

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT LUCIA
COMMERCIAL DIVISION**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2015/0489

BETWEEN:

ISIS HOMESTYLE LIMITED

Claimant

And

CHRISTOPHER BRIAN BEECHING

Defendant

Appearances:

Mr. Gerard R. Williams for the Claimant
Mrs. Maureen John-Xavier for the Defendant

2016: June 20
August 04

Agreement for Sale – Commencement date of agreement – Termination – Breach of Contract – Estoppel by Representation

This is an action which arose out of an agreement for sale between Isis Homestyle Limited ("the claimant") acting through its sole director Marion Marshall and Christopher Brian Beeching ("the defendant"). The claimant has sued the defendant for recovery of a deposit paid towards the purchase price and other sums expended for construction and finishing works, on a partially completed five bedroom villa with swimming pool, at Marigot in Saint Lucia. The villa is located on two parcels of land, belonging to the defendant.

The agreement for sale and its addendum ("the agreements") contained the terms and conditions for initial purchase of an undivided half share of the property by the claimant and subsequent purchase of the remainder of the property within three years of the initial purchase.

Certain events in the agreement for sale were qualified to run "from the date hereof", meaning the date of the agreement. The parties disagree on the operative date for these purposes, as no date is inserted in the opening paragraph of the agreement for sale. The claimant asserts that the agreements contain the commencement date intended by the parties, in the addendum, albeit that the date was not inserted in the agreement itself. The defendant asserts that the commencement date is the date on which the agreements were fully executed viz; the date on which they were signed by him as the last signatory and duly delivered.

The date of the agreement for sale is pivotal in determining whether or not the claimant lawfully terminated the agreements and is entitled to restitution of the sums claimed.

The defendant's contends that the agreements were terminated pre-maturely or in breach of the terms of the agreements and in the alternative, the claimant is not entitled to restitution as it has not come to this court with clean hands. The defendant seeks to rely on representations were made to him by the claimant which caused him to forego taking certain action, to his detriment. Consequently he avers that the claimant is estopped from asserting otherwise, in order to benefit from the relief provided in the agreements.

This court finds (1) that the commencement (effective) date of the agreement for sale is September 8, 2011 the date intended by the parties and contained in the addendum which is to be read as one with the agreement for sale; (2) the claimant acted within the ambit of clause 3 of the addendum, in terminating the agreements and would have been entitled to the sums claimed but for the defence of estoppel by representation which has been made out by the defendant; (3) in the circumstances the defendant is entitled to retain the deposit paid by the claimant, as the only remedy afforded to him under the agreements; (4) the claimant is entitled to a refund of the sums expended in the construction and finishing works of the property as the agreement never contemplated that it should be deprived of these sums; and (5) the parties will each bear their own cost of these proceedings.

JUDGMENT

[1] **ST. ROSE-ALBERTINI, J. [Ag]:** The claimant is a locally registered company, with Marion Marshall, a British national, as its sole director and shareholder. It was incorporated by her solely for the purpose of acquiring an interest in the defendant's property located at Marigot, in the Quarter of Anse la Raye in the state of Saint Lucia.

- [2] The defendant is also a British national and the registered proprietor, with absolute title, to two parcels of land registered in the Land Registry of Saint Lucia as Block 0443B Parcel No. 79 & 80, with a villa and swimming pool erected thereon ("the property"). He also owns an International Business Company, Bayview Limited ("Bayview"), incorporated in Saint Lucia, of which he is the sole director and shareholder.

BACKGROUND

- [3] Sometime in 2010 the claimant became interested in owning an interest in the property and the parties commenced negotiation to permit the claimant to acquire a 50% interest therein. The parties agreed on a structure for doing so and the intention was that the defendant would transfer the property to Bayview, at a nominal value, following which the claimant would acquire 50% of the shareholdings in Bayview. The parties entered into an agreement for sale of the shares, at a purchase price of £350,000.00 which was considered to be the equivalent of 50% of the value of the property.
- [4] Since Bayview is classified by law as a foreign company it was necessary to obtain an Aliens Landholding Holding Licence ("ALL") on behalf of the company, for this transaction to take effect. In pursuance of that arrangement, on August 10, 2010 the claimant paid the defendant the sum of £35,000.00 as a 10% deposit of the purchase price, for acquisition of the shares in Bayview¹. In furtherance of this arrangement the parties agreed to fund the remaining construction and finishing works on the property by equal contributions deposited to an agreed bank account in Saint Lucia. Against this backdrop the claimant proceeded to expend sums of money towards construction and finishing works on the property.

