors of Chitty on Contracts,[10] where a contract is executory on both sides, i.e. where neither party has performed the whole of his

[10] Pg. 817, para. 1482. Davis v Street (1823) 1 C & P 18, Rose and Frank Co. v JR Crompton and Bros. Ltd, (1925) AC 445.

obligations under it, it may be rescinded by the mutual agreement of both parties, express or implied. This is called a rescission of the contract by agreement.

[23] According to the law, the consideration for the discharge is found in the abandonment by each party of his right to performance or his right to damages, as the case may be.[11] The consent of both parties can be gathered from their words and conduct and not upon the intimation by one of them that he does not intend to be bound by the agreement.[12] This has the effect of discharging the contract in its entirety, thereby it cannot be revived.[13]

[24] In our view, the said telephone conversations between the parties and the "release letter" written by Dr. Noel are good examples of a rescission of the contract by agreement. Therefore, the contract of sale between the parties for the property had been discharged, and Dr. Noel can no longer rely on his prior rights under the contract.

[25] Further, learned Queen's Counsel for Dr. Noel argued that the Bank would have proceeded with the second bidding process with or without Dr. Noel's representations as raised in ground (v). However, the evidence of Messrs. Sayers and Weir revealed that even before the release letter was written, Dr. Noel was "pleasant and very understanding" when he was informed of the second process of bidding.[14] In our view, the trial judge correctly stated that a "court is not allowed to speculate as to what might have happened." This is the principle laid down in Brikom Investments v Carr,[15] where Lord Denning stated as follows:

> "It is no answer for the maker to say, "you would have gone ahead with the transaction anyway." That must be mere speculation. No one can be sure what he would or would not have done in a hypothetical state of affairs which never took place…"

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[11] Scarf v Jardine (1882) 7 App. Cas 345, 351; Raggow v Scougall & Co. (1915) 31 TLR 564.
[12] Chitty on Contracts, pg. 817, para. 1482
[13] Andre et Compaignie SA v Marine Transocean Ltd. (1981) QB 694.
[14] Dr. Sayers' witness statement, paras. 25-26; Mr. Weir's witness statement, para. (d).
[15] (1979) 1 QB 467, 482, 483.

[26] In any event, the fact is that the "release letter" was written and sent by Dr. Noel and it has the effect of discharging the contract of sale. We are satisfied that Dr. Noel, a medical doctor with business acumen, sent this letter willingly, albeit, against the legal advice from his lawyers.

[27] In our opinion, there is no basis on which this court can interfere with the conclusion reached by the learned judge as to the effect of the statements made by Dr. Noel in conversation and the subsequent release letter. We find that these grounds of appeal are unsustainable and we would dismiss them.

Alleged representations and the executed mortgage

[28] Grounds (i) and (ii) deal with the issue of the alleged representations by the Bank and its effect (if any) on the executed mortgage. Learned Queen's Counsel for Dr. Noel argues that when the Bank called Dr. Noel to execute the mortgage after he had resubmitted his bid in the second bidding process, it could only have meant that his bid had been accepted since a mortgage is not given in isolation and especially since the executed mortgage was in respect of the property. Accordingly, says learned Queen's Counsel, the Bank made representations to Dr. Noel stating that his bid was accepted. On the other hand, learned counsel for the Bank, Mr. Williams, insists that the sale of the property and the financing were two discrete transactions.

[29] The learned judge dealt with this issue at paragraphs 51 and 53 of the judgment. At paragraph 51, she stated that the instructions by the Bank to its solicitors to prepare the mortgage and conveyance took place on 13th January 2004, before the telephone conversations with Dr. Noel between 14th January and 20th January, and his "release letter" was dated 20th January 2004, which made it clear that Dr. Noel was taking his chance with the sealed bid process.

[30] At paragraph 53, the learned judge said:

> "When [the] claimant agreed to give up his rights under this agreement and to be bound by a second process, he did not agree to release the bank from its commitment to provide a mortgage. His reason for this is

clearly stated- if he were successful in the bidding process, he would need the mortgage, therefore he kept it alive. So it is apparent that the bank continued to process the mortgage."

[31] The judge considered the Bank's allegations that Dr. Noel knew that he was not the successful bidder before he went to execute the mortgage and that he acted in haste to execute the mortgage in an attempt to force the bank's hand. However, she did not find so. Instead, she found that Dr. Noel misconstrued the significance of the letter from the Securities Officer to the Solicitors that the mortgage document was in order and the subsequent request by the Solicitors. According to the learned judge "He [Dr. Noel] simply failed to recall his own reasoning that the mortgage was being kept because if he was the successful bidder he would need financing."[16]

[32] The acceptance letter specifically mentioned that the agreement was dependant on FCIB Grenada approving a mortgage to Dr. Noel in the equivalent of 95% of the purchase price. Therefore, when the Bank approved the mortgage to Dr. Noel, it completed the requirements as set out in the initial agreement.

