

THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2012/0339

BETWEEN:

VINCENT BUCKLEY

Claimant

and

ELDORA HODGE

Defendant

Appearances:-

Ms. Angelina Gracy Sookoo and Ms. Renal Edwards of Counsel for the Claimant.
Mr. Nassibou Butler of Counsel for the Defendant.

2017: 7th July

JUDGMENT

[1] **CARTER, J.:** The claimant seeks relief against the defendant for breach of contract and/or unjust enrichment. In an amended claim form the relief claimed is as follows:

“AND THE CLAIMANT CLAIMS:-

- 1. The sum of Eighty-Five Thousand Dollars being the cost of land purchase pursuant to an agreement dated 26th day of September, 2011;*
- 2. Or in the alternative damages;*
- 3. Prejudgment commercial interest of 10% pursuant to Section 29 of the Eastern Caribbean Supreme Court Act;*
- 4. Costs; and*
- 5. Any other relief this Honourable Court deems just.”¹*

¹ Amended Claim Form filed on 30th November, 2012

- [2] Both the claimant and the defendant were business people, the claimant the owner of a Backhoe and Trucking business and the defendant a retail merchant, trader and restaurateur. The claimant, in the statement of claim filed on the 30th November 2012, set out that:

“By letter dated 4th October, 2011 the was defendant allocated a parcel of land situate at Lot C-5, Lime Kiln Institutional and Commercial Park measuring 10,000 square feet for the purchase price of EC\$70,000.00 (‘said land’) by the Department of Lands and Surveys. The defendant was however, unable to pay the said purchase price of EC\$70,000.00 and approached the claimant to enter into a business transaction to repurchase the said land from the defendant for EC\$85,000.00 the defendant there make[e] a profit of EC\$15,000.00 from the Agreement.”²

- [3] The parties reduced this business transaction into an agreement. The agreement (hereinafter referred to as “the Agreement”) was dated the 26th of September 2011. The terms of the Agreement are set out here:

“ a. The claimant shall pay the full payment of the said land of EC\$70,000.00 and an additional EC\$15,000.00 to the defendant in 3 stages:

- I. EC\$5,000.00 on 26th September, 2011*
- II. EC\$2,500.00 on 26th October, 2011 and*
- III. EC\$7,500.00 at closing*

b. That the defendant shall assign the benefit of the offer to purchase the said land to the claimant upon payment for the said land; or
c. If the Department of Lands & Surveys fails to honour this agreement, the defendant will transfer the said land to the claimant by way of Memorandum of Transfer on condition that the claimants pays the transfer tax. “

The Agreement was signed by both parties and witnessed by an attorney-at-law.

- [4] The claimant also relies on an affidavit (hereinafter referred to as “the Affidavit”) that he states was executed by the defendant on the same date the 26th day of September 2011. That contents of that affidavit are set out here:

“I, ELDORA HODGE of 63 Pleasant View, Shadwell in the Island of ST. Kitts hereby states as follows:

² Paragraph 3 of Amended Statement of Claim

1. That I am deponent herein.
2. That I was granted the offer to purchase all that piece and parcel of land known as Lot No. C-5 situated at Lime Kiln Institutional and Commercial Park.
5. That I am unable to purchase the said land from Sustainable Department.
6. That I gave the option to Vincent Buckley who has now paid for the said lot.
7. That I hereby authorize and direct the Department of Lands & Surveys to issue the Certificate of Title for Lot. C-5 in the name of Vincent Buckley of Douglas Estate, St. Peters, St. Kitts.

I make this affidavit sincerely and conscientiously knowing its contents to be true in every respect."

- [5] It is not in dispute that subsequent to the signing of the Agreement the claimant paid the sum of \$70,000.00 to the Crown in five installments, each Installment was made by cheque and the claimant received a receipt evidencing each payment. The claimant also paid directly to the defendant the sum of \$15,000.00. The claimant received signed receipts from the defendant evidencing these latter payments.
- [6] Once the final installment had been made to the Accountant General on the 27th January 2012, the claimant's attorney "*submitted the requisite documentation to the Department of Lands and Surveys [hereinafter referred to as "the Department] for the said land to be transferred to the claimant. On the 18th April, 2012 the Department of Lands & Surveys wrote to the defendant informing her that the offer to purchase the said land was revoked and that she should contact the Ministry of Sustainable Development for information regarding her refund of the purchase price. On the 19th April, 2012 the Department of Lands & Surveys also wrote to the claimant's then Counsel informing him that they could not process his transaction. On the 30th April, 2012 the purchase price of EC\$70,000.00 was paid to the defendant by way of cheque ...from the Government of St. Kitts and Nevis Treasury Department."* The upshot of these factors was that the defendant was no longer in a position to sell the land to the claimant.

