

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2007/0067

BETWEEN:

MICHAEL JOSEPH

Claimant

and

RBTT BANK CARIBBEAN LIMITED – duly constituted attorneys
for William and Indra Charles with Power of Attorney Instrument
No. PA245/2003

Defendant

Consolidated with:

SLUHCV 2007/1113

BETWEEN:

MICHAEL JOSEPH

Claimant

and

**(1) INDRA HARIPRASHAD-CHARLES
(2) WILLIAM CHARLES**

Defendants/Ancillary Claimants

and

RBTT BANK CARIBBEAN LIMITED

Ancillary Defendant

Appearances:

Mr. Alberton Richelieu holding papers for Mr. Horace Fraser of
Counsel for the Claimant.
Mr. Dexter Theodore Q.C and with him Ms. Isabella Shillingford for the
Defendants (The Charles)
Mr. Mark Maragh for the Defendant (The Bank)

2013: April 16th
2014: February 17th; July 9th
2018: July 9th; August 14th

JUDGMENT

- [1] **WILKINSON J.:** At the close of Mr. Joseph's case, Counsel for RBTT Bank Caribbean Ltd (the Bank) in regard to SLUHCV2007/0067 made a no case submission and to which the Court gave Counsel for Mr. Joseph an opportunity to respond. The Court rendered its oral decision in favour of the Bank and struck out that suit. The Court having struck out **SLUHCV2007/0067**, there remains only **SLUHCV2007/1113** for trial.
- [2] In regard to **SLUHCV2007/1113**, Counsel for the Bank pursuant to **CPR 2000** rule 18.10 (1)(c) made an application that the ancillary claim between Mrs. Indra Hariprashad-Charles and Mr. William Charles (the Charles) and the Bank be tried separately, on the ground that it was a claim of indemnification with respect to liability which may be found against the Charles. Counsel for the Charles on inquiry of the Court indicated that the approach was correct. At this juncture the Court proceeded as agreed by Counsel with only hearing the suit as between Mr. Joseph and the Charles.
- [3] Given the approach of Counsel for the Bank and agreed to by Counsel for the Charles, it means that the Court is limited to only the evidence of Mr. Joseph, his witness Ms. Clarita Phillips, and that of Mrs. Hariprashad-Charles and the witnesses of the Charles.

- [4] Neither Mr. Charles Ceres nor Mr. William Charles attended the trial and so the Court will have no regard to their respective witness summary and witness statement.
- [5] Mr. Michael B. Joseph (Mr. Joseph) filed his suit against the Charles on 24th December 2007. He pleaded breach of an agreement for sale of 2 Parcels of land by the Bank on the instructions of the Charles, who directed the Bank to cancel the agreement. He sought by way of relief (a) an order of specific performance of an agreement executed on 19th June 2006, for the purchase of 2 Parcels of land situate at Vigie in the Quarter of Castries, (b) alternatively damages for loss of bargain, (c) refund of deposit of \$40,000.00 and expenses incurred \$51,132.60 for a total sum of \$91,132.60, (d) general damages, (e) interest, (f) costs, (g) further or other relief.
- [6] The Charles filed their second amended defence and counterclaim on 17th July 2008. They pleaded that they were unaware until August 2006, that the Bank had advertised their 2 Parcels of land for sale by auction and it was around that time that they also became aware of Mr. Joseph's offer of \$400,000.00 and his payment of a non-refundable deposit of \$40,000.00. They further pleaded that they would rely on the construction of the power of attorney between the Bank and themselves for its full terms and effects as they were of the view that the Bank had acted outside of its scope of authority by (a) failing to obtain the best price available, (b) allegedly rendering certain advice to Mr. Joseph and which allegedly caused Mr. Joseph to expend money for expert advice concerning the 2 Parcels. They pleaded in the alternative, that a material term of the agreement with Mr. Joseph was that the balance of the purchase price - \$360,000.00, was payable on or before 19 July 2006, and time was of the essence. Mr. Joseph failed to pay the balance on the appointed date and so they treated his failure as repudiation of the agreement which entitled them to terminate and so were entitled to keep the non-refundable deposit. By way of relief, in their counterclaim the Charles sought (a) an order compelling Mr. Joseph to remove the caution imposed on the 2 Parcels.

(b) damages for loss arising from the wrongful imposition of the caution, (c) costs, and (d) such further relief as to the Court appeared just.

- [7] Mr. Joseph in his reply to the defence and defence to the counterclaim alleged that the Charles did not terminate the agreement for non-payment of the \$360,000.00 but on the sole ground of not being in agreement with the sale price of \$400,000.00. Further, the Bank had approved by 26th June 2006, the \$360,000.00 for payment of the balance of the purchase price and issued instructions to his Counsel to prepare the documents for the loan and who had completed same and it was not until 13th August 2006, that Counsel for the Bank sought of Counsel for Mr. Joseph that he make corrections on his drafted documents. A query also brought about the need that there be executed a statutory declaration. As to the allegation of the Bank acting outside of its scope, that was a matter of proof.

The Issue

1. Whether Mr. Joseph or the Charles have proved the other to be in breach of the agreement for sale of the 2 Parcels.

The Evidence

- [8] It is not disputed that the Charles are the owners of 5 adjoining Parcels of land described as Block 0650E Parcel 30,31,32,33 and 34 and situate at Vigie in the Quarter of Castries. Upon part of those Parcels is established the family residence. 2 undeveloped Parcels of the 5 are Nos. 30 and 31 (the 2 Parcels) measuring 18,198 square feet and 15,052 square feet respectively for a total of 33,250 square feet and they were purchased pursuant to instrument no. 1892/95 on 5th May 1995, for the sum of \$665,000.00. Copies of the Land Registers as issued at 10th August 2007, for the 2 Parcels were disclosed by Mrs. Hariprashad-Charles.

