

ST. LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2022/0513

BETWEEN:

ROSEMARY NOONE

Claimant

and

PETER HOPKINSON

(as beneficial owner)

Defendant

Appearances:

Ms. Wauneen Louis-Harris, counsel for the Claimant

Ms. Tianah Foster, counsel for the Defendant

2024: October 9
 December 3

JUDGMENT

- [1] **SAUNDERS, M:** In this matter the Claimant's ("*Ms. Noone's*") claim is for specific performance and damages arising from the Defendant's ("*Mr. Hopkinson's*") breach of an agreement for the sale of a condominium in Cas En Bas, Gros Islet ("*the Property*"). The agreement is alleged by Ms. Noone to be contained in a document dated 20 October 2021 labelled "OFFER TO PURCHASE" ("*the Proposal*") and later allegedly formalised in a draft agreement for sale transmitted to Mr. Hopkinson's attorneys in January 2022 ("*the Draft Sale Agreement*") which was never signed. Mr. Hopkinson has defended the claim on the basis, in summary, that there was never a written or other agreement between the parties and that, in any event, he is only a beneficial owner of the Property. It is not disputed that the legal title to the Property is currently held by a company which is the subject of insolvency

proceedings, but which has an obligation, subject to those proceedings, to transfer the legal interest to Mr. Hopkinson.

- [2] The importance of there being a written agreement, specifically, is that Article 957 of the Civil Code of St Lucia, Chapter 4.01 (*“the Civil Code”*) mandates, among other things, that there must be a deed of sale or memorandum in writing setting out the conditions of sale of immovable property.
- [3] On 29 January 2024 Mr. Hopkinson applied for Summary Judgment (*“the Application”*) on the following grounds, essentially:
- a. No agreement was ever executed by the parties; and
 - b. Ms. Noone’s claim purports to enforce an offer which expired on 12 November 2021; and
- [4] The parties made oral submissions concerning the Application on 9 October 2024 and having considered them, the written submissions and legal authorities, I have decided to dismiss the Application for the reasons which follow.

Summary Judgment Applications

- [5] CPR 15.2, the rule which governs the Court’s remit on an application for summary Judgment, provides that:
- “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 issue.”*
- [6] There is no shortage of legal authority concerning the Court’s role on summary judgment applications. For the purpose of the Application and because there was no dispute regarding the relevant test, it is sufficient to say that granting summary judgment is a discretionary exercise in which the Court considers whether to summarily dispose of cases or issues because they do not require a

trial due to the absence of genuine disputes of fact¹. Said in a different way by Pereira CJ in Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others (2016) 89 WIR 277:

*“In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly.”*²

The Issues

- [7] The issues relevant to the determination of the Application, having heard the oral submissions of the parties, are whether Ms. Noone has no realistic prospect of success on her claim because:
- a. No written agreement was ever executed between the parties and the Proposal is an offer only which had expired at the time of purported acceptance; and
 - b. As there is no written agreement, any other agreement between the parties does not conform with Article 957 of the Civil Code and is therefore null and void.

Whether a Valid Agreement Subsists Between the Parties

- [8] The Proposal is boldly headed “OFFER TO PURCHASE” and so Mr. Hopkinson’s counsel contends that it could not possibly be an agreement and exists purely as an unaccepted offer. Ms. Noone’s counsel argues that the document was an offer which was accepted by Mr. Hopkinson when the deposit was paid to his attorneys on 10 November 2021 and thereafter placed in their trust account. Mr. Hopkinson’s counterargument is that the offer could not have been accepted by him on 10 November 2021 because the Proposal specifically says that it would expire well before that.

¹ Bank of Nevis International Trust Services Inc v Belmont Holdings SKN Limited NEVHCVP2023/0018; at [34]

² (2016) 89 WIR 277; at [23]

- [9] Notwithstanding the heading of the Proposal, it is a basic principle of the law of contract that whether an agreement subsists between parties is to be determined based, not on the heading of a contractual document, but on a consideration of the verbal exchanges, contractual texts and conduct of the parties. See e.g. the dicta of Lord Cairns in Brogden v. Metropolitan Railway Co. (1877) 2 App.Cas. 666³ that:

“... there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description...”

- [10] The whole exercise concerns the application of an objective test in which a party may be bound regardless of their intentions. See for example the decision Smit v. Hughes (1871) L.R. 6 Q.B. 597 at 607 on the point:

“I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v. Cooke (1). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms”
(emphasis supplied)

- [11] It is also settled law that headings and marginal notes cannot override the meanings of the terms of a contractual document. See e.g. the decision, National Farmers' Union Mutual Insurance Society, Limited v. Dawson [1941] 2 K.B. 424 in which a marginal note was considered an unsafe guide in construing a condition and Cott UK Ltd v F E Barber Ltd [1997] 3 All ER 540 in which it was

³ At pg. 672

decided that that the heading “arbitration” was a catchword, or form of identification, inserted for convenience of reference and could not prevail over the express wording of the clause.

- [12] The Proposal, as a contractual document, must be construed keeping in mind the principles set out by Thom JA in Antigua and Barbuda Transport Board v Anderson Carty ANUHLTAP2020/0005-6 where the following dicta of Lord Hodge in Wood v Capita Insurance Services Ltd [2017] AC 1173 was approved:

*“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause **but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.**”*

- [13] From my consideration of the Proposal, the witness statements and the pleadings, there is still yet another interpretation that the Court may take of the relationship between the parties, which is that the Proposal is, at one and the same time, both an offer by Ms. Noone and an acceptance by Mr. Hopkinson. The Proposal contains several terms which could suggest that on a wholistic construction of the document and the way the parties conducted themselves, an agreement for the sale of the Property was reached on 22 October 2021 when Mr. Hopkinson signed the document. For example:

- a. After recording that Ms. Noone was submitting to Mr. Hopkinson an offer in the sum of USD\$100,000 for the purchase of the Property, the next paragraph of the Proposal provides explicitly that, “at the execution and acceptance of this OFFER TO PURCHASE, the offeror and the offeree agree as follows” (Emphasis supplied);
- b. The Proposal was signed by Ms. Noone on 21 October 2021 whereas Mr. Hopkinson signed it on 22 October 2024. The Proposal notes as

follows immediately above the parties' signatures as offeror and offeree:
"Accepted"; and

- c. Following the execution of the Proposal, Ms. Noone paid a deposit of USD\$10,000, as provided by Proposal.

[14] It is undoubtedly true that understanding the Proposal is made more difficult because at different places throughout it refers to itself as both a "binding" document and an "offer". I was told at the hearing by counsel for Mr. Hopkinson that the document was not drafted by an attorney. Despite that, the Court must ascertain the legal effect, if any, of the Proposal and the objective intentions of the parties in signing it. Although the document is littered with instances in which it refers to itself as an "OFFER TO PURCHASE" which is "binding" and other similar oxymorons, if one takes the view that the Proposal, the "OFFER TO PURCHASE", was an offer right up until both parties executed it whereupon it became a binding agreement, it is not too difficult to make sense of the apparent contradictions in terms which feature from time to time. In other words, that the heading of the document does not manage to keep up with the current state of things may be excusable.

[15] Having said all of that, I dare say, although the written evidence has been filed, this Court is at a disadvantage relative to the trial Court following the hearing of cross-examination, in making a conclusive finding concerning the contractual relationship between the parties. This is particularly so when I consider the respective constructions of the Proposal contended for by the parties themselves and set out by me at [8] above. For example, the following factual issues arise, which may be treated with in cross-examination that, in my opinion, could make a significant difference to whether the Proposal is an offer only, an offer that was accepted upon payment of a deposit, or, whether it contains a binding agreement:

- a. What was said by Mr. Hopkinson's attorneys when the deposit cheque was given to them?
- b. How soon following the receipt of the cheque was it deposited into Mr. Hopkinson's Attorneys' trust account? What was the reason for the deposit

of the funds into the trust account if there was no agreement between the parties?

- c. Did Mr. Hopkinson's counsel only seek to refund the deposit in April 2024 as Ms. Noone has said in her Witness Summary? If so, why did the purported return take so long if there was never an agreement between the parties? If not, when was the first time that Mr. Hopkinson sought to return the deposit?

[16] Insofar as Mr. Hopkinson's counsel has submitted that the offer could not have been accepted as it had expired, is it not open to Ms. Noone to contend, as she has, that an agreement was formed by way of the parties' conduct? That is, could not a new offer in terms of the Proposal have been made because of payment of the deposit and thereafter accepted by receipt of same without complaint and an implied agreement then formed?⁴ It seems to me that the scenario is possible. What all the arguments have in common is that they call for a fact intensive analysis of what transpired together with a construction of the Proposal. Although the witness statements have been filed, cross examination could be helpful to put matters beyond doubt one way or another, the issues turning, in large part, on an examination of the parties' conduct. For that reason, in my opinion, it is not safe to make a summary determination regarding whether there was an agreement and what were its terms and effect.

Whether Ms. Noone's Claim has No Realistic Prospect of Success Because there is No Memorandum of any Agreement

[17] Notwithstanding that I have decided that I am unable to summarily say whether there was and what was the agreement between the parties, I believe that I should make some statements regarding the issue that there was never any memorandum of an agreement regardless of the contractual effect of the Proposal. Article 957 of the Civil Code provides as follows:

"957. A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the mere consent of the parties. Movable must be delivered in order to affect third parties, and

⁴ See e.g. Hart v Mills (1846) 15 L.J. Ex. 200; Steven v Bromley & Son [1919] 2 K.B. 722 and The Saronikos [1986] 2 Lloyd's Rep. 277.

in the case of immovables there must be a deed of sale, or memorandum in writing, stating the conditions of the sale.” (Emphasis supplied)

[18] It is settled law, as Gordon JA observed in the Grenada appeal Nelson Lewis and Another v Dirk Burkhardt [2007] ECSCJ No. 40, that the purpose of a memorandum is not to set out all the terms of the agreement, but to evidence essential terms. At [13] of Nelson Lewis and Another v Dirk Burkhardt the Learned Judge states as follows regarding the requirement while construing s. 4 of the Grenada Real and Personal Property (Special Provisions) Act which is *in pari materia* with Article 957:

“The memorandum is required only as evidence of a contract. Put another way, the contract exists independently of the writing or memorandum but cannot be proved in court without the memorandum or writing. It has been consistently held in England that no special form of memorandum in writing is required provided only that it contains the essential terms of the contract and is signed by the party to be charged, or by someone on his behalf.² It has further been held that where the memorandum in writing consists of more than one document, but only one document is signed by the defendant or on his behalf, then if that one signed document contains some implied or specific reference to another document, then oral evidence is admissible to identify the other document and the two may be read together”⁵. (Emphasis supplied)

[19] When I consider Ms. Noone’s Statement of Claim and Witness Summary it is clear that, while the Proposal is relied on by her as the entire agreement between the parties, Ms. Noone appears to seek specific performance of the terms of the Draft Sale Agreement⁶. Even if the trial Judge ultimately finds that the Draft Sale Agreement is not simply a formal version of what is contained in the Proposal, the Court would still be entitled to consider whether the Proposal evidences an agreement if it finds that one was in place.

⁵ Nelson Lewis and Another v Dirk Burkhardt [2007] ECSCJ No. 40; at [13]

⁶ Attached as “RN8” to Ms. Noone’s Witness Summary

[20] The purport of the Proposal is that of an open contract for the sale of land and it is therefore implied in law that the vendor, Mr. Hopkinson, will give good title. There need not be any memorandum of such an implied term⁷. Mr. Hopkinson, for his part, is permitted to prove at trial that Ms. Noone contracted with the knowledge that certain defects in title were known to her when the agreement was reached and that she was therefore content to take a title less complete than that which the law would otherwise have given by implication⁸. In such an event, Ms. Noone would be entitled to seek damages or specific performance (of Mr. Hopkinson's interest) with an abatement of price and compensation⁹ while Mr. Hopkinson would be free to rebut that he is obligated to convey any more than his beneficial interest in the Property¹⁰.

[21] I make the above statements only to say that it would by no means be a pyrrhic victory for Ms. Noone to be given the opportunity to prove whether there was an agreement between the parties and that her claim for specific performance has a realistic prospect of success.

My Order

[22] For all the reasons set out above my Order is as follows:

- a. The Defendant's Application for Summary Judgment is dismissed.
- b. Costs in the cause.

Yuri Saunders

Master

Registrar

⁷ McGrory v. Alderdale Estate Co. Ltd [1918] A.C. 503; at pg. 508

⁸ McGrory v. Alderdale Estate Co. Ltd [1918] A.C. 503; at pg. 508

⁹ See Abraham v Chu For HCA No. 1461 of 2000 (8 April 2008) (Trinidad and Tobago), Barnes v Wood [1869] L.R. 8 Eq 424 and Basma v Weekes [1950] AC 441

¹⁰ McGrory v. Alderdale Estate Co. Ltd [1918] A.C. 503; at pg. 508