- [7] The claimant set out that he thereafter made numerous verbal and written request of the defendant for the return of the EC\$85,000.00 but to no avail. He therefore claims restitution from the defendant of the full sum or in the alternative damages for unjust enrichment.
- [8] The defendant's position as set out in her amended defence filed on the 26th of December 2012 was to the effect that she and the defendant were in an amorous relationship which persisted for 10 years from 2002 until April 2012. The defendant's pleadings state that as a result of that relationship the parties were in the habit of assisting each other financially and otherwise with gifts. The defendant was desirous of building and establishing a business complex and as a result she applied to the Ministry of Sustainable Development for the purchase of a lot of land at Lime Kiln Commercial and Institutional Park. She states that she was offered Lot C5 for the price of \$70,000.00, and that *"acceptance of this offer was to be made by a deposit of \$50,400.00 of the price of the land by 30th September 2011, and the remainder plus interest must be paid within six months of the date of the letter of offer dated 15th September 2011"*³
- [9] The defendant states that when she informed the claimant of the offer, that he volunteered to assist the defendant financially with a gift of the full amount of the purchase price inclusive of interest. She states that the additional \$15,000.00 was to assist the defendant with incidental expenses such as paying the surveyor, the purchaser's transfer tax, the registration fees, assurance fund, property tax and legal fees.
- [10] The defendant stated that:

"8. There was no business transaction to repurchase the said land from the defendant for &85,000.00 or at all but it was the understanding that after the business complex had been built the claimant would be a silent partner in the business.

9. In order to continue to conceal the intimate relationship of the parties from the claimant's spouse and so that the claimant's spouse may not become aware of the financial assistance accorded to the defendant, the

³ Paragraph 6 of the amended Defence filed on the 30th November 2011.

parties decided to have an agreement drawn up and signed by the parties purporting to show that the financial assistance accorded to the defendant was in return for the defendant assigning the offer of the said Ministry to the claimant.”

- [11] The defendant also takes issue with the validity of the affidavit dated the 26th September 2011. The defendant pleads that this affidavit was a nullity, as it was never sworn by the defendant, never signed and notarized by any Notary Public or Commissioner of Oaths and that inter alia, *“It could not properly authorize or direct the department of land and surveys to issue a certificate of title to the said land to the claimant when as yet there had been no acceptance of the offer by payment of the deposit of \$50,400.00.... The purported Affidavit was never intended by the parties to be sworn and notarized but to be used as a means of preventing the claimant’s spouse [from] becoming aware of the intimate relationship between the parties and the gift of \$70, 000.00 that the claimant had made to the defendant.”*
- [12] The defendant states that in early 2012 the longstanding relationship between the parties broke down and that it is as a result of the claimant becoming revengeful thereafter that the claimant approached the ministry with the purported affidavit when the claimant *“was fully aware that it was never the intention of the parties to apprise the Ministry of the purported “Affidavit” or to have the land transferred to him.”*⁴ The defendant therefore denies that she received monies from the claimant or that he paid monies on her behalf in pursuance of the Agreement. She instead states that if matters concerning the Agreement are as the claimant alleges, that it is the claimant who is in breach of the said Agreement in that: the payment for the said land was not completed, there was a balance of interest in the amount of \$24,995.00, the claimant did not pay the full amount of the deposit by the 30th September 2011 and that it was not part of the agreement that the claimant should submit any documentation to the Department for transfer of the land to the claimant.
- [13] The defendant therefore denies that she is indebted to the claimant or that he is entitled to the reliefs as prayed for.

⁴ Ibid at paragraph 13

[14] An earlier court order in this matter determined that the defendant would not be permitted to file witness statements out of time in this matter and when the matter came to trial the defendant did not appear. Her attorney did appear and he was allowed to cross-examine the claimant. The claimant's witness statement was accepted as his evidence-in-chief at the trial and he called no other witnesses. At the conclusion of the trial counsel for both parties filed written closing submissions for the court's consideration.