- [9] According to the Land Registers for the 2 Parcels, the creditor, Caribbean Banking Corporation Limited registered hypothec instrument no. 1893/95 on 18th May 1995, to secure the sum of \$500,000.00.
- [10] Again according to the Land Registers for the 2 Parcels, there was also registered a judicial hypothec as instrument no. 2910/2006 on 13th June 2006, by the creditor, John Grable Exports. The judgment sum was not stated but there was a note recorded that the judicial hypothec was to secure the amount stated within the instrument.
- [11] On 2nd April 2003, the Charles executed an irrevocable power of attorney in favour of the Bank pertaining to the 2 Parcels. It is registered as instrument no. PA245/2003. The Power of attorney provides that the Bank on behalf of the Charles was to perform the following acts, matters and things with respect to the 2 Parcels:
1. "To take charge of manage transact and administer The Properties in such manner as THE ATTORNEY shall think fit.
 2. To sell convey or otherwise dispose of to all or any person or persons all or any part of The Properties for such price or prices and upon such terms and conditions as THE ATTORNEY shall deem fit.
 3.
 4.
 5. To utilise all monies received from the sale leasing or other disposal of The Properties for the purpose of reducing and or liquidating in full The CONSTITUENTS' indebtedness to THE ATTORNEY only and to pay any monies remaining after the liquidation of such indebtedness to THE CONSTITUENTS.
 6. To make sign execute and deliver all deeds documents or instruments in writing requisite or necessary in the premises.
 7. Generally to do all other acts deeds matters and things whatsoever in or about the premises for and on THE CONSTITUENTS behalf as fully and effectually in all respects as THE CONSTITUENTS could do if personally present.
 8. To obtain a current valuation of The Properties to be sold or leased and to endeavor to obtain the best sale or lease price available taking the said valuation into consideration.

AND THE CONSTITUENTS hereby ratify and confirm and agree to ratify and confirm all and whatever **THE ATTORNEY** in or about the premises shall lawfully do or cause to be done by virtue of these presents.

....”

- [12] On the appointment of attorney, the Bank in relation to the Charles held 2 distinct roles, that of banker holding a mortgage, and that of attorney/agent pursuant to the power of attorney.
- [13] While it is unclear as to the period over which the Bank advertised the 2 Parcels for sale by way of auction, it is uncontested that the Bank pursuant to the power of attorney did just that.
- [14] Mr. Joseph, a finance specialist and businessman said that sometime during 2005, he saw the Bank's advertisement of the 2 Parcels in The Voice Newspaper and whilst interested in making a bid for the 2 Parcels, he was unaware of their location. He contacted the Bank and spoke to his namesake, Mr. Michael B Joseph (Mr. Michael B Joseph), an account executive. They discussed several matters about the 2 Parcels and made arrangements for a site visit. Mr. Joseph together with the Bank's Mr. Michael B. Joseph visited the 2 Parcels in June 2006.
- [15] Mr. Joseph's interest in the 2 Parcels was with a view to carry out a housing development and he disclosed this to the Bank's Mr. Michael B. Joseph.
- [16] During the site visit, Mr. Joseph observed that the 2 Parcels were comprised of rough steep sloping rock which in his opinion made it not easily accessible and could pose physical challenges for his housing development. He also observed that there were unusual cracks on a neighbouring building and this indicated to him, that the land was characterized by some instability. He spoke with the Bank's Mr. Michael B Joseph about his observations and he was advised to seek the opinion of a professional building consultant.

[17] According to Mr. Joseph, acting on what he had observed and on the Bank's Mr. Michael B. Joseph's advice, he thought it necessary to seek professional advice. He wanted the best advice and so retained Mr. Mark Hennecart, an architect, whom he took to see the 2 Parcels. He was advised to seek the advice of a geotechnical engineer. It proved difficult to retain such an engineer at Saint Lucia and his research led him to Mr. Charles Ceres of Ground Structures Engineering Consultants Ltd. at Guyana. Mr. Ceres a qualified and experienced geotechnical engineer was the company's lead consultant.

[18] Mr. Joseph, at his expense flew Mr. Ceres flew to Saint Lucia and they visited the 2 Parcels. Mr. Ceres advised Mr. Joseph on structural matters in relation to developing the 2 Parcels. Mr. Joseph paid for all of Mr. Ceres' expenses in connection with the visit to Saint Lucia and for his expert advice on developing the 2 Parcels.

[19] On 12th June 2006, Mr. Joseph wrote to the Bank as follows:

"June 12, 2006
P.O Box 1884
Castries

Mr. Michael Joseph
Recoveries Dept.
RBTT Bank Caribbean Limited
Micoud Street
Castries

Dear Sir,

**Ref: Bid for Land – BLOCK 0650E Parcels 30 & 31 at Vigie,
Saint Lucia**

Having read an advertisement in the Voice Newspapers posted by your office of two parcels of land for sale at Vigie, I immediately arranged for a site visit to the property. An agent of RBTT arranged for a visit to the site.

I later contracted the services of an architect to advise me on the suitability of the land for my development concept. He immediately suggested that the contours would be challenging and particularly so

when the signs of cracks and decay of the existing building adjacent to the land was so apparent. The existence of fissures was also a possibility.

Based on his advice I contracted from overseas the Geotechnical expertise of Mr. Charles P Ceres, PE from Ground Structures Engineering Consultants Ltd. On Saturday June 03, 2006 the Architect accompanied us during the inspection. A Statement of Qualification of Ground Structures Engineering Consultants Ltd. and an Inspection Report emanating from our site visit on the caption property are enclosed for your reference.

From your own cursory layman observation and from an analyses of the attached technical report you should concur that my bid of **Four Hundred Thousand East Caribbean Dollars (\$400,000.00)** is reasonable against the background of the massive capital outlay that will be required to bring this land into a suitable construction site. I should not be made to run the risk of an improper least-cost development as might have been the case with the adjacent building and put my proposed development and its financiers into abnormal risk exposure.

