

SAINT LUCIA

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

CLAIM NO. SLUHCV 2012/0255

BETWEEN

PAUL JASON AUGUSTE

Claimant

AND

**MARIE MADELEINE MARSHAL aka
MARIE MADELEINE AUGUSTIN**

Defendant

Appearances:

Dr. Richard Barrow for the Claimant
Mr. Evans Calderon for the Defendant

2013: September 23rd.
2013: November 18th.

JUDGMENT

[1] **Carter J:** The Claimant by fixed date claim form seeks the following relief:

- (1) Specific Performance of the Agreement dated 31st day of May 2005 for the Sale of the Property Block 1256B, Parcels 331 and 332 to Paul Jason Auguste and Madeleine Clovis;
- (2) Legal possession of the immovable property registered at the Registry of Lands Saint Lucia as Block 1256B, Parcels 331 and 332;
- (3) Special damages in the amount of \$5,897.06;
- (4) Interest on Special damages at the rate of 6% per annum from 5th December 2011 and continuing until payment in full;
- (5) Costs of this application;

(6) Further or other relief as the Court in its discretion deems fit.

[2] The claim arises out of an agreement for the sale of land dated the 31st May 2005.

The Claimant's case

[3] The Claimant and his common law wife, a relative of the Defendant, built a dwelling house on land located at Bella Rosa, Gros Islet registered as Block 1256B Parcel 177, this land being part of an undivided parcel of land ("the undivided parcel") in which the Defendant and the Claimant's common law wife held an interest. The Claimant and his common law wife constructed the dwelling house between 1995 and January 1999.

[4] In or about 2004 the Claimant and his common law wife met with the Defendant, seeking to get the Defendant involved in discussions concerning the survey and partitioning of the undivided parcel. Sometime after this initial meeting the Claimant indicated to the Defendant his interest in purchasing the Defendant's share of the undivided parcel and the Claimant and Defendant agreed that an Agreement for sale would be prepared.

[5] The Claimant contends that it was also agreed with the Defendant that since she was having disagreements with the other heirs and did not want to get involved with them, that the Claimant would represent her with respect to matters associated with the survey and partitioning of the undivided parcel, and further that he would pay all expenses on behalf of the Defendant involved therein. It was further agreed that the sum of all such expenses paid by him would be deducted from the purchase price to be paid to the Defendant for her interest in the undivided parcel.

[6] An agreement for the sale of the Defendant's interest in the undivided parcel ("the Agreement") was prepared by the Claimant's attorneys and executed by the parties on the 31st May 2005, in the presence of the attorney, Mrs. Andra Gokool-Foster and also of Ms. Cornibert, a clerk at the attorney's Chambers.

The purchase price was agreed at EC\$97,002.68 based on a price per square foot of \$3.50. Upon signing the Agreement the Claimant paid the Defendant an initial deposit of \$10,000.00. The balance of the purchase price of EC\$87,002.68 was to be paid to the Defendant immediately on completion of the Survey and Partition of the Property. The total square footage was stated in the Agreement to be an undivided 1/8 share measuring approximately Twenty Seven Thousand Seven Hundred and Fifteen Point Zero Five Square Feet (27,715.05 sq ft).

- [7] Subsequent to the signing of the Agreement the Claimant met with the other heirs to the undivided parcel and it was agreed that upon partitioning, that the site where the Claimant's dwelling house was located would go to the Defendant. It is not disputed that the Claimant paid the Defendant's share of the fees for matters attendant upon the survey and partitioning of the undivided parcel, to wit: applications for extension of time and amendments to Letters of Administration; preparation of a Vesting Deed; preparation of a Deed of Partition, completion of the administration of the estate and surveying, together totaling \$5,897.062.
- [8] On the 12th August 2008 the Defendant's attorneys wrote to the Claimant informing him that the Defendant had never agreed with the terms of the Agreement and that considering her age at the time, she had not received or was not advised to seek independent legal Advice. Based on these contentions the letter sought a meeting with the Claimant to discuss the return of the deposit paid by the Claimant to the Defendant as well as any other expenditure incurred by the Claimant as a result of the Agreement.
- [9] The Parties met in the presence of their attorneys to discuss the matter but there was no resolution of the issues raised in the letter of 12th August. On the 17th March 2009 the Defendant's attorneys wrote to the Claimant's common law wife informing her that the Claimant no longer had the authority to represent her in any matter concerning her share of the undivided parcel.