¹ Receipt is tendered as Exhibit MM1

- [5] There were protracted delays in the application process for the ALL and the claimant travelled to Saint Lucia on or about September 2, 2011 and discovered that the ALL was not approved by the Cabinet of Ministers, thus frustrating the arrangement between the parties. Following this the parties agreed that the claimant would undertake a direct purchase of an undivided half share in and to the property, at the same price of £350,000.00 and would undertake to obtain the ALL for this new transaction.
- [6] On September 5, 2011 the claimant visited the law firm of Peter I Foster & Associates ("PIFA") to deliver instructions for preparation of a new agreement for sale. The agreement² was prepared but remained undated in the opening paragraph and had appended to it an addendum dated September 9, 2011. The addendum makes reference in several places, to the "**Agreement for Sale dated September 8, 2011**". The deposit paid in August 2010 under the failed agreement for purchase of shares in Bayview was applied to the new agreement as the deposit for this new transaction.
- [7] The addendum varied the agreement for sale to allow the claimant to purchase the remaining undivided half share in and to the property for a further sum of £350,000.00, within 3 years of the date of payment of the balance of the purchase price for the first half of the property.
- [8] The agreement for sale was executed by the claimant on September 8, 2011 and the addendum on September 9, 2011. The addendum gives the date of the agreement for sale as September 8, 2011 and claimant contends that this is the commencement date intended by the parties.

² Tendered as Exhibits MM2 MM3 & CB41

- [9] The defendant avers that he attempted to contact PIFA by email, to discuss the terms for the new agreement but was unsuccessful. He first saw the agreements on September 12, 2011 when they were emailed to him by Mr. Peter Foster QC of PIFA. Prior to that date he had no knowledge of the contents. He immediately reviewed them and sought clarification on certain aspects by email, to which Mr Foster responded by email on the same day. Upon being satisfied with the terms and conditions he signed the agreements on September 13, 2011 and emailed them back to Mr Foster, who received them on that same day. He avers that the agreements were executed on the date that he signed and delivered them to Mr. Foster, for the benefit of the claimant, which is September 13, 2011 and that is the rightful commencement date of the agreement for sale.
- [10] Clause 3 (a) of the agreement for sale required the claimant to submit its application for the ALL within 45 days **“of the date hereof”**. The evidence discloses that this was done by September 30, 2011³.
- [11] Clause 1 (d) of the agreement for sale defined the closing date as 4 months **“from the date hereof”**, or 7 days after the claimant received the registered ALL, whichever is earlier, or such extension date as the parties may agree in writing.
- [12] Clause 3 of the addendum stated that if the ALL was not obtained within the 4 month period, or any extended period, then the claimant would be at liberty to rescind the contract and become entitled to a return of the deposit paid and all other sums expended for completing the property.
- [13] In two emails dated January 7 & 8, 2012⁴ the claimant conveyed to the defendant that the ALL had been agreed by Cabinet. Subsequently on

³ Tendered as Exhibit MM4

⁴ Tendered as Exhibits CB24 & CB 26

January 12, 2012 the claimant terminated the agreements pursuant to clause 3 of the addendum, by notice via email to the defendant⁵.