Awaiting your positive consideration of my bid.

Yours respectfully

(signed)
Michael B. Joseph B.Sc., M.Sc.,"

[20] On 19th June 2006, the Bank's officer, also called Mr. Michael B. Joseph responded to Mr. Joseph's offer as follows:

"June 19, 2006

Mr. Michael B. Joseph
P.O. Box 1884
Castries.

Dear Mr. Joseph:

**Property located at Vigie, Castries known as Block No. 0650E
Parcel No. 30 and 31.**

We refer to your offer received on June 12, 2006 to purchase the above at a price of \$400,000. and confirm our willingness to accept same.

The conditions of sale, will be a non-refundable down payment of 10% (\$40,000.), immediately on acceptance of this offer with the balance due and payable no later than July 19, 2006 time being of the essence of this agreement.

We confirm that this property will be sold free of encumbrances and with vacant possession but subject to all rents, rates, taxes and other charges (if any), which may be due at the time of this sale.

Kindly sign the attached duplicate indicating your clear understanding and agreement of the above.

Yours truly,

(signed)
M. Joseph
Account Manager – Commercial

Recoveries

I accept

(signed)
Michael B. Joseph
22-06-06"

- [21] According to Mr. Joseph, he immediately applied to the Bank for a loan in the sum of \$ 360,000.00 to settle the balance of the purchase price for the 2 Parcels. The loan was approved on 26th June 2006, and by letter of same date, the Bank instructed Mr. Joseph's Attorneys-at-Law to prepare the mortgage debenture, deed of sale and related documents to finalize the loan.
- [22] As far as Mr. Joseph knew, his Attorneys-at-Law expeditiously executed their duty in keeping with the Bank's instructions and on the Bank's instructions forwarded the draft documents to the Bank's Attorneys-at-Law for vetting.
- [23] Mr. Joseph was informed by his Attorney-at-Law that before they forwarded the documents to the Bank's Attorneys-at-Law for vetting that they encountered a major difficulty, an outstanding judgement debt against Mr. Charles and held by a judgment creditor that resided outside of Saint Lucia. He was told that the

judgment debt had to radiate before the sale could be closed. This too brought about a delay in the execution of the mortgage debenture, deed of sale and related document. This delay Mr. Joseph said “fell at the door” of the Charles.

- [24] On or about the 13th August, 2006, the Bank’s Attorneys-at-Law made an inquiry about judgments registered against one “Michael Joseph”. As a result of the inquiry, Mr. Joseph’s Attorney-at-Law prepared a statutory declaration dated 15th August 2006, and therein he swore that the judgments referred to did not concern him.
- [25] Mr. Joseph, sometime in early August 2006, received a telephone call from the Bank’s Mr. Michael B. Joseph and wherein he was informed that the Bank was cancelling the sale agreement for the 2 Parcels. On his inquiry as to why, he was told that the Charles were not in agreement with the sale price and had instructed the Bank to cancel the agreement. Mr. Joseph refused to accept the Charles’ cancellation of the agreement and wrote several letters to the Bank including one to the Bank’s headoffice in Trinidad demanding and urging the Bank to continue with execution of the agreement.
- [26] Following Mr. Joseph’s demands and urgings, the Bank convened a meeting at its place of business on 29th September 2006. Mr. Joseph and his Attorney-at-Law attended with a view to having the matter settled but such was not the outcome.
- [27] Mr. Joseph said that after the 19th July 2006, the Bank acting through its Attorneys-at-Law continued to treat the agreement as existing by queries and requests made by its Attorneys-at-Law on vetting of the draft documents which his Counsel had prepared. Such requests were made as late as 13th August, 2006. He also said that there was nothing in the agreement requiring him to seek an extension of time to complete the sale.

- [28] As a result of the cancellation of the agreement, Mr. Joseph said that he has suffered loss as described in his statement of claim.
- [29] Cross-examination of Mr. Joseph by Counsel for the Charles was pursued in relation to his alleged expenses incurred in pursuing the sale. Also pursued was his understanding of what was meant by a sale being subject to “time of the essence” It was put to Mr. Joseph that he made no effort to seek an extension of time as the deadline for completion of the sale approached. He responded that he saw no need to request an extension as the transaction remained alive to both Parties at the date of closing.
- [30] There was a question as to the timing by which he may have provided the Bank with his financials for consideration of the loan. The Court gives the question no weight because the Bank issued a letter on 26th June 2006, confirming the loan. Such would not have happened without the Bank being satisfied that Mr. Joseph qualified for the loan.
- [31] Mr. Joseph’s sole witness, Ms. Clarita Phillips was employed by The Law Offices of Williams and Fraser. Mr. Joseph’s attorney-at-law within the firm was partner, Mr. Horace Fraser. Ms. Phillips was the office manager. Her duties included amongst other things the drafting of deeds, preparation of hypothecary obligations, mortgage debentures and other related documents.
- [32] On 26th June 2006, Mr. Joseph’s Attorney-at-Law delivered to Ms. Phillips a letter from the Bank containing instructions regarding the preparation of a mortgage and letter of undertaking for Mr. Joseph.
- [33] Ms. Phillips acting on the Attorney-at-Law’s instructions caused a search to be carried out at the Deeds and Land Registry and obtained letters from the National Insurance Corporation and Inland Revenue in respect to Mr. Joseph’s indebtedness to those 2 institutions.