- [10] By letter dated the 4th June 2010 the Defendant's attorneys informed the Claimant that their client did not wish to be bound by the Agreement and requested that the Claimant not act for her or interfere with her share of the Administration of the Estate of her late husband.
- [11] By this time, there had been a number of significant and relevant developments with regard to the undivided parcel. A Designation and Vesting Deed with respect to Block 1256B Parcel 177 was registered on the 3rd August 2007. The Survey of the undivided parcel was executed between the 7th July 2005 and 15th January 2008 and lodged on or about the 17th March 2008. A Deed of Partition dated the 29th day of June 2010 was registered on the 5th October 2011.
- [12] The Claimant filed the instant claim on the 16th March 2012.

The Defendant's case

- [13] The Defendant does not dispute the fact that she signed a document relating to her share of the undivided parcel. However, she seeks to impugn the validity of the Agreement on a number of fronts. At issue is the Defendant's state of mind at the time of signing of the Agreement, specifically whether she appreciated that it was an agreement for sale that she was signing; whether she was sufficiently appraised of the contents of the said Agreement; whether the subject matter of the Agreement, the parcel of land situate at Block 1256B, Parcels 331 and 332, was sufficiently particularized in the Agreement, whether the Defendant was unduly influenced to agree the price per square foot as set out in the Agreement and crucially whether any of these factors were sufficient to allow her to rescind the Agreement as she has purported to do.
- [14] The Defendant in her witness statement agreed that she met with the Claimant and her niece, Madeleine Clovis, the common law wife of the Claimant, concerning their purchase of her share in the undivided parcel. She agrees that the Claimant was to pay all expenses on her behalf concerning the survey and partitioning of the undivided parcel and that he would deduct these

expenses from the purchase price of the land. The Defendant was adamant that she wanted to sell her share for \$6.00 per square foot and reduced this to \$4.00 per square foot after meeting with the Claimant's attorney but denies agreeing to a price of \$3.50 per square foot.

[15] The Defendant stated that she did go to the office of the attorney for the Claimant to sign a document but stated that she thought that it was a "paper for the surveyor to survey the land" and not an Agreement for the sale of her share of the undivided parcel. She further stated that some time after this transaction, the signing of the paper, her grand daughter visited her from Cuba and she showed the Granddaughter the paper and that it was only then that she discovered that it was an agreement for the sale of the land and not an authorization for the surveyor to survey the land. She stated in her examination in chief that she was advised by her granddaughter to seek independent legal advice and she did so, instructing her attorneys to write to the Claimant that she was no longer interested in selling the land to him.

[16] The Defendant avers that she never agreed to sell her entire share of the undivided parcel to the Claimant and further that in any event the Agreement was never explained or read to her at the time of signing. Counsel for the Defendant suggested to the witnesses for the Claimant that the Defendant did not understand English and suggested that for this reason she did not understand the provisions of the Agreement. Further for all of these reasons the Agreement should be declared null and void.

Court's Findings

[17] At the outset it must be noted that Counsel for the Claimant sought and was granted a variation of the case management order to allow Counsel further time to file closing submissions by the 8th October 2013. No closing submissions have been received by the Court on behalf of the Claimant, however, Counsel has indicated to the Court at the time of the reading of this Judgment that submissions were filed on the Claimant's behalf some time after the deadline.

[18] The Court had the benefit of the cross-examination of four witnesses, the Claimant, Madeleine Clovis, Ms. Christina Cornibert and the Defendant Marie Madeleine Marshall, their witness statements having been tendered as examination-in-chief.

[19] The Court is also grateful for the legal submissions presented on behalf of the Defendant. These submissions dealt with the main issues before the Court and the Court will deal with these in turn.

(1) The Valuation Report

[20] Heavy weather was made by Counsel for the Defendant of a valuation report that the Claimant obtained before approaching the Defendant to seek to purchase her share of the undivided parcel. The Claimant agreed that he had access to a valuation of the property before approaching the Defendant but denied that this had been done in order to gain some unfair advantage over the Defendant. The Defendant has presented no evidence to show that the price arrived at by the valuation was outside the realm of prices for land of that nature at the time that the valuation was done so as to impute some improper motive on the part of the Claimant.

[21] In any event, the Defendant in her evidence admits that she felt that the land was valued at \$6.00 per square foot but agreed to sell it for a lower price because the Claimant's common law wife was her niece. Whether or not the valuation is insufficient or faulty does not then affect any of the issues upon which the Court is being asked to consider. Whether or not the valuation was being done for the Paul Jason Auguste and/or Madeleine Clovis is of no moment. This Court finds that the fact that the claimant had sought a valuation report before approaching the Defendant to discuss purchasing the land from her is no bar to his being able to come to the court to seek an order for specific performance to enforce the Agreement.