- [14] The reason given was that the ALL was not approved within the 4 month period. A requested was also made for refund of the deposit and the sum of £39,623.52 expended in construction and finishing works on the property. The claimant contends that the defendant has refused to pay the said sums and is in breach of the provisions of the agreement and also seeks interest and costs.
- [15] The defendant contends that it is the claimant who breached the contract by terminating it prior to the expiration of the 4 month period, having obtained approval of the ALL and is not entitled to the redress that it seeks. Further that having represented to him in the emails of January 7 & 8, that the ALL was approved, the claimant is estopped by this express representation from asserting otherwise, in order to benefit from restitution under clause 3 of the addendum. The effect of this representation he claims caused him to act to his detriment by forgoing his option to seek an extension of time for the transaction to be completed, as contemplated in clause 14 of the agreement for sale⁶.
- [16] As it turned out, by a letter dated January 19, 2012 from the Permanent Secretary in the Ministry of Physical Development, Housing and Urban Renewal, the firm of PIFA was advised that the claimant's ALL had been approved by Cabinet on January 9, 2012. It appears that the letter was received at the firm on February 3, 2012 by which time the claimant had already terminated the agreement.
- [17] The terms and conditions of the agreements are not in dispute, save for the commencement date of the agreement for sale.

⁵ Tendered as Exhibit MM10

⁶ Clauses 4 and 14 of the agreement for sale

THE ISSUES

[18] The Issues to be determined are as follows:-

- (1) What is the commencement or effective date of the agreement for sale and the addendum.
- (2) Was the claimant in breach of contract by terminating the agreements on January 12, 2012 pursuant to clause 3 of the addendum.
- (3) Is the claimant barred from receiving restitution in accordance with the terms of the agreements, by virtue of estoppel by representation.

LAW AND ANALYSIS

Issue 1 : What is the commencement or effective date of the Agreement for Sale and the addendum.

[19] The claimant position is that the agreement for sale is dated September 8, 2011 on the basis that the parties had engaged in extensive and meticulous discussion prior to the preparation of the agreements, were fully aware of the terms and conditions to govern the transaction and intended that it should take effect on September 8. This was clearly stated in the addendum, though not on the agreement for sale and the addendum is dated September 9, 2011.

[20] The defendant on the other hand asserts that on September 11, 2011 by way of email the claimant informed him that the agreements had been prepared, were signed on behalf of the claimant and Mr Foster would be emailing same to him, along with further details. On September 12, the defendant received the documents from Mr Foster. He replied on the same day in three emails to Mr Foster, requesting clarification on certain aspects of the agreements, which were not in conformity with what he the

defendant had proposed. Mr Foster responded on the same day in 4 separate emails.

[21] On September 13, when he (the defendant) was satisfied with the terms and conditions based on the clarification provided, he signed and emailed the agreements back to Mr Foster, for the benefit of the claimant. The duly executed agreements were received by Mr Foster on that day.

[22] It is agreed that the agreements were executed on diverse dates and in counterparts. They were first executed by the claimant in Saint Lucia on September 8 and 9 respectively and subsequently by the defendant in the United Kingdom, on September 13. The fully executed agreements were then returned to the offices of PIFA, the legal practitioners acting for both parties.

[23] The defendant's main argument on this point is that the commencement date is the date on which he executed the agreements. He could not have done so on September 8, as on that day he had not yet seen the documents, had no knowledge of their contents and could not have been in a position to sign. He first saw the agreements when they were emailed to him by PIFA on September 12. He relies on the express terms of clause 12 of the agreement for sale which provided that the agreement can be executed in counterparts and would be deemed to be executed on the date that it was executed by all the parties and delivered. Therefore it is the execution date of September 13 which is the commencement date as that is when all the elements of a valid contract would have been achieved.

[24] He stated in cross examination that there was no reason to clarify the date stated in the addendum because he understood that the date of the agreement for sale and the execution date mean two completely different things and he was not in the habit of questioning the obvious.