- [34] Upon completion of the Land Registry search, Ms. Phillips realized that there was a judgement against Mr. William Charles in favour of John Grable Exports and the judgement was registered as judicial hypothec instrument no. 2910/2006 dated 13th June 2006 on the 2 Parcels which were to be sold to Mr. Joseph.
- [35] According to Ms. Phillips, by 3rd July 2006, she had prepared the mortgage debenture, deed of sale, hypothec obligation and 2 radiations but before the said documents could have been sent to the Bank's Attorneys-at-law, Messrs. McNamara and Company for vetting the discovery of the judgment against Mr. Charles delayed the process because the judicial hypothec had to be radiated. Ms. Phillips knowing that the judgment against Mr. Charles had to be radiated, she informed Mr. Joseph's Attorney-at-Law about the judgment against Mr. Charles. On instructions she made contact with Mrs. Shirley Lewis, Attorney-at-Law for the judgment creditor, John Grable Exports. Ms. Phillips informed of Mrs. Lewis of her instructions and which were that there was a need to settle the judgment debt. She also inquired about who would be signing the radiation in order for Mr. Joseph to get a clear title.
- [36] On 7th July 2006, Mr. Joseph's Attorney-at-Law was informed that the judgment creditor, John Grable Exports was not amenable to accepting a lesser sum in settlement of the judgment debt and wished to be paid in full before the radiation was executed.
- [37] Subsequently, John Grable Exports executed a power of attorney appointing its Attorney-at-Law, Mrs. Shirley Lewis as its attorney pursuant to a power of attorney registered as PA637/2006 on 26th July 2006. A copy of same was forward to Mr. Joseph's Counsel. According to Ms. Phillips, up to this time, it was impossible to complete the work required to close the sale. This delay was not that of Mr. Joseph's Attorney-at-Law.

- [38] On 13th August 2006, the Bank's attorneys-at-law, Messrs. McNamara and Company sent to Mr. Joseph's Attorney-at-Law a list of judgments against one "Michael Joseph". Mr. Joseph caused a statutory declaration to be prepared and which he swore to on 15th August 2006.
- [39] According to Ms. Phillips, all legal work required of Mr. Joseph's Counsel in relation to the mortgage deed was completed save and except for registration when the Bank cancelled the agreement. Delay she said was caused by Mr. Charles' judgment debt which had not been radiated.
- [40] As to Mr. Joseph's bills for work completed by the firm, Ms. Phillips said that Mr. Joseph was billed as follows: (a) notary fees for the hypothecary obligation-mortgage debenture - \$5,200.00, (b) preparation of the mortgage debenture for \$360,000.00 - \$5,600.00, (c) preparation of the radiation in favour of the Charles for \$500,000.00 by Caribbean Banking Corporation - \$1,073.00, (d) preparation of the radiation for \$59,342.25 by John Grable - \$191.80, (e) legal counselling, consultation, advice and meeting - \$7,500.00. Total \$19,564.00.
- [41] Under cross-examination Ms. Phillips said that she did all that was required of Mr. Joseph's Attorney-at-Law by 13th July 2006.
- [42] A series of cross-examination questions were:
- Counsel: "But do you not consider the work of getting those judgments sorted out the work of your office/job at the office?"
- Ms. Phillips: "For instance a letter comes to prepare a mortgage on sale. Then do necessary searches and realize incumbrances on the property. We do prepare the radiation and when it involves the Bank we know will get payoff but when (it) involve(s) another person, e.g. Grable Exports, we want to be certain, we got in touch with Mrs. Lewis and she was attending to John Grable and so after speaking....
- Counsel: "Would it be true to say that you left it to Mrs. Lewis to handle because it was her client?"

Ms. Phillips: "I did not leave it to Mrs. Lewis because we have to prepare the radiation. I just wanted to be sure that when everything is finalized that our client would not have no problem in getting his deed registered and so when Mrs. Lewis gave us her undertaking that she got in touch with her client, and getting a power of attorney, I had already prepared everything, including tax letter by 5th July, and attached everything and sent documents for vetting."

Counsel: "I am understanding you to say you submitted the documents for vetting on or about 13th July 2006?"

Ms Phillips: "Yes"

Counsel: "In your experience, how long (does it) take to vet (a) mortgage at McNamara & Co? Generally?"

Ms. Phillips: "It depends, sometimes months, 3 weeks, sometimes more than that."

Counsel: "So when you sent (it) on or about 13th July 2006, in your experience you did not expect it to come back by July 19th 2006?"

Ms. Phillips: "It depends. It can be shorter. It can be 2 days. It depends."

Counsel: "But in this case (were) you not thinking of closing date?"

Ms. Phillips: "My job was to do the documents and send out. I would not know about closing date. All I know is (I) sent (them) to Bank's lawyer and they do necessary and send back to us."

Counsel: "At the time when you prepared documents, were you aware Mr. Michael Joseph had a letter from the Bank saying he had to close by 19th July 2006?"

Ms. Phillips: "No."

[43] In relation to Mr. Joseph's expenses as stated by him and Ms. Phillips, the Court observes at this juncture that neither Mr. Joseph nor his witness have complied with **CPR 2000** rule 29.5(g).

[44] For the Charles, the Court received evidence from Mrs. Hariprashad-Charles, Mrs. Giselle Hull-Casimir and Mr. Ausbert D'Auvergne.

- [45] Mrs. Hariprashad-Charles is a high court judge and her husband Mr. Charles is a businessman. At the time of the purchase of the 2 Parcels in 1995, the Charles paid a deposit of \$165,000.00 and borrowed \$500,000.00 from a Bank secured by the 2 Parcels. According to Mrs. Hariprashad-Charles, the 2 Parcels being a total amount of 33,200¹square feet, the purchase price was approximately \$20.03 per square feet.
- [46] In or about 2002, the Charles began to experience financial difficulties and as a result they decided to appoint the Bank as their attorney pursuant to a power of attorney for the purpose of selling the 2 Parcels and applying the proceeds of sale to the mortgage. By this time the Charles had already paid about \$500,000.00 of the mortgage based on payments of \$8,700.00 per month and which were paid from June 1995 to April 2000. Subsequently the Charles sought additional money from the Bank and so obtained a further loan of \$300,000.00 secured by the 2 Parcels.
- [47] According to Mrs. Hariprashad-Charles, at the time the Charles appointed the Bank as their attorney they owed the Bank approximately \$300,000.00 in principal plus interest of \$427,000.00. At the time of the agreement to sell to Mr. Joseph, the mortgage balance stood in the region of \$450,000.00, a large percentage of which was interest. The Bank while authorized to sell the 2 Parcels was specifically required to obtain a current valuation and endeavor to obtain the best sale price taking into consideration the valuation.
- [48] Mrs. Hariprashad left Saint Lucia on 5th January 2005. Prior to her departure, due to the location of the family home, she was aware that the Bank had brought prospective purchasers to view the 2 Parcels.
- [49] Prior to leaving Saint Lucia Mrs. Hariprashad-Charles gave the Bank her contact details in the event that they needed any information from her. Sometime in early