[33] Noteworthy is the fact that Dr. Noel, in the release letter, released the Bank of all obligations, with the exception of "other than the financing arrangement."

[34] In our view, since the mortgage was approved after Dr. Noel had already discharged his rights under the contract, he is not entitled to rely on the mortgage. The release letter states that he wholly released the Bank from any legal or moral obligation it had with him. We therefore find that these grounds lack merit and accordingly, we would dismiss them.

Was the second bidding process conducted in good faith?

[35] Dr. Noel complains that the learned judge erred and misdirected herself in concluding that he was not entitled to challenge the irregularities in the bidding process. He maintains that the efficacy of the bidding process was specifically

[16] See paragraph 54 of the Judgment.

pleaded at paragraphs 12(7)(a) and 12(8) of the Bank's defence and that the oral and documentary evidence which the Bank relied on at the trial was inconsistent with its pleaded case.[17]

[36] According to learned Queen's Counsel, when Dr. Noel submitted himself to the second bidding process, he did so on the basis that it will proceed in good faith. Counsel also contends that the Bank assured Dr. Noel that it was committed to a fair process, yet it breached several conditions as referred to in paragraphs 12(7)(a) and 12(8) of its Defence, which succinctly states that the bidding process would be conducted "in accordance with the specified conditions contained in the attachment sent to the Claimant and did so in good faith."

[37] Paragraphs 12(7)(a) and 12(8) have nothing to do with the irregularities in the bidding process. The learned judge quite properly refused to entertain this issue as it was not pleaded. Nor did it emerge in Dr. Noel's Reply. In addition, there was not a shred of evidence to prove such a serious allegation. In any event, even if the second bidding process was done in bad faith, that would not have the effect of re-creating the contract of sale or entitle Dr. Noel to the relief that he is seeking. This ground of appeal is without merit. Accordingly, we would dismiss it.

Clean hands

[38] At the trial, Dr. Noel invited the learned judge to find that the Bank had not come into equity with clean hands.[18] He said that this was manifest from a perusal of the documentary evidence and the cumulative evidence of Messrs. Sayers, Weir and Huntley. He also referred to alleged examples of impropriety.

[39] The maxim "he who comes with equity must come with clean hands" is another way of saying that "the plaintiff (in this case, the Bank) not only must be prepared now to do what is right and fair, but also must show that its past record in the transaction is clean…"[19] The learned judge found that "on the evidence, the court

[17] See paragraph 4(iv) of the Notice of Appeal filed on 11th December 2007.
[18] See page 50 of claimant's closing submissions.
[19] See Jones v Lenthal (1669) 1 Ch. Ca. 154.

cannot agree with the submission that the [Bank] is not entitled to invoke the equitable jurisdiction of the court since [it] has not come with clean hands."[20] Dr. Noel criticised this aspect of the judge's finding.

[40] This issue was never pleaded. It was a closing submission. We find this ground to be without merit and we would dismiss it.

Costs

[41] Ground (vii) raises an issue of discretion of the trial judge in awarding prescribed costs. It was raised for the first time before us. The learned judge ordered Dr. Noel to pay the Bank's costs on the basis of prescribed costs in accordance with the decision of Baptiste J. On 18th August 2006, Baptiste J placed a value on the claim for the purpose of calculating the costs in the amount of US$80,000.[21]

[42] Learned Queen's Counsel urges this Court to reduce the amount of prescribed costs. She urges on the basis that Dr. Noel was able to make out several aspects of his case and perhaps, more significantly, the relative economic position of the parties.

[43] The learned judge made an award of costs in the exercise of her judicial discretion. Learned Queen's Counsel has not advanced any argument to show why this court should interfere with the exercise of the judge's discretion. This ground of appeal fails and we would therefore dismiss it.

The Respondent's Counter-Notice

[44] In its Counter-Notice, the main challenge by the Bank is the learned judge's finding that a valid contract of sale was made between Dr. Noel and the Bank. It contended that the acceptance letter accepting Dr. Noel's offer was made subject to the preparation and approval of a formal contract of sale and that the contract of

[20] See paragraph 45 of the Judgment.
[21] The appellant appealed the order of Baptiste J. Barrow JA on 19th March 2007 upheld the order of Baptiste J.

sale was never prepared, completed or approved, and therefore, there was not a binding contract of sale. The judge after considering the evidence did not accept the Bank's contentions on this point.

[45] In our view, no useful purpose will be served by further considering this issue in the light of the final outcome of this appeal. We would therefore, dismiss the cross-appeal and make no order as to costs.

Conclusion

[46] We are satisfied that the learned judge correctly held that although, in her view, Dr. Noel had a binding contract for the sale of the property with the Bank, his subsequent representations to the Bank discharged that contract of sale. Accordingly, we would dismiss the appeal and the cross-appeal. We would further order that the Bank shall have its costs in the court below of US$80,000 and of this appeal, at two-thirds of that sum, (US$53,333).

This is a judgment of the Court.