- [25] Simply stated a document is said to be fully executed when it is signed by all the parties to it. This may be done in the presence of each other or by each party at a different time. The basic legal principle is that as long as the proper formalities for signing have been complied with the contract is deemed to be validly executed. It is not unusual that the execution date may differ from the commencement date, if the parties so choose. Where that is the case the execution date would be the date on which the parties sign the agreement in proper form and the commencement date would be a specified date stated in a separate clause in the body of the agreement, on which date the various obligations would take effect and become operative. Where no separate commencement date is given it is usually presumed that the agreement commences on the execution date.
- [26] It is trite law that where words expressed in writing are unambiguous the court **must** give effect to the plain and ordinary meaning of the words used in determining the intention of the parties.
- [27] The documents which the defendant exhibited as having been received as attachments in the email of September 12⁷, shows the addendum as dated September 9, and it records the date of the agreement for sale as September 8, in the opening paragraph, the recitals and clause 2. Clause 2 stated that ***“The terms and conditions contained in the agreement for sale dated 8th September, 2011 shall be read with this addendum and shall continue to have full effect.....”***.
- [28] The defendant sent several emails to PIFA seeking clarification on various aspects of the agreements⁸ but never once raised or sought clarification on the agreement being referred to in clause 2 of the addendum. Neither did he request that the dates reflected in the addendum be corrected to

⁷ Exhibit CB41

⁸ Tendered as Exhibits CB9, CB10 & CB 11

reflect the execution date, so as to conform to clause 12 of the agreement for sale.

[29] In cross examination the defendant described himself as an experienced property developer who was used to the formalities of such agreements. It therefore appears highly unusual that if the execution date was intended to be the commencement date that he would not have taken issue with date of September 8 & 9, to have it corrected, if he honestly believed that it ought to have been September 13.

[30] He reviewed both agreements and would have been aware of the dates stated in the addendum. He signed the agreements without raising any query on this issue. At a minimum at the time of signing the agreements he was fully aware that the agreement for sale was being referred to as ***“the agreement for sale dated September 8, 2011”***. As the final signatory it would have been his prerogative to ensure, if that was the intention, that the execution date was made the commencement date of the agreements. Having not made an issue of it then, I do not see how the point can successfully be taken at this time.

[31] Moreover in an email to the claimant on January 13, 2012⁹ responding to the termination notice, the defendant specifically wrote the following ***“.....Therefore you are still under an obligation to proceed according to the agreement for sale dated the 8th of September, 2011...”*** This, to me, confirms that the defendant knew and accepted this as the date of the agreement for sale, thereby accepting it as the commencement date.

[32] In arriving at a determination on the commencement date the court must apply the basic principle that the interpretation of a contract is derived from the objective common intention of the parties to the contract. That

⁹ Exhibit CB27

objective common intention is an inference drawn from the words or phrases interpreted objectively light of their contractual context. That contractual context comprises the whole or every part of the contract and all relevant contractual surrounding circumstances which were known to and should be presumed to have been within the contemplation of the parties at the time of the execution of the contract¹⁰

[33] When one speaks of the intention of the parties to the contract, one is speaking objectively. The parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had, if placed in the situation of the parties. Similarly, when one is speaking of aim, or objective, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. No contracts are made in a vacuum; there is always a setting in which they have to be placed and this in turn pre-supposes the background and the context in which the parties are operating¹¹.

[34] Applying these principles to the facts of the present case an objective interpretation of the contractual context of the addendum in relation to the agreement for sale infers that the addendum fixed the date of the agreement for sale as September 8. That document was intended by the parties to be read with the agreement for sale. The reference to that date in the addendum is inescapable. It appears in several places. The defendant testified that he read and reviewed the documents in entirety but did not challenge or object to the said dates as being inconsistent with the execution date.

[35] The defendant and claimant were the only parties to the agreements and the obvious objective purpose for stating the date of the agreement in the

¹⁰ *Halstead (Donald) v Attorney-General of Antigua and Barbuda* (1995) 50 WIR 98 at 102 to 104

¹¹ *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 at page 574

addendum could only be for the determination of rights and events arising from the agreements. The surrounding circumstances all point to September 8 and 9 as the dates presumed to have been known and within the contemplation of the parties, at the time the agreements were fully executed. There is nothing in the evidence to suggest that the parties intended it to be otherwise.