¹ Should be 33,250 square feet.

2006, the Bank's Mr. Michael B. Joseph telephoned her at the British Virgin Islands and told her that he believed that he had found a purchaser for the 2 Parcels. She could not recall whether she was told the price. She told him at the time that she had just come out from court and would be unable to consent to anything without first speaking to Mr. Charles. She asked for the offer to be put in writing and emailed to her. She never heard from the Bank's Mr. Michael B. Joseph again. She concluded that like many of the other perspective purchasers, the offer had fallen by the wayside. She continued to hold the belief that the Bank would adhere to the terms and conditions of the power of attorney in regard to obtaining a current valuation of the 2 Parcels and the best sale price. According to Mrs. Hariprashad-Charles, at the time, the price of land particularly in a residential area like Vigie had escalated due to the impending World Cup Cricket Tournament.

[50] Mrs. Hariprashad-Charles did not know the purchaser, Mr. Joseph. In or about early August 2006, she happened to be in Saint Lucia at the family home. She was enroute to attend a conference in Dominica. She was informed by some of her workmen who were cutting down trees and clearing her and that some unknown persons were around and they told her other things. While at the family home, she looked out and she saw a BMW motor car being driven by a person whom she identified as Mr. Horace Fraser enter her family property. In his motor car was a person unknown to her. She now believes that person to be Mr. Joseph. She inquired of Mr. Fraser why he was on her property and he said he was passing in the area. She never spoke to the unknown person. Mr. Fraser and the unknown person then left her premises.

[51] As a result of what her employees told her, Mrs. Hariprashad-Charles called the Bank and spoke to the Bank's Mr. Michael B. Joseph. She asked him whether the 2 Parcels had been sold and the sale price. When he told her the sale price she told him to cancel the sale immediately because the 2 Parcels were worth more than that price. She also wrote a letter to that effect. The letter though not copied

to Mr. Fraser, was sent to him in or about 7th August 2006. She disclosed the letter.

[52] Mrs. Hariprashad- Charles letter to the Bank is instructive and reads as follows:

“7th day of August 2006

The Manager
Royal Bank of Trinidad & Tobago
Micoud Street
Castries

Attention: MR. MICHAEL JOSEPH

Dear Mr. Joseph

LANDS AT VIGIE, CASTRIES

On 24 May 2000, your bank sent a demand loan balance to myself and my husband, William Charles showing a balance of \$300,000 + interest of \$427,400. I have no reason to challenge the figure. You today indicated to me that the present loan balance (was) standing in the region of \$450,000. Again, I have no justifiable reason to challenge this figure but to accept your mathematical accuracy and competence.

In order to show good faith to your bank and also to avoid the judicial process, in or about 2002, we executed a Power of Attorney in favour of your bank which always held first mortgage over the two parcels of land which we bought in 1995.

Last month, you telephoned me in the British Virgin Islands and indicated that you have some prospective purchasers. I indicated that you should contact me by email and after I did not hear from you, I was left to assume, albeit erroneously now, that the prospective purchasers had changed their minds. I arrived in Saint Lucia on Friday last to see an unauthorized person using our private driveway to our property and from a litany of subsequent conversations with yourself and others, I learnt that your bank has received a deposit of \$40,000. for two parcels of land which your bank intends to sell for \$400,000. From my understanding, my husband came to see you some two or three weeks ago and negotiated a way forward with respect to this loan and his personal loans and from my understanding, you did not inform him that you have a serious purchaser which I would imagine, was the most prudent thing to do.

Whilst you hold a Power of Attorney over those two parcels of land and has (have) the power to dispose of the property in a fair manner (given the fact that your bank has already been paid most of the principal sum), I urge

you to reconsider your decision to do so especially since the two parcels of lands were bought for \$665,000. (as is evidence by the Deeds of Sale) and are worth much more now. Should you still persist in proceeding with the impending sale (as I gather from our oral conversations), this letter serves as a formal objection to such a sale for the following reasons: (i) as of 15th August 2006, a banking institution will be renting our residence (contiguous to those landlocked lands) and as such, we will be able to resume loan payment to your bank shortly, (ii) the sale price is inadequate given that the lands in question were purchased for \$665,000. some ten years ago and are sea-front properties in a highly residential area: (iii) the parcels of land are landlocked and there is no access to them except by sea; (iv) from June 1995 to April 2000, we paid with promptitude monthly repayments of approximately \$8,700.00 towards the said loan and only stopped because of financial difficulties; and (v) there is always a willingness to see an end to this loan as I wish not to be a delinquent customer given the fact that I am the holder of high judicial office in the Eastern Caribbean Supreme Court.

I also think it prudent to inform you that plans are well ahead to install a gate at the entrance of our property so that our private driveway over our lands constructed at our expense will no longer be used as a public thoroughfare and foremost, the privacy of our new tenant (a banking institution) will be preserved. As I indicated to you, a copy of the lease agreement could be made available to you and a standing order could be created in favour of your bank.