(2) The Whereof Record

- [22] Counsel for the Defendant sought to impugn the Agreement on the matter of the location where the Agreement was signed. While the Claimant and Ms. Christina Cornibert both agreed that the signing took place at the offices of Ms. Gokool-Foster in Castries, the Whereof Record in the Agreement gives the place of signing as at Marisule in Gros Islet. The Claimant under cross-examination asserted that the Agreement had been signed in Castries at the offices of his attorney and not at Marisule as appeared on the "whereof record" and stated that it was an error on the document. He further stated that he had seen the Defendant sign the Agreement in Castries as he had also signed the agreement at that time. Ms. Cornibert, the person who prepared the document, upon being confronted with this anomaly agreed that it was an error but insisted that the signing did take place in Castries.
- [23] It is interesting to note that neither in her witness statement, nor under cross-examination in the witness box did the Defendant say otherwise. While she says that she thought she was signing a document to allow the conduct of a survey only, she does not deny that this signing took place in Mrs. Gokool-Foster's Chambers in Castries. The Court finds as a fact that the signing of the Agreement did take place in Castries.
- [24] Counsel on behalf of the Defendant submitted to this Court that the Agreement was not an Authentic Notarial Document because of the error in the Whereof Record referred to above and that therefore no judgment could be founded upon such a document. He referred to the case of **Laurent John v John Bertrand Goddard**, Court of Appeal of the West Indies Associated States, September 10, 1971 in aid of this submission.
- [25] The Civil Code of St. Lucia at Article 926, in relation to Causes of Nullity in Contracts, states that:

"Error is a cause of nullity only when it occurs in the nature of the contract itself, or respecting that which is the subject of the contract or the principal consideration for making it."

[26] The error in the Whereof Record complained of does not affect the nature of the contract itself or that which is the subject of the contract or the principal consideration for making it. For these reasons the Court finds that the error complained of does not invalidate the Agreement.

(3) Did the Defendant understand the nature and meaning of the Agreement?

[27] Counsel for the Defendant submitted to this Court that at the time that the Defendant signed the Agreement she did not understand the full nature and meaning of the Agreement that it is alleged that she signed. He based this submission on the fact that the Defendant was at the time a woman some 72 years old, illiterate and he submitted not able to understand English sufficiently as to appreciate what she was signing.

[28] Ms. Christine Cornibert was called as a witness for the Claimant. Ms. Cornibert was employed by the Claimant's attorney at the relevant time. The Court after observing Ms Cornibert found her to be a witness of truth. She stated that the Claimant and the Defendant had attended at the Chambers to execute the Agreement for sale within one month of her becoming employed at the Chambers. In her witness statement she indicated that she had prepared the Agreement for sale, the terms of which were dictated to her by Mrs. Gokool-Foster.

[29] At the time of signing, the terms of the Agreement were read and explained to the Claimant and to the Defendant who were both present. She explained that Mrs. Gokool Foster then requested that she read and explain the terms of the Agreement to the Defendant in Creole which she did. She stated that the reading of the Agreement in patois or Creole was just another safeguard established by the Chambers in which she worked and applied to all elderly persons.

- [30] She freely admits that where there were words that she could not interpret into patois, that she said these to the Defendant in English and the Defendant appeared to understand all that was said. She stated under cross-examination that: *"when I asked her did she understand she responded to me in English that she did understand."*
- [31] The witness stated that she was aware that the Defendant could speak and understand English very well as the Defendant was in the habit of visiting the office to inquire about the status of the survey on the property, and that on those occasions she spoke to the Defendant both in English and in creole but mainly in English. All her previous conversations with the Defendant had been in English. The Claimant's evidence supported this version of the events.
- [32] The Court's own observation of the Defendant when she was cross-examined was that she clearly understands both patois and English very well. While giving evidence in Court, the Defendant had the benefit of the Court interpreter to assist her to understand and to answer questions posed by counsel for the Claimant in English.
- [33] The Court observed that the Defendant was able to understand all the questions posed in English and although the interpreter was present to assist her, the Defendant answered sometimes in English and sometimes in patois, even before the interpreter could translate the questions asked by Counsel.
- [34] The Defendant maintained that she did not become aware of the nature and meaning of the document until her granddaughter explained it to her. However, this Court finds that the Defendant's account does not hold true. If, as she says, she discovered the mistake within one month after the Agreement was signed the evidence is that she did nothing to redress this situation. Indeed she did not instruct an attorney to write to the claimant seeking to rescind until some three (3) years after she had this information.