- [36] I accept the claimants' submission that the effect of not raising the issue, for correction prior to signing, the contemplation of extension of time by the defendant in various emails and the reference to that date in the email of January 13 are indicative of the fact that the defendant all along accepted September 8 as the date of the agreement for sale for the purposes of qualifying events which were stated as commencing "***from the date hereof***", in the agreements.
- [37] If the execution date was intended to be the commencement date then the agreements should have clearly stated this. At the very least the by raising a query before signing, the defendant would have ensured that it was clearly stipulated. Not having done so, it is left to this court to construe the intention of the parties from the words used, the conduct of the parties and the contractual circumstances within the contemplation of the parties at the time of executing the agreements.
- [38] These factors support the finding that the parties intended the agreement for sale to take effect on September 8 and for the addendum on September 9. For all intents and purposes the commencement date or "*the date hereof*" referenced in the agreements is September 8, 2011 and time commenced to run from that date.

Issue 2 : Was the claimant in breach of contract by terminating the agreements on January 12, 2012 under clause 3 of the addendum

- [39] There can be no doubt that approval of the ALL was granted by Cabinet on January 9, 2012 as conveyed in the letter of January 19, 2012 from the Permanent Secretary.
- [40] This meant that approval was not obtained within the 4 month period contemplated in clause 1 (d) which stated that:- ***“THE CLOSING DATE” means four (4) months from the date hereof or seven (7) days after THE PURCHASER has registered the Aliens Licence, whichever date is earlier or such extension date as THE VENDOR or THE PURCHASER may agree in writing.***
- [41] With a commencement date of September 8, 2011 that period would have ended on January 7, 2012. From January 8, 2012 the claimant became entitled to terminate the agreements for failure to obtain the ALL within the stipulated time. The termination notice was issued on January 12, 2012 outside of the 4 month window for approval. Therefore such termination would not have been in breach of the terms and conditions of the agreements.
- [42] By virtue of clause 3 of the addendum the claimant would have been entitled to receive the deposit plus 100% the sums expended towards the construction and finishing works on the property, within 7 days of receipt of the notice.
- [43] That clause provided that:- ***“THE VENDOR and THE PURCHASER agree that should THE PURCHASER not obtain approval for an Aliens Licence within the 4 month period or any extended period THE PURCHASER shall be at liberty to terminate the agreement or***

the parties MAY EXTEND THE TIME BY MUTUAL AGREEMENT. Should THE PURCHASER wish to terminate this agreement pursuant to this paragraph the PURCHASER shall do so by written notice to THE VENDOR and THE VENDOR shall pay to THE PURCHASER the deposit plus 100% of all costs paid by THE PURCHASER towards the construction and finishing works on the property within 7 days of receipt of the written notice”

[44] The 4 month period referred to in clause 3 is premised on clause 1 (d) of the agreement for sale.

[45] However that does not put an end to the matter.

[46] The defendant's refusal to repay any of the sums contemplated under the said clause is on the basis that the claimant reneged on its obligations under the agreements when it represented to him on January 7 & 8 that the ALL was agreed and subsequently failed to complete the sale. The ALL was in fact approved on January 9 albeit that this was communicated to PIFA by letter dated January 19.

[47] As a result of the claimants representation he relented from his previous position of seeking an extension of time to complete the sale. It was always the intention, he says, that the transaction should not be frustrated on account of any delays which were outside the control of the parties.

Issue 3 : Is the claimant barred from receiving restitution in accordance with the terms of the agreements, by virtue of estoppel by representation

[48] Counsel for the defendant argued on this point that after the application for the ALL was submitted for consideration of Cabinet in September 2011 an event arose which caused the defendant some concern. General

elections were called in Saint Lucia, which led to Parliament and by extension the Cabinet being dissolved in November 2011 to facilitate this process. Following the election there was a change of government and the first cabinet meeting after the election was on December 12, 2011. Between November 16, 2011 (last sitting of cabinet before election) and December 12, 2011 (first sitting of cabinet after the election) he the defendant, anticipated a delay in approval of the ALL.