Given these reasons, I trust that you will use your good offices to reconsider your decision and that we could negotiate an amicable way forward. I leave this jurisdiction on Wednesday next so if you need to see me in person, I will be available until Tuesday 15 August 2006.

In concluding, let me take this opportunity to express gratitude to your bank for their (its) patience over the years.

Yours sincerely
(signed)
INDRA HARIPRASHAD-CHARLES"

- [53] Mrs. Hariprashad-Charles, in August 2006, had a valuation done of her entire property including the 2 Parcels. She disclosed the valuation. The valuation surveyor, Mrs. Hull-Casimir valued the property including main building, external works, and land at \$4,852,250.00. The Land described as a total of 80,530 square feet was valued at \$2,013,250.00 i.e \$25.00 per square foot.

- [54] Mrs. Hariprashad-Charles was of the view that in negotiating the sale of the 2 Parcels with Mr. Joseph that the Bank paid no regard to the actual value of the 2 Parcels due to the fact that the Bank was aware that it loaned the Charles \$500,000.00 towards the purchase price of the land in 1995 to enable them to purchase the 2 Parcels.
- [55] Mrs. Hariprashad-Charles was also of the view that by agreeing to sell the 2 Parcels for \$400,000.00, the price represented a substantial undervalue to the 2 Parcels. The Bank in her view failed in its duty to the Charles as specifically set out in the power of attorney. For this reason as well, she was of the view that the Charles ought not to be forced to sell the 2 Parcels to Mr. Joseph.
- [56] Mrs. Hariprashad-Charles said that she was aware that the price of land in the vicinity of the 2 Parcel had increased and therefore the Bank did not obtain a current valuation of the land prior to agreeing to sell for \$400,000.00. She put forward, that should the Court think otherwise then the Charles claim from the Bank the difference between \$400,000.00 and the current market value for the 2 Parcels together with interest at the rate of 11.5 percent per annum, that being the interest rate on their hypothecary obligation and the costs.
- [57] There was no cross-examination for Mrs. Hariprashad-Charles.
- [58] The second witness for the Charles was Mrs. Giselle M. Hull- Casimir, their valuator. On or about 10th August 2006, she received an oral request from Mr. Donald Sammy, an architect and following on from that request she conducted an appraisal to assess the current market value of the Charles entire property. She disclosed her valuation report referred to by Mrs. Hariprashad-Charles. She said that in preparing her report she had regard to comparable sales within the area. She also carried out a site visit of the Charles property. Her reason for valuing the property as she did was due to comparable sales and costs data.

- [59] There was no cross-examination for Mrs. Hull-Casimir.
- [60] The final witness for the Charles was Mr. Ausbert D'Auvergne. He was a financial development consultant and in addition to knowing the Charles, he also knew the Bank's Mr. Michael B. Joseph.
- [61] Mr. D'Auvergne recalled attending the Bank with his client, Mr. Charles for a meeting on 26th July 2006. The purpose of the meeting was to negotiate a resolution for the Charles' business with the Bank. They met with the Bank's Mr. Michael B. Joseph. At the meeting it was not indicated on the part of the Bank that it had a purchaser or prospective purchaser for the 2 Parcels. Rather Mr. William Charles told Mr. Michael B Joseph that he was in negotiations with Mr. Chester Hinkson of Scotiabank, which he anticipated would result in the property being leased to Scotiabank and that the proceeds of the lease or part thereof would be assigned to the Bank. Scotiabank did lease the Charles' property which included the 2 Parcels.
- [62] According to Mr. D'Auvergne, there was no discussion about the sale of the 2 Parcels for \$400,000.00 and Mr. William Charles did not agree to a sale for \$400,000.00 or that the Bank "write off" the balance. The purpose of the meeting was for Mr. Charles to inform the Bank of his position with respect to the Charles' property.

The Law

- [63] By the power of attorney, an agency is created between the Charles and the Bank. The net effect of which the Bank has the authority to act on behalf of the Charles and create legal relations between the Charles and third parties.

[64] According to **Black's Law Dictionary**² a power of attorney is:

"power of attorney. 1. An instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal...

Irrevocable power of attorney. A power of attorney that the principal cannot revoke. – Also termed power coupled with interest."

Power coupled with an interest. A power to do some act, conveying along with an interest in the subject matter of the power. A power coupled with an interest is not held for the benefit of the principal, and it is irrevocable due to the agent's interest in the subject matter. For this reason, some authorities assert that it is not a true agency power."

[65] **Halsbury's Laws of England**³ provides:

"21. Powers of attorney. Where the authority of the agent is required to be conferred by a deed, or where in any other circumstances it is desired formally to appoint an agent to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally, the necessary authority is conferred by an instrument known as a power of attorney. Such powers are the subject of statutory provision, which specifies the method of execution, the proof of instruments creating such powers, the revocability and the effect of revocation of powers....

187. Powers of attorney. Where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed by the donee, the power is irrevocable either by the donor without the consent of the donee or the death, incapacity, bankruptcy, winding-up or dissolution of the donor, so long as the donee has the interest or the obligation remains undischarged. A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and persons deriving title under him to that interest, and those persons will be the duly constituted donees of the power for all the purposes of the power, without prejudice to any right to appoint substitutes given by the power."

[66] The Court believes that any further legal discussion on the construction, termination and so forth of the power of attorney, would arise solely between the Bank and the Charles.

² 8th Edition

³ 4th Edition Reissue Vol. 1 (2).

[67] As to the matter of the non-refundable deposit, the Court is guided by **Halsbury's Laws of England**⁴:

"246. When right of forfeiture arises. Where the contract gives the vendor an express right of forfeiture on non-performance of the contract or non-observance of its conditions, the right is exercisable when such non-performance or non-observance is finally ascertained, that is, at the date for performance or observance named in the contract, if, but only if, time is of the essence of the contract.

...."