[15] The issues for determination are as follows:

- 1) Whether the Agreement formed a valid and binding contract between the parties
- 2) Whether the defendant has breached the contract and therefore liable for damages for such breach
- 3) In the alternative, whether the claimant is entitled to damages for unjust enrichment.

The Agreement

[16] The Laws of St. Christopher and Nevis state that:

"Contracts for sale, etc., of land to be in writing.

(1) No action may be brought upon any contract for the sale or other disposition of and or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him or her lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the Court."⁵

[17] Although the contract to be enforceable must be in writing, in the ordinary case the law does not require a contract to be made in any particular form, nor according to any particular formalities. It is sufficient that there be a simple contract. Therefore,

⁵ See Section 4 of the Revised Laws of Saint Christopher and Nevis 2002, CAP. 10.04

such a contract may be validly made either orally or in writing, or partly orally and partly in writing.

- [18] To constitute a binding contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. In order for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately.
- [19] The claimant submits that the Agreement was a simple written contract which contained all of the elements of the parties' obligations, that it is a simple contract for valuable consideration and is therefore enforceable in law.
- [20] In submissions to this Court the defendant argues that the Agreement was only made at the suggestion of the claimant with the intention of continuing to conceal an amorous relationship between the parties and that it was never witnessed by anyone and was never intended to be binding upon the parties.
- [21] The claimant's witness statement was accepted by this Court as his evidence-in-chief and essentially mirrored what had been set out in his statement of claim. He was cross-examined by counsel for the defendant. The claimant denied that he was ever in an amorous relationship with the defendant and instead stated that he knew her doing business and that he had done some heavy equipment work for her when he was building a house sometime in or about 2002. The defendant stated that he believed that the defendant had, had use of the land for some time and that she would ask him to clear the land occasionally. He stated in answer to counsel for the defendant that he eventually asked her to store material on the property.
- [22] The claimant stated that he became aware of the offer to purchase the land from the Department of Lands and Surveys when the defendant showed him the letter of offer and that the defendant told him that she intended to build a restaurant on the land. He described that when the defendant told him of the offer from the

Department and that she could not pay for the land, he saw this as a business opportunity and approached her about purchasing the lot.

[23] He described going to his attorney to draw up the Agreement. The claimant maintained under cross-examination that he did not volunteer to assist the defendant financially as a gift. The claimant went on to clarify that as far as he was concerned *"The agreement was that I would pay for the land on her behalf and when it was paid for she would then do what transfer that was necessary. She said that she did not want anyone else to get the land so she offered me the privilege to pay for the land on her behalf."*

[24] This Court found the claimant to be a truthful witness. He gave a credible and unshaken evidence of how the Agreement between himself and the defendant came about. Despite the best efforts of counsel for the defendant his account did not shift. I do not believe that the monies were given as a gift to the defendant. I do not believe that the parties were in an amorous relationship.

[25] The issue of whether or not there was a binding agreement between the parties is a question of construction for the court and the court is satisfied that on the facts and the applicable legal principles, a binding contract was reached between the parties on 26th September 2011.

Breach of Contract

[26] The claimant's case is that the defendant is liable for breach of contract for not having performed any part of the contractual duties as set out under the Agreement. The defendant's obligations under the contract were to: *"assign the benefit of the offer to purchase the said land to the claimant upon payment for the said land; or ... transfer the said land to the claimant by way of Memorandum of Transfer on condition that the claimant pays the transfer tax."*

- [27] The claimant argues that the defendant had a duty to take all necessary steps to ensure that she was in a position *“to deliver her end of the bargain...”*⁶ and that her failure to do so resulted in her inability to perform her obligation under the contract. In this regard, the claimant points to the defendant’s failure to pay interest on the property as required by the Department and argues that this amounts to the defendant being in breach of the Agreement. The claimant further argues that: *“the failure of the defendant to limit or provide for the refusal of the Crown to sell the land to her personally, means that she must face the consequences of not being able to transfer the said property to the Claimant.”*⁷
- [28] The defendant’s submission is that this Court should find that there was no breach of contract on the part of the defendant as claimed because the Agreement was a nullity. The defendant argues that the defendant had no offer that she could assign to the claimant *“as the offer did not move from her to the Ministry but vice versa.”* She argued further that a binding contract could not arise from a promise that is manifestly incapable of performance either in fact or in law at the time when it was made because there is no real consideration. The defendant had merely an offer to sell from the Department, and she could not assign this offer at the time that the Agreement was made on the 26th September 2011. As it was put by counsel for the defendant, the promise to do an act which was obviously impossible is no consideration.
- [29] The claimant’s evidence is particularly relevant on this issue. The claimant maintained that at the time that the agreement was signed by the parties he was aware that the defendant did not own the land. He stated that: *“The offer was from the Department. I knew the offer came from the lady not the department. I was dealing with the lady.”* He insisted that as far as he was concerned the defendant *“did have an offer she could pass to me.”* He agreed that he knew that *“if the department did not honour the agreement,”* that the defendant *“could not transfer any land to me.”*

⁶ Pre-trial submissions of the claimant at page 7, paragraph 18

⁷ Supra at paragraph 19

- [30] In answer to counsel for the defendant the claimant was adamant that he *“did not know that since the Department did not offer me I could not accept their offer.”* I believe the claimant’s account that the parties themselves mistakenly believed that the defendant could transfer the offer to the claimant in the manner that was set out in the agreement when in fact this was not the case.
- [31] Having carefully considered the evidence before the court and the submissions of counsel for both parties, it is this Court’s finding that there has been a failure of consideration in this case. There has been a complete failure of the performance for which the payer, here the claimant, had bargained.⁸ It is clear that the Agreement was based upon a mistaken premise on the part of both parties. Both parties were mistaken as to the defendant being in a legal position to transfer the property, when all that she had at the time was an offer made to her by the Department. Although the defendant has not given evidence in this case the claimant’s evidence as set out above supports this Court’s findings.
- [32] The upshot of this is that when the unhappy event happened, when the offer was withdrawn by the Department, the direct effect of this on the parties was a realization that the Agreement that they signed was incapable of performance. Indeed, the claimant does not suggest in his pleadings or at trial that the defendant knew that the Agreement was incapable of performance on her part prior to its execution and the narrative of how the events unfolded supports this. In his evidence in chief the claimant describes the series of events as *“a failed contract”*⁹ between the parties.
- [33] Neither party contemplated what their respective rights would be if the offer could not be transferred and if the defendant was unable to transfer the land to the claimant. The claimant agreed with counsel for the defendant that *“There is nothing in the agreement to indicate what should happen if the defendant is unable to transfer the land to me. It is not in the agreement.”*
- [34] Counsel for the defendant states in his submission that: *“...it is patently obvious*

⁸ Chitty on Contracts, 29th Edn., Volume 1 at 29-054, page 1665

⁹ Witness statement of the claimant dated 13th June 2014 at paragraph 21.

*that the parties contemplated impossibility of performance of the agreement but did not provide for it. Both parties accepted the risk with their eyes wide open so that the obvious inference is that they intended the loss to lie wheresoever it might fall.*¹⁰ The defendant's contention is that this results in the claimant being denied recovery of the monies paid to the Department on the defendant's behalf under the terms of the Agreement. The court does not share counsel's view on this point. The parties should return to the position that they were in prior to the agreement being signed. The defendant cannot argue that the contract is a nullity and therefore void ab initio but yet seek to have the defendant remain in a position where she gets the benefit of the contract. There is no reason for the defendant not to return the monies paid under the Agreement which has being found to be a nullity in the circumstances as outlined.

- [35] The effect of the circumstances as outlined above is that the Agreement is discharged and the claimant is able to recover the monies paid under the Agreement.¹¹ The claimant has by his actions clearly elected to treat the contract as discharged as evidenced by his detailing "*numerous requests to the defendant for her to return the sum of \$85,000.00*" since the defendant was no longer in a position to hold up her end of the Agreement, and by the letter sent by his attorney giving the defendant notice that she was to deliver up possession of the money within a stated time period, which the defendant has failed to do.
- [36] In light of the court's findings that the Agreement was a nullity there is no need to consider the submissions on breach of contract.

Unjust Enrichment

- [37] If this court is not correct in its conclusions on the initial claim for restitution, this Court will go on consider the alternative plea for relief for unjust enrichment.

¹⁰ Closing Submissions on behalf of the defendant at paragraph 31

¹¹ See *Kwei Tek Chaov British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 475

[38] In **Featherwood Trading Limited v Fraunteld Management Limited**¹², Mitchell JA [AG] stated the principles applicable to unjust enrichment afresh:

“First, to succeed in a claim in unjust enrichment the claimant must demonstrate three things: (1) that the defendant has been enriched; (2) that this enrichment was gained at the claimant’s expense; (3) that the defendant’s enrichment at the claimant’s expense is unjust. Second, the basis must be jointly understood as such by both parties, though it need not be expressly stated. Third, failure of basis must not be confused with receipt of benefit. The transferor may receive a benefit from the transferee, but it does not follow that the basis for the transfer has, therefore, been satisfied. Fourth, in a claim for unjust enrichment, the cause of action is generally restricted to the direct provider of the benefit only.”

[39] The court went on to hold that:

*“Enrichment will be unjust where there is a “failure of basis” or in more traditional language a “failure of consideration”. A claimant may transfer a benefit to a defendant on the basis of a future event without the defendant promising that that event will occur. If that event does not happen one can describe there as being a failure of consideration.”*¹³

[40] This Court finds that the claimant has proved to the requisite standard that the defendant has been unjustly enriched by the mistaken belief of the parties that the offer could be transferred from the defendant to the claimant in the manner contemplated by the Agreement.

[41] In Chitty, the learned authors referred to the case of **Norwich Union Fire Insurance Society Ltd v W.H. Price Ltd**¹⁴ as authority for the modern formulation of the law with regard to restitution and mistake. In that case Lord Wright stated that it is *“essential that the mistake relied on should be of such a nature that it can properly be described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.”*¹⁵ Insisting that: *“The test of mistake in restitution is broader than that in contract.”* The authors went on

¹² BVIHCVAP2012/0020

¹³ Applying *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Roxborough v Rothmans of Pall Mall Australia* (2001) 208 CLR 516. These principles are similarly stated in Chitty, *supra*, at 29-018, page 1642

¹⁴ [1934] A.C. 455

¹⁵ *Ibid* at page 463

to state that “the word ‘mistake’” in this context not only signifies a positive belief in the existence of something which in reality does not exist but it may also include forgetfulness and sheer ignorance of something relevant to the transaction.”¹⁶

[42] In the instant case the claimant must prove the he would not have made the payment had he known of his mistake, here his mistaken belief that the defendant could have transferred the offer to buy the property to him, at the time when the payments amounting to \$85,000.00 were made. From the evidence led in this matter this Court is of the view that the claimant has discharged this burden.

[43] Money paid in discharge of a genuine legal obligation cannot be recovered merely because the payer was induced to fulfill his legal obligation by a mistake. “A payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him.”¹⁷ The defendant could only be entitled to receive the sum in this case if this Court were to conclude that it was made as a gift, which this Court has already found that it was not, or if she was entitled to receive it under a valid contract which the defendant’s attorney denies was the result of the Agreement under consideration, since he argued and this Court agreed that the contract was a nullity for failure of consideration.

[44] On the issue of whether notice of the mistake and a demand made for return of monies is necessary, Chitty favors the view that “a right of restitution arises immediately following overpayment and it is submitted that failure to give notice of the claim before action should be relevant only to the court’s discretion in awarding costs.”¹⁸ In the instant case the pleadings refer specifically to the demand by the claimant’s attorneys for the return of the monies upon the withdrawal of the offer from the Department. The defendant did not return the monies as requested and instead the claimant brought the instant action before the court.

Conclusion

¹⁶ Supra, note 8 at 29-032, pages 1650-1651

¹⁷ Kleinworth Benson Ltd v Lincoln C.C. [1999] 2 A.C. 349 at page 410

¹⁸ Supra note 8, at 29-039, page 1656

[45] The Agreement made between the parties on 26th September 2011 is discharged. The claimant is entitled to the return of the sum of Eighty-Five Thousand Dollars and prejudgment commercial interest of 10% pursuant to Section 29 of the Eastern Caribbean Supreme Court Act. The claimant is also granted prescribed costs to be assessed if not agreed.

Marlene I Carter
High Court Judge

By the Court

Registrar