- [35] Based on these observations the Court finds that the Defendant did understand and appreciate that it was an Agreement for sale that she was signing, was sufficiently appraised of the contents of that Agreement and understood fully the nature and meaning of the Agreement.

(4) Undue Influence

- [36] Counsel for the Defendant in his written submissions to the Court asks this Court to find *"that there was undue influence by a Solicitor who was dealing with a person of that age and is illiterate"*. In aid of his submission he referred to the Defendant's evidence that she told the Claimant's attorney, Mrs. Andra Gokool-Foster that her price was \$6.00 per sq. ft. for the land, but Mrs. Foster told her if she could reduce the cost because at \$6.00 Government will make her pay too much taxes so she reduced it to \$4.00 per sq. ft. Given the nature of this allegation the Court thinks it essential that the evidence on this matter is set out in its entirety.

- [37] Significantly on this point, the evidence of the Defendant was that Mrs. Gokool-Foster called her to her offices to discuss the cost of the land. The Defendant states in her witness statement that she attended upon Mrs. Gokool-Foster's request, and that it was at that time that Mrs. Gokool-Foster asked her to reduce the price. Under cross-examination the Defendant stated to the Court that: *"when I came in contact with Mrs. Foster she came to my house with Jason and Madeleine Clovis. I did not go to her to seek legal help."*

- [38] The Claimant in his witness statement does not mention how the price was agreed, except to state that the property valuation had given the market value of the property at \$4.00 per sq. ft. Of relevance to the issue of undue influence is his statement under cross-examination that:

"Mrs. Marshall agreed to sell me at \$3.50. It was Mrs. Gokool-Foster, Mrs Marshall, myself and Madeleine Clovis present when the price was agreed. Mrs. Marshall did not mention \$6.00 at any time. I do not recall that. Mrs. Gokool-Foster never said she would accept \$4.00 per sq. ft. Myself and Ms. Madeleine Clovis

did not go to Mrs. Marshall's home to tell her to reduce the price to \$3.50 per square foot."

- [39] In the case of **Calixte & Calixte v Ayrton Cornelius Sargusingh, Administrator in the Estate of Garnet Surgusaing**, SLUHCV Claim No. 507/2004, Mason J. dealt with the issue of undue influence. She referred to Article 354 of the Civil code wherein individuals have the free disposal of the things belonging to them under the modifications established by law and that an inadequacy of consideration or other inequality in transactions is not necessarily enough for a transaction to be set aside.
- [40] The Learned Judge referred to the decision of Slade LJ in the case of **Bank of Credit and Commerce International SA v Aboody** (1990) 1 Q.B. 923 in which he quoted the case of **Allard v Skinner** (1887) Ch. D 145 where it was determined that if there is no special relationship between the parties, the onus is on the person seeking to avoid the transaction to establish that undue influence existed. Thus a person relying on a plea of undue influence must show (a) that one party to the transaction had the capacity to influence the other, (b) the influence was exercised, (c) its exercise was undue and (d) the exercise brought about the transaction.
- [41] This Court considers that these are the relevant considerations even though the allegation is against the claimant's attorney. There is no evidence that Mrs. Gokool-Foster was in any position to influence Mrs. Marshall in any way. The evidence is that she met the Defendant in the presence of the Claimant and his common law wife and/or the surveyor. There is no evidence to support the Defendant's contention that she was called to Mrs. Gokool-Foster's office on her own and that Mrs. Gokool-Foster attempted to influence her with regard to the price per square foot of the property. This Court finds that the Defendant's evidence on this matter not credible.
- [42] The Defendant under cross-examination stated to the Court that: "At the time when I was involved in selling land to Jason {the Claimant} I had already been involved in the selling of some of my father's land." and further that: "The

selling of land was not strange to me. I had sold three (3) spots of my father's land to help my children with schooling." The Defendant appeared to this Court not to be someone who could be easily influenced in this regard. I find that there is no evidence before this Court that Mrs. Gokool-Foster had the capacity to influence the Defendant, that she sought to exercise such a capacity if it did in fact exist or that that influence was undue and brought about the agreed price under the Agreement of \$3.50 per square foot.

[43] Counsel must be very careful to advance such submissions, without firm evidence, against an officer of the Court.

(5) Were all the elements of a binding contract present in this Agreement?

[44] Counsel for the Defendant submitted that the area of land, the subject matter of the Agreement, was not sufficiently specified or determined. He argued that for the Agreement to be binding the subject matter must be expressed and determined. The Court was invited to find that the absence of specificity of the land area vitiated the Agreement.

[45] Article 992 of the Civil Code of St. Lucia deals with the 'Subject of Obligations', a contract being one such obligation, and states:

"An obligation must have for its subject something determinate at least as to its kind. The quantity may be uncertain, provided it is capable of being ascertained."

[46] Applying this principle, the subject of the Agreement was determined and the quantity of land could and was ascertained upon the completion of the survey and partitioning of the undivided parcel. The land that is the subject of the Agreement was stated as being approximately 27,715.05 square feet. The Deed of Partition showing the amount of the Defendant's entitlement to the undivided parcel, the parcels which are the subject of this Claim (parcels 331 and 332), together amount to Twenty seven thousand eight hundred and seventy four square feet (27,874 sq. ft.) well within an approximate range.

The subject matter of the Agreement was determinate as to its kind, and its quantity was capable of being and has now been ascertained. Counsel's submission on this point must fail.

- [47] The Court finds that all the elements of a binding contract were present, the subject matter was sufficiently expressed and determined, there was proper consideration and further that there was consensus ad idem in all the circumstances of this case.

(6) Specific Performance

- [48] According to Chitty on Contracts¹ at paragraph 27-004

“the term ‘specific performance’ refers to the remedy available in equity to compel a person actually to perform a contractual obligation.”

and further at paragraph 27-044 that:

“specific performance may be refused on the ground of mistake, misrepresentation and delay.”

- [49] Specific performance is a discretionary remedy and the Court will not grant specific performance where the complainant is in default of an essential condition. Specific performance being an equitable remedy, he who wants equity must do equity. See ***Elise Meyer v Shoal Bay Development Corporation***, Claim No. AXAHCv 0028/2010

- [50] There has been no mistake, misrepresentation or delay on the part of the Claimant. As the Court noted at above, between the time that the Agreement was signed and the first letter from the Defendant's attorney to the Claimant, a number of transactions relating to the survey and partitioning of the Property were undertaken or were in train and these continued up to the time that the Deed of Partition was prepared, in no small measure due to the actions of the Claimant.

¹29th Edition, Sweet & Maxwell, 2004.

- [51] It appears from the evidence that the Defendant may have become impatient with the process. The uncontroverted evidence of Ms. Christina Cornibert was that after signing the Agreement the Defendant visited at the Chambers of the Claimant's attorney inquiring as to the status of the survey "because she wanted to know how long the surveyor would take to complete the survey because she wants to be able to enjoy her money." There is no evidence that the delay in completion of the survey or indeed the partitioning of the undivided parcel was caused by any fault on the part of the Claimant and this has not been pleaded.
- [52] The Claimant appeared to the Court to be a witness of truth and gave his evidence in a very forthright manner. The Claimant maintained that he had done all that he had agreed with the Defendant in pursuance of the Agreement and was therefore entitled to have the Defendant transfer the land, the subject of the Agreement to him. This Court finds that there are no grounds on which the Defendant can avoid the Agreement.
- [53] The Claimant instructed his attorneys to write to the Defendant on the 5th December 2011, indicating that, the survey and partitioning having been completed, he was ready to complete. The Court finds that the Claimant is entitled to specific performance of the Agreement, damages not being an adequate remedy in all the circumstances.

The Court's Order

1. The Claimant is granted an order for specific performance of the contract for the sale of the property described in the Registry of Lands as Block 1256B, Parcels 331 and 332 to Paul Jason Auguste and Madeleine Clovis. The Claimant shall pay the balance of the purchase price to the Defendant within 90 days hereof (less Vendor's Stamp Duty); the Defendant shall within 14 days of the receipt of the balance of the purchase price cause a Transfer of Land to be executed in favour of the Claimant in respect of the said property. Should the Defendant fail to convey the property to the Claimant in compliance with this Order, the Registrar of the High Court is

authorized to execute the Transfer of Land to convey the said property to the Claimant and Madeleine Clovis.

2. The Defendant to pay to the Claimant Special damages in the amount of \$5,897.06.
3. The Defendant to pay interest on Special damages at the rate of 6% per annum from 5th December 2011 until the date of judgment;
4. The Defendant to pay costs to the Claimant, such costs to be prescribed costs in accordance with Part 65.5.
5. The Claimant is to pay to the Defendant the value of the difference in the square footage of the property, being 168.95 square feet at \$3.50 per square feet.



Marlene I. Carter
High Court Judge
(Ag.)