255. Right to recover deposit. Where the vendor makes a default in performing his part of the contract which entitled the purchaser to rescind the contract, the purchaser can recover the deposit with interest at the appropriate rate determined by the court, or such other rate as may be agreed.

256. When the purchaser's right to recover the deposit arises. The purchaser's right to recover his deposit is a legal right which springs out of breach of contract by the vendor.

[68] Mr. Joseph sought the relief of general damages and on this issue, the Court is also guided by **Halsbury's Laws of England**⁵

"265. Action for damages. Either the vendor or the purchaser can maintain an action for damages for breach of contract by the other party, but for this purpose there must be a contract enforceable at law. The claim may be made by a party who has elected to rescind the contract following a repudiatory breach by the other party. On the other hand, a party who elects to affirm the contract may claim in the alternative for specific performance or damages.

266.

267. Purchaser's action. The damages which a purchaser of realty can recover for a breach of contract by the vendor are, in general, limited to the expenses which he has incurred. This rule forms an exception to the ordinary law of contract that an injured person is entitled to be placed in the same position as if the contract had been performed. Thus, if a vendor who has not expressly undertaken to deduce a good title, is unable, acting in good faith, and without committing to a breach of trust, to make a title, the purchaser, in an action for breach of contract, can recover only the expenses which he has incurred, but not damages for the loss of his bargain. This is an exceptional rule which applies only if the vendor, through no fault of his own, is unable to carry out his contractual obligation to make a good title. In order to obtain the full benefit of the rule, the vendor must prove that he has used his best endeavors to make a good

⁴ 4 Edition Vol. 42

⁵ 4th Edition Vol.42

title, including a proper attempt to obtain any necessary consent of a third person. If the vendor fails to discharge this burden of proof, the purchaser is entitled to substantial damages, which will be assessed according to the normal rule applicable to damages in contract. In such a case the purchaser is entitled to damages for consequences of the vendor's breach of contract as follow in the usual course from the breach or may reasonably be supposed to have been in the contemplation of both parties at the time of contract."

Findings and analysis

- [69] Given the approach of the Bank, it meant that any challenge to the power of attorney is reserved strictly for the suit between the Charles and the Bank. The Court therefore, being guided by the authority of **Black's Law Dictionary** and **Halsbury's Laws of England**, accepts and proceeds on the footing that the Bank acted pursuant to its power of attorney and was attorney/agent for the Charles.
- [70] The Court starts with the valuation of Mrs. Hull-Casimir. The Court found it of little assistance. The 2 Parcels although bought separately were included in the valuation of all 5 adjoining Parcels (# 30, 31, 32, 33 and 34) owned by the Charles. It is common knowledge that the value of land may be enhanced by variables such as access to utilities, beaches, public roads and so forth. The difficulties for the Court with Mrs. Hull-Casimir's valuation being so inclusive are: (a) according to Mrs. Charles' letter to the Bank, the 2 Parcels do not have their own entrance and so one must traverse over some other Parcel/s of the Charles to get to them, this is usually recorded on a valuation, (b) there are no statements about utilities services to the 2 Parcels, and (c) finally, it is not uncommon for example where land adjoining beachfront land would have the same sale price per square foot but if separated, for the land without the beachfront to be cheaper. This example is not in direct reference to the 2 Parcels of which the Court is not familiar. These are mere general comments as to why the Court would have found more useful a separate valuation for the 2 Parcels.

- [71] The Court now reverts to the pleadings of the Parties to see if either has made out their case.
- [72] Mr. Joseph's case is simple. He saw the newspaper advertisement offering by auction of the 2 Parcels. As required to protect himself, he viewed the 2 Parcels and sought professional advice as to whether they were fit for his purpose and then he made an offer of \$400,000.00 by letter dated 12th June 2006. 7 days later, 19th June 2006, the Bank as agent for the Charles accepted Mr. Joseph's offer by letter and wherein were set out terms and conditions on both Parties for closing the sale on 19th July 2006. Mr. Joseph signed off the agreement on 22nd June 2006. He paid the non-refundable deposit of \$40,000.00 and was expecting to close the sale when suddenly the Bank informed him that the Charles wished the sale to be cancelled and it proceeded to do so.
- [73] The Charles by their counterclaim in so far as it relates to Mr. Joseph, plead the deposit of \$40,000.00 was non-refundable and that the sale was to close on 19th July 2006, time being of the essence, and Mr. Joseph failed to pay the \$360,000.00 to close the sale. His failure entitled them to terminate sale and retain the deposit.
- [74] The agreement of 19th June 2006, by way of terms and conditions provided (a) acceptance of Mr. Joseph's offer of \$400,000.00, (b) the payment of a non-refundable deposit of \$40,000.00, (c) the closing date of 19th July 2006, (d) that time was of the essence, and (e) that the Bank would confirm that the 2 Parcels would be sold free of encumbrances, with vacant possess save subject to rents, rates, taxes and other charges (if any) due at the time of completion of the sale.
- [75] By the agreement there were therefore burdens on both Mr. Joseph as to payment of the non-refundable deposit and the balance of \$360,000.00 on 19th July 2006, and on the Bank as attorney for the Charles to ensure that the titles to the 2 Parcels was free of encumbrances.