[49] Had it not been for the representation made he would have engaged the claimant for an extension of time to be agreed, in order to conclude the sale. The agreement provided for either party to initiate an extension by exchange of letters under clause 14. It stated as follows:- ***“THE VENDOR and THE PURCHASER may by exchange of letters between the parties extend any of the times for completion of acts to be performed or documents to be received under this agreement, the intent being that delays beyond the control of the parties should not nullify this agreement.”***

[50] As a result he made inquiries of PIFA via email dated November 11, 2011¹² stating “.....Do you know whether there is any way we can speed up this application by forwarding it now to other departments of the process, so that something is being done while we wait for the election? Can you please reassure me that this further delay will not in any way be used as a reason to not complete this sale under the conditions of the agreement for sale?.....”

[51] Following this in an email to the claimant on November 14, 2011¹³ he alluded to delay likely to be caused by the elections. He wrote the following:- “.....Once again things will be further delayed, because as you will probably know, a general election has now been called, so all the

¹² Exhibit CB22

¹³ Exhibit CB23

ministerial positions and the cabinet have therefore been put on hold pending the results of the election. Consequently your ALL application will no doubt be sitting dormant for a while, and obviously an allowance for this will be automatically incorporated to the estimated time schedule in the sales agreement.

[52] The claimant subsequently informed him in email dated January 7, 2012¹⁴ “.....My Aliens Licence is virtually agreed”. This was a lengthy email the contents of which indicated very clearly that by this time the parties appeared to be having disagreement on major issues concerning their joint enterprise and the business relationship was becoming strained. There were discussions in the email on various options to enable the parties to forge ahead.

[53] On Jan 8, 2012¹⁵ that defendant responded by stating “.....I am obviously encouraged by your ALL being virtually agreed, however how many times have we heard this during the last 18 months. Before considering anything further, please can you tell me what information you have been given and by whom, what exactly is the position, what has to be done next, and when therefore is it likely to be approved.....”

[54] The claimant replied on even date¹⁶ stating “.....Renee¹⁷ has advised cabinet has agreed the licence....she is just waiting for the stamped document to come through which is the final stage and likely to arrive in the next 2 weeks....” The defendant stated in his witness statement at paragraph 22 that he had no reason to doubt the confirmation given by the claimant’s representative.

¹⁴ Exhibit CB24

¹⁵ Exhibit CB25

¹⁶ Exhibit CB26

¹⁷ Legal Practitioner at PIFA

[55] Then on January 12 the claimant issued a notice of termination stating that the approval for the ALL was not obtained within the 4 month period¹⁸.

[56] The defendant responded on the following day via email¹⁹ reminding the claimant of its representation made on January 8, in particular, that the ALL was agreed by cabinet. He also stated the following....*"that the agreement allows for the extension of time for the ALL which shall not be unreasonably withheld, and it also states that delays beyond the control of the parties should not nullify the agreement. Notwithstanding the above, I believe the disbanding of cabinet for a general election and the formation of a new government and cabinet, constitutes a delay beyond our control. Therefore you are still under an obligation to proceed according to the agreement for sale dated the 8th of September, 2011."*

[57] Counsel for the defendant relied on several authorities which adequately addressed the legal principles relating to estoppel by representation. I find the definition given by Spence Bower on Estoppel by Representation²⁰ to be quite instructive.

[58] It states:-

"...Under the doctrine of estoppel of representation of fact: where one person (the representor) has made a representation of fact to another person (the representee) in words or by actions or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation

¹⁸ Exhibit CB17

¹⁹ Exhibit CB27

²⁰ 4th edition at para 1.2.2 on page 4

which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner objects thereto.”

[59] The elements of estoppel by representation are stated by Browne LJ in **Moorgate Mercantile Co. Ltd. V Twitchins**²¹ where he said: ***“A person seeking to rely of an estoppel by representation must prove:(1) that the representation was made to him by or on behalf of the person against whom he seeks to rely on the estoppel; (2) that it was the intention of the person making the representation that the person to whom the representation was made should act on it as correct; (3) that the person to whom it was made did act on it; (4) that the representation was not correct and that as a result of acting on it he suffered detriment.”***

[60] Applying these principles to the facts of the present case the following findings emerge:-

(1)The claimant in the emails of January 7 & 8 represented to the defendant that the ALL was agreed by cabinet and that PIFA was awaiting the stamped copy which was likely to arrive in 2 weeks.

(2) The claimant intended that the defendant would act on the representation, as correct otherwise it would not have been made. At no time was any attempt made to correct or retract any error which may have been communicated. The ALL was in fact approved around that same time, albeit that formal communication came a few weeks later. The claimant's representative admitted in cross examination that she might have been reckless in making the statements without having formal confirmation of approval. The expiration of the 4 month window for obtaining approval of the ALL was approaching and it was known to the claimant that the defendant would have been pressing for an extension of time, considering that time might have been lost during the election period when cabinet did not meet.

²¹ [1975] 3 ALL ER 314 at 326, CA

(3)The defendant did act on the representation by relenting from his previous position of pursuing an extension to complete the sale, pursuant the clause 14 of the contract.

(4) At the time that the representations was made on January 7 & 8 the ALL had not been approved therefore the representations were incorrect. The 4 month period ended on January 7, and on the evidence the representations appeared to have conveyed an impression to the defendant, as a result of which further enquiry or steps were thought to be unnecessary or useless. Various emails exhibited convey clearly that the parties were having some business disagreements²² but until January 10, the parties were still engaging in discussions for completion of the sale²³.

(5) At that time the defendant made no propositions in relation to extension of time because he believed this was no longer required as the ALL had been approved. By making these representations the claimant cause the defendant to act to his detriment by not pursuing an extension of time to complete the sale.

(6) Without warning the claimant issued a notice of termination on the grounds that the ALL had not been approved within the stipulated period, contrary to what was represented earlier.

(7) Having represented to the defendant that the ALL was approved, the claimant is estopped is these proceedings from making or attempting to establish a contrary averment, so as to obtain relief.

[61] Counsel for the claimant relied on the case **of Rosilee Herbert v Attorney General**²⁴ to advance the notion that inaction on the part of a complainant does not give rise to estoppel. In that case the plea was not made out by the claimant for two reasons. First the court found that no representation of the facts alleged was made by the defendant and secondly the claimant was afforded the opportunity to explore certain options and advised of the procedure to be followed for doing so and chose not to. In the circumstances the representation claimed to be made, was never made, by the respective defendant.

²² Exhibits CB 65 to CB70

²³ Exhibit CB74

²⁴ BVIHCV2010/0294- delivered on January 26, 2012-unreported

- [62] That case differs with the present case where representation was in fact made in writing, to the defendant. He acted on it by believing the representation, the result of which was that he found no need to continue to engage the claimant in a discussion on extension of the time for obtaining approval of the ALL or completion of the sale. It is not for this court to speculate on what might have been the outcome of such discussion. The fact is clause 14 of the agreement made provision for this by exchange of letters and the defendant was denied this opportunity. Having been informed by the claimant that the ALL was agreed, it follows that the claimant would have put the defendant off from making further inquiry or pursuing extension of time.
- [63] The legal authorities clearly establish that it is hopeless for a representor to turn around and contend after making a representation for the purpose of inducing the representee to act in a particular way that it was for the representee to inquire into the circumstances of the representation or to have been better advised. This could in no way thwart the legal consequence of estoppel.
- [64] The court must now ask; what is the detriment that the defendant suffered as a result of the representations and to what relief is he entitled.
- [65] In **National Westminster Bank plc v Somer International (UK) Ltd**²⁵ it was held by the English Court of Appeal that there remains a scope for the operation of equity to always alleviate the position of parties on grounds of unfairness. The very doctrine of estoppel by representation stems from and is governed by considerations of justice and equity, therefore equity is not powerless in an appropriate case, as between the parties, to require a person relying on the defence of estoppel by representation to rely on it only to the extent of the detriment suffered.

²⁵ [2002] 1 All ER 198

- [66] In that case the payment sought was of a magnitude which bore no relation to the detriment suffered and it was found to be un-conscionable to allow the defendant to retain a sum over and above the value of the goods in question.
- [67] Within the context of the agreements the claimant would only be required to forfeit the deposit to the defendant for having failed to meet any of the obligations under the agreements. Clause 4 (b) stated that:- **“Should THE PURCHASER fail to fulfill any of her obligations or to pay to THE VENDOR THE BALANCE at THE CLOSING DATE THE VENDOR shall be entitled to rescind This Agreement and withdraw from the sale whereupon THE DEPOSIT shall be forfeited to THE VENDOR unless THE VENDOR waives any breach or agrees to an extension of time in writing for the payment of THE BALANCE, which will not be unreasonably withheld.”**
- [68] There is nothing to say that having not received approval of the ALL by January 7, the claimant would have automatically agreed to an extension of time. The parties own exchanges in the various emails tendered in evidence convey that business relations had soured and they were having major disagreements. It is was difficult to envisage how they would have continued as business partners for a further three years, while the claimant waited to acquire the remainder of the property.
- [69] The claimant representative stated in cross examination that she always had the balance of the purchase price to complete the sale for the first half of the property. In addition the claimant's business plan for the property would have afforded the opportunity to secure the revenue to purchase the remainder of the property, at the stipulated time. However there appear to have been were other reasons why termination was imminent. The business partnership was not working and the defendant was pressuring the claimant to purchase the entire property immediately,

which it could not afford. Exhibits CB24 and CB28 bear testimony to these matters.

[70] However the court must not lose sight of the fact that having represented to the defendant that the ALL was agreed by cabinet, the claimant is precluded by the doctrine of estoppel from receiving the relief which she would have been entitled to upon termination of the agreements, to the extent that the court deems just and fair.

[71] At paragraphs 48 and 49 of the defendant witness statement he outlines several losses which he claims were as a consequence of the claimant's termination. In my opinion these losses are not entirely the claimant's doing. The defendant ought to have had some appreciation of the financial risks involved in the venture and that the matters complained of were possibilities, if the ALL was not approved and the claimant had chosen to lawfully terminate the agreements. He is responsible for arranging his financial affairs to avoid such outcomes.

[72] I do not find that the losses he complained of were as a direct result of the representations made by the claimant. The villa was completed five years ago and by the defendant's own admission is being rented and he is benefiting fully from the rental income. It would therefore be unjust in such circumstances for the defendant to benefit in this way from the claimant's contribution.

[73] The agreements only addressed forfeiture of the deposit in the event that the claimant did not meet its obligations. Nowhere is it stated that the expenses for completion works borne by the claimant should be forfeited. The only clause which speaks to refund of these expenses is clause 3 of the addendum which is directed to the claimant. It was not an expense that was ever contemplated to unilaterally benefit one party over the other

and as such the claimant is entitled to a full refund of the sums expended for completion of the property.

[74] I therefore find that the defendant is entitled to retain the deposit as stated in clause 4 (b), to place him in the position that he would have been, had the claimant obtained approval of the ALL as represented but failed to complete the sale.

[75] It is not disputed that the parties agreed to fund the completion works equally and commenced doing so since 2010. Several email exchanges support this finding. I accept the claimant's evidence on the quantification of the sums expended of £39,632.52. In the absence of any juristic reason (and I found none), the defendant is not entitled to benefit from or retain such contribution and it should be repaid to the claimant.

CONCLUSION

[76] For the foregoing reasons this court orders and declares as follows:-

- (1) That the defendant shall retain the deposit in the sum of £35,000.00 in accordance with clause 4 (b) the agreement for sale.
- (2) That the defendant shall pay to the claimant the sum of £39,623.52 as the expenses incurred by the claimant for construction and finishing works in relation to the property, together with interest at the rate of 6 percent per annum from the date of this order, until payment in full.
- (3) The parties having each been successful on part of their respective claim and defence, this court orders that they shall each bear their own costs of these proceedings.

[77] I wish to thank Learned Counsels for their respective submissions.

Cadie St Rose-Albertini
Commercial Court Judge