

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2015/0036

BETWEEN:

**[1] RICKIE MORAIN
[2] ROBBIE MORAIN**

Claimants

and

BEVERLEY WHINT

Defendant

REPUBLIC BANK (GRENADA) LIMITED

Interested Party

BEFORE:

**Her Ladyship, the Honourable Agnes Actie
(High Court Judge)**

VIA ZOOM

APPEARANCES:

Ms. Celia Edwards Q.C with Mr Zuriel Francique for the claimants

Mr. Nigel Stewart for the defendant

Ms Amy Bullock Jawahir for the Interested Party

2021: February 15;
November 26.

JUDGMENT

[1] **ACTIE, J.:** The claimants seek specific performance of an agreement made between the parties for the sale of freehold property with a two-storey concrete dwelling situate at Woburn in the parish of Saint George's, Grenada.

Background

[2] The claimants and the defendant are siblings. The property in dispute is registered in the name of the defendant and is subject to a mortgage with the Republic Bank (Grenada) Ltd. The defendant defaulted in the payment of the mortgage and the bank as mortgagee was in the process of selling the property under its power of sale under the mortgage deed. The second claimant becoming aware of the defendant's default and wanting to keep the property in the family's circle contacted the mortgagee's representative, Mr O' Neale Dominique.

[3] The claimants, in an effort to assist the defendant, negotiated with the mortgagee and entered into a loan agreement with the mortgagee to clear off the mortgage debt. The defendant consented and promised to the transfer of property to the claimants and addressed a note to the mortgagee on 27th January 2011, which reads as follows:

"ATTENTION MR ONEAL DOMINIQUE

Please use this letter as authority to certify that I promise to sell the building located at Woburn, St. George's Grenada to Robby Morain and Rickey Claude Morain for the amounts of EC\$154,719.15 70,00.00 being the full outstanding balance on the account.

Please let me know of any other conditions in order to process this sale."

Sincerely

Beverly Whint

[4] The claimants obtained a loan from the mortgagee and the funds disbursed were used to clear off the defendant's outstanding balance on her mortgage. However, the defendant failed to sign the deed of conveyance to the claimants. As a result, the mortgagee reversed all the transactions, and the claimants were reimbursed all sums paid to the bank and the mortgage was reinstated on the defendant's property. The defendant's mortgage with the mortgagee remains due and owing to date.

[5] The claimants contend that they were put in occupation of the property and upon reliance on the agreement made with the defendant, entered into a mortgage agreement with the bank to purchase the property. The claimants state that they

expended in excess of \$330,000.00 to renovate and refurbish the dwelling house. The claimants aver that the defendant to date has refused to sign the deed of conveyance. The claimants state that damages will not be an adequate remedy since the defendant has no funds to pay. Also, they are in possession and have made their home in the premises and have expended funds to make the same to their comfort. Accordingly, the claimants seek specific performance of the agreement made with the defendant.

The defendant's case

- [6] The defendant denies that an agreement was entered into between herself and the claimants. She states that she migrated to the USA in 2007. At the time the downstairs portion of the building was rented, and the rental income was partially used for the payment of the mortgage loan. The tenants vacated the property in 2010 and accordingly the loan fell into arrears. She asked the second claimant to make inquiries about the mortgage debt. By email 27th January 2011, the second defendant informed that the mortgagee was not interested in monthly payment arrangement and that she would have to make a sale agreement with the claimants as the other option was that the property would be placed on the open market for sale by the mortgagee.
- [7] The second claimant informed that he could shift some funds and arrange for his salary to go towards the loan payment. He further told that the defendant that she should not go too high with the purchase price as this would affect the amount he would have to pay towards the loan. The second claimant also indicated that he was not interested in holding the property for life and would resell the said property to the defendant once she was back on her feet. The defendant contends that she drafted a note to Mr. Dominique advising that she agreed to the sale of the property for the sum of \$154,919.15 being the full balance due on the mortgage account. On advice given, she sent an email to indicate that the sale should not be arranged for just the balance of the mortgage debt but should also include government taxes and

transfer tax, among other fees. The defendant then amended the note to reflect the amount of \$170,000.00.

[8] The defendant states that the property was in fact valued in 2011 in the sum of \$682,617.60. The defendant contends that no consideration was given for the actual value of the property at the time of making the said note as the intention was just to pay off the outstanding mortgage balance and taxes which the claimants agreed to assist her and to which the mortgagee also agreed. The defendant contends that the claimants agreed orally to pay off the outstanding sum under the mortgage on the following terms:

- (a) that the defendant convey the property in exchange for the sum of \$170,000.00 and that the property be used by the claimants to secure the loan of \$180,000.00.
- (b) that the claimants pay the bank the sum owing on the mortgage
- (c) that the claimants pay the property transfer tax on the sale of the property.
- (d) that the defendant pay the claimants the sum of \$180,000 in ten years plus any amount paid to the Government of Grenada, as property transfer tax;
- (e) that upon repayment of the loan of \$180,000.00 plus amount paid to the government and all interest, the claimants would reconvey the said property to the defendant:
- (f) in the event that the defendant is unable to repay the said amounts that the claimants have completed the repayment of the entire loan to pay off her indebtedness to the bank, and the bank had reconveyed the said property to the claimants, the claimants shall immediately convey to the defendant one half share interest part or share to the defendant and

then the property would be owned by the Claimants and the defendant in equal shares as joint tenants.

- [9] The defendant contends that she received the conveyance deed sometime in July 2011, however the deed did not speak at all to the terms agreed with the claimants and as a result she did not sign the deed. The defendant denies that she agreed upon signing the note dated 27th January 2011, that the claimants would take possession of the property and neither did she authorize the claimants to do so. The defendant contends that even after the note was signed, she actively sought the assistance of the claimants to find new tenants. The defendant further avers that the second claimant resided in his house while the first claimant resided in the family house, respectively, which are both adjacent to the defendant's property.
- [10] The defendant asserts that the purpose of the agreement was not to secure living accommodation for the claimants but rather for the sole purpose of assisting her in paying off the mortgage and to ensure that the property was not out on the open market for sale by the mortgagee. The defendant contends that the arrangement was conditional upon the mortgagee agreeing to advance by way of loan, the said outstanding sum to the claimants and using the property as security for same.
- [11] The defendant denies that the claimants spent in excess of the \$330,000.00 or any sum at all to renovate or refurbish the property to their comfort as there was no need to do so as the house had been recently refurbished and financed by the said mortgage. The defendant contends that the property from 2011 was valued at \$682,617.60 which suggests that no further improvements were made to the said property. The defendant contends in any event that the claimants were not authorised to carry out any repairs at all to the said house especially when they knew from the very start i.e. from July 2011, that she was not willing to sign the said conveyance without the inclusion of all the terms of the oral agreement made by the parties. The defendant contends that the claim for specific performance should not

be made by the court as damages will be an adequate remedy since the claimants failed to disclose the true terms of the agreement.

Law and analysis

- [12] The issue arising on this case is whether the note signed by the defendant addressed to Mr Dominic O'Neal for the sale of the property to the claimants is enforceable. The claim is for the sale of property for which **Section 4 of the Real and Personal Property (Special Provisions) Act of Grenada ("the Act")**¹ applies. The section reads:-

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

- [13] The interpretation and application of Section 4 has been the subject of many decisions in this jurisdiction. Thom JA in the Court of Appeal decision in **B.B Inc. v. Lewis Hamilton**² which was cited in approval in the recent Court of Appeal decision in **Donald Bridgeman (also called "Earl Gerald Bridgeman" and KZ INC)**³ said:

"It is well established so as to be trite law, that section 4 contains two requirements for a contract for sale of land to be enforceable by action before the courts. The first is that there must either be a written contract for the sale of land or some interest in land or, where the contract is oral only, some memorandum or note in writing evidencing the essential terms of the oral agreement. The second is that the memorandum or written note evidencing the essential terms of the oral contract must be signed either by the party being charged (the defendant) or by someone authorized to sign it on his behalf. ***Accordingly, the memorandum or note is not the contract itself which the parties entered into, but a document which evidences the existence of a binding oral contract for the sale of land between the contending parties.***

- [14] The court held further that the memorandum or note need not be one document but may consist of more than one document in circumstances where the document

¹ Cap 273 of the Laws of Grenada.

² GDACVAP2015/00352.

³ GDAHCVAP2021/0011.

signed by the person to be charged refers directly or by necessary implication to another document or documents which themselves, individually or collectively, contain the essential terms of the oral contract entered into by the parties.

[15] Thom JA in **B.B. Inc.v Lewis Hamilton** further said:

“Although section 4 requires a memorandum or note in writing, it is not necessary that every term agreed by the parties be included in the note or memorandum. It is imperative however that all the essential terms of the agreement except terms implied by law be included. The contents of the memorandum or note must show that a binding contract was concluded. Where essential terms agreed are omitted from the memorandum or note, the requirement of section 4 would not have been satisfied as the contract evidenced by the memorandum or note would not be the contract the parties entered into.”

[16] The case at bar, involves the bank intending to exercise its power of sale under a mortgage loan. It is to be noted that the Bank as mortgagee was not an initial party to the claim when the claim was filed. The mortgagee was added as an interested party by Glasgow J in an order made on the 6th February 2019. The evidence is clear that the bank official was facilitating the transaction with the claimants and mortgagor(the defendant) in clearing her indebtedness with the bank. The correspondence between the 2nd claimant and the defendant speaks to the amount that should be reflected on the note to the bank official to facilitate the sale together with transfer tax, and other associated fees. The evidence suggests that the arrangement with the bank was to facilitate the preservation of subject property which had formed part of the family assets.

[17] The correspondence exchanges between the parties are instructive on the proposed arrangement. I reproduce the terms of the email verbatim only for emphasis.

[18] In an email correspondence from Rickie Morain dated 25th January 2011; He wrote:
“Hi Beverley

I went in and spoken to Mr Dominique at republic this morning. What he said basically is that no payment has been made from January 2010 until December and then one again recently.

He said the bank did an evaluation of your ability to repay and conclude that you are not in a position to be doing so at this time and so has instructed his department to proceed to recover cost... you know what that mean.

So he said they are not interested in any monthly arrangement, it has gone far past this stage.

What he said is that you would have to make a side arrangement with one of us (you can do this by yourself or with the help of a lawyer) the financial agency would have to evaluate our credit worthiness and ability to repay and make a decision.

They were actually due to come to evaluate the property today and take internal and external pictures .. I asked him if it is possible to hold off until next week, but he said they should have done this long before.

He said he needs to hear from you by Monday, and if he does, then he can ask for 2 – 4 weeks hold while the financial institution makes the decision – that will give some more time to organise things.

If you make a sale agreement for robby and me then I can shift my funds from scotia over to republic and arrange for salary to go towards the loan. I think that I should be in a position to qualify for that loan .. its 156 now but we can do it of about \$180, so that maybe you can get a little change in hand in the meantime... you can't go too high as that would affect the amount to pay back, along with bank fees **(neither robby nor I is interested in holding on to your property for life, so once downstairs is rented again and you are back on your feet, then we will resell to you).**

This is the best we can offer at this time, the alternative is that it will go on the market, and believe me, there are already a lot of enthusiastic buyers, including as it seems, one lady at the same republic who seems very anxious for the bank to proceed. I found Dominique to be very helpful and caring (don't know if it is just a front) he is the one who gave the advice on how we can help...I told him that the property was always in the family, and we don't want it to go to strangers.

B everyone here is shaken by this but I think that if we all come together, we can, with God's help, pull it off in the end and we have been through more than that in the past and managed to get come through. (my emphasis)

I will try to find an email address for Dominique so you can send him a note in the meantime, so that he has something on his file. Let me know what you think... also copy to Cindy in case I cannot access my email

Speak soon”

[19] By email dated 28th January 2011, Ricki Morrain wrote to Mr Dominique:

“Please see the attached sales agreement document from Beverly that was faxed to your office on Thursday January 27.

As mentioned, Me and my brother have agreed to jointly purchase that property. We wish to seek financing from Republic and so would like a appointment to discuss this with you and other relevant officers at your bank at your earliest convenience, we would in the meantime arrange the transfer of some funds into my republic accounts so that we can proceed with the transaction. ‘we would be grateful for your comment/confirmation as to whether.

- (a) the attached document is acceptable to the Bank
- (b) the suggested way forward is also acceptable to your bank

As mentioned, the property (land) has been in the family for many generations and so strong sentimental values are therefore attached to same. We would therefore greatly appreciate your cooperation and guidance on the best way out of this crisis.” (my emphasis)

[20] In an email dated 31st January 2011, Mr Dominique wrote to Beverly:

“Thank you for your response.

I advise that the sale should not be arranged for just the balance of the debt, Government transfer tax of approx... \$7000 has to be deducted from the sale among other fees. I suggest the agreement be done for at least \$170,000.00.”

[21] The note headed “agreement” was clear and did not give rise to any uncertainty that the defendant wanted the property transferred to the claimants for the clearance of the mortgage debt and no more. The email of Rickie Morrain further affirms the point where he said “ **neither robby nor I is interested in holding on to your property for life, so once downstairs is rented again and you are back on your feet, then we will resell to you**” is a further indication that this was just a family arrangement

to clear off the mortgage debt until the defendant was able to be in better financial standing.

[22] The court is of the view that the purpose of the agreement was not to secure living accommodation for the claimants as claimed but rather for the sole purpose of assisting the defendant in paying off the mortgage and to ensure that the property was not out on the open market to be sold by the mortgagee.

[23] The email by Mr Ricky Morrain and the attitude of the defendant in not signing the deed of indenture fortifies the view that there were several other terms to be agreed by the parties. At the trial, the second defendant confirmed that there were other terms and conditions of the agreement that did not form part of the note addressed to Mr. Dominic. Rickie Morrain in his witness statement and at trial states that “money was transferred to the defendant to seek counsel of a lawyer in New York and to write up the sales agreement”. He further states that the sum was agreed upon taking into account “our overall interest and share in the house re- money we had already put in”. Rickie Morrain further stated that the defendant owed him money that he paid to the university that the defendant attended, and all of these were taken into account when arriving at the agreement of the 27th January 2011. However, this was not expressed in a signed agreement. Mr Dominique, the Bank’s representative also indicated at trial that there were other conditions of sale which were not incorporated in the note addressed to him to facilitate the sale.

[24] Gordon JA in **Nelson Lewis and Another v Dirk Burkhardt**⁴, in a decision emanating from this jurisdiction said “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.”.

[25] There is no memorandum in writing before this court to indicate that the sale at the undervalue price took into account consideration of good deeds and other payments

⁴ GDA Civ Appeal no 7 of 2006

made by the claimants on behalf of the defendant. The evidence all suggest that the arrangement was only to facilitate the clearing off of the mortgage debt on behalf of the defendant.

[26] The court is of the view that, applying all the principles in the authorities cited above, the claimants have not satisfied the requirements of **Section 4 of the Real and Personal Property (Special Provisions) Act**. The overall purpose of the clause in the contract and the facts and circumstances known by the parties at the time that the document was executed was to facilitate a transfer to the claimants so that they in turn could obtain a loan to clear off the outstanding mortgage debt. However, in my view, the claimants' correspondence and the defendant's refusal to sign the deed of conveyance from the initial start in July 2011 suggests that the note to the bank was not the full agreement.

[27] Specific performance is an extraordinary discretionary equitable remedy. Specific performance is only be granted when there is a valid enforceable contract with certainty of terms. The remedy of specific performance is not available in circumstances where damages would be an adequate compensation. The facts and circumstances before this court suggest that the terms of the agreement between the claimants and defendant are uncertain and accordingly not enforceable in the circumstances. In any event, equity will not act in vain. The claim is brought against the defendant who is not in a position to convey the property. It is the evidence that the mortgage debt is still outstanding. The title in property is vested in the mortgagee under the mortgage deed. The equity of redemption has not been reinvested in the defendant. The court is of the view that damages will be an adequate remedy for any loss suffered and proved by the claimants as result of the unenforceable agreement for the sale of the property.

Order

[28] For all the forgoing reasons, it is order and directed as follows:

I. The claimants claim seeking specific performance is dismissed.

- II. The court is of the view that damages would be an adequate remedy.
- III. The injunction granted on the 6th February 2018 is discharged.
- IV. Costs and damages are to be assessed, if not agreed within twenty one (21) days.

Agnes Actie
High Court Judge

By the Court

Registrar