- [76] It is not contested that Mr. Joseph was securing the balance of the purchase price - \$360,000.00, by way of a loan from the Charles' Bank, and that the Bank had issued instructions to Mr. Joseph's Attorney-at-Law to prepare draft the mortgage debenture, deed of sale and other documents and submit same to the Bank's Attorneys-at-law for perusal. Ms. Phillips under cross-examination was not shaken that she had sent the drafted documents to the Bank's Attorneys-at-law by 13th July, i.e. 6 days before closing.
- [77] There is no evidence from the Bank that there was going to be any hindrance in the disbursement of the loan of \$360,000.00 to pay off the balance of the purchase price once the Bank's Attorney-at-Law vetted and confirmed the documents for execution.
- [78] It was not disputed that it was not until August 2006, being sometime after the deadline for the closing of the sale, that the Bank's Attorneys-at-Law made contact with Mr. Joseph's Attorney-at-Law in regard to comments on the draft documents and in regards to judgments against one "Michael Joseph" which Mr. Joseph and his Attorney-at-Law responded to within 2 days by way of a statutory declaration indicating that the purchaser, Mr. Joseph was not the same person as the "Mr. Michael Joseph" with the outstanding judgements.
- [79] It was the duty of the Bank as attorney and ultimately the Charles to ensure that the Bank's Attorney-at-Law had completed the vetting of the documents and so there could be no doubt that they would be available for execution on 19th July 2006, unless held back by Mr. Joseph or his Attorney-at-Law.
- [80] It is not contested that there was registered the judicial hypothec of John Grable Exports against the 2 Parcels. According to the **Civil Code** article 1923, a judicial hypothec results from judgments of the court ordering the payment of a specific sum of money. The judicial hypothec affects generally the immovables (land) owned by the judgment debtor and that subsequently owned by him unless the

same are exempt from seizure or are incapable of alienation otherwise. According to article 1967, registration gives effect to real rights and establishes their order of priority according to the provisions contained in the Book 18 of the **Civil Code**. A judicial hypothec was an encumbrance against the 2 Parcels.

- [81] There was no evidence from Mrs. Hariprashad-Charles or her witnesses as to the status of the judicial hypothec on 19th July 2006. No evidence that the judicial hypothec was cleared off by payoff of John Grable Exports prior to 19th July 2006, or arrangements made to payoff at time of closing of the sale. According to Ms. Phillips, John Grable Exports wanted full payment of its judgment from Mr. Charles.

- [82] It was also the duty of the Bank as attorney and ultimately the Charles to ensure the undertaking to sell the 2 Parcels free of encumbrances was possible on 19th July 2006, if they wanted to close the sale on that date. As Ms. Phillips said, in certain situations where there are encumbrances, there was usually a presumption that the Bank would payoff but in others such as that of John Grable Exports such was not the case.

- [83] On the evidence before the Court, it appears that neither the Bank nor the Charles were in a position to complete the sale on 19th July 2006, while the judicial hypothec remained on the register and there was no evidence of it being dealt with. It certainly was not Mr. Joseph's responsibility to deal with the judicial hypothec.

- [84] Finally, Mr. Joseph remained steadfast in his belief and which arose from what he was told by the Bank's Mr. Michael B. Joseph, that the agreement was cancelled for no other reason than that the Charles wanted the agreement cancelled because they were not in agreement with the \$400,000.00 which he had offered to pay for the 2 Parcels and the Bank had agreed to accept.

- [85] Mr. Joseph's belief is not whimsical or fanciful, it is indeed supported by the contents of Mrs. Hariprashad-Charles letter of 7th August 2006, to the Bank. The Court observes that although the letter is dated 7th August 2006, and so post the closing date for the transaction, it never states that the transaction has naturally rescinded because Mr. Joseph had not closed on 19th July 2006, and time was of the essence. Rather, the tone of the letter is of that the agreement is still ongoing and the Bank put under pressure to terminate, and to ensure that the Bank gets the point, a gate was being installed denying access to the 2 Parcels.
- [86] Overall, the witness statement of Mrs. Hariprashad-Charles was much more about events between the Bank and the Charles, than about Mr. Joseph.
- [87] In the circumstances of there being no proof that Mr. Joseph was not ready to close the sale on 19th July 2006, and the only recorded delays were on the Charles' side and they being: (a) the Bank's Attorneys-at-Law late review of the draft documents, and (b) the outstanding judicial hypothec, the Court finds that there was no breach of the agreement by Mr. Joseph but on the other hand for the reasons stated, the Charles were not ready to complete the sale on 19th July 2006 and so were the Party in breach of the agreement.
- [88] The Court having found that there was no breach of the agreement by Mr. Joseph, and the Charles have confirmed the payment of \$40,000.00, will order on the authority of **Halsbury's** paragraph 255, the return of the non-refundable deposit.
- [89] Looking at the other relief sought by Mr. Joseph, the Court is of the view that this is a case suitable for an order of specific performance of the agreement however, there are the matters of (a) the encumbrance of the judicial hypothec and (b) the 2 Parcels are not accessible according to Mrs. Hariprashad-Charles' letter except thru the Charles other Parcels and which are all are now sealed off by a gate. The Court being guided once again by **Halsbury's** paragraph 267, that where a vendor fails to discharge his burden then the purchaser is entitled to substantial damages

as assessed using the normal rule applicable to damages in contract, will grant Mr. Joseph general damages in the sum of \$360,000.00 so as to put Mr. Joseph in the same position as if the sale had been completed.

[90] In regard to the relief sought of damages for loss of bargain, there was no evidence before the Court to support this claim for relief.

[91] In regard to the special damages claim of \$91,132.60, the Court has already addressed the deposit \$40,000.00 and prior expressed the view that in relation to the other expenses claimed of \$51,132.60, that there was no compliance with **CPR 2000** rule 29.5(g).

[92] **Court's Order**

- (1) Judgment is entered for Mr. Joseph.
- (2) The Charles are to pay within 30 days to Mr. Joseph the sum of \$40,000.00 being a refund of the deposit paid on execution of the agreement on 22nd June 2006.
- (3) Interest is awarded on the \$40,000.00 at the rate of 6 percent and is payable from 2 February 2007, until paid in full.
- (4) The Charles are to pay Mr. Joseph \$360,000.00 by way of general damages and same is payable within 30 days.
- (5) Interest is awarded on the \$360,000.00 at the rate of 6 percent and is payable on any sum unpaid after 30 days, until paid in full.
- (6) Mr. Joseph is awarded prescribed costs.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar