

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

CLAIM NO. NEVHCV2005/0147

BETWEEN

ROLAND LEDUC

Claimant

And

**CHARLES DE BARBIER
KARL HEINZ HIBBELN**

Defendants

Appearances:

Dr. Henry Browne instructed by Mr. Geoffrey Romany for the Claimant.
Ms. Denise Lee for the Defendants.

2006: October 13;

2008: June 27.

JUDGMENT

Introduction

- [1] **LEIGERTWOOD-OCTAVE J:** The Claimant Roland Le Duc ["Mr. Le Duc"], the First Defendant, Charles De Barbier ["Mr. De Barbier¹"] and the Second Defendant Karl Heinz Hibbeln ["Mr. Hibbeln²"] are all three Canadian born gentlemen. They come from different walks of life, Mr. Le Duc being a retired naval officer, Mr. De Barbier a retired salesman and Mr. Hibbeln a retired manager. Mr. De Barbier and Mr. Hibbeln were business partners at all material times. Mr. Le Duc

¹ It should be noted Mr. De Barbier and Mr. Hibbeln are also referred to as "the Defendants" in the judgment.

² Ibid.

met Mr. De Barbier sometime in the early 1960's but he and Mr. Hibbeln have never met. What has brought these three good gentlemen together is the dispute that surrounds this case.

- [2] Also in the early 1960's, the Defendants bought land at Shaws Estate on the island of Nevis. The Certificate of Title, which recorded the purchase, described them as the registered proprietors. The land was subsequently subdivided and several lots were sold.
- [3] Mr. Le Duc's claim is that he purchased certain lots from the Defendants some time in 1966. Essentially he has referred to "two" purchases, one being the purchase of Lots 76, 77 and 78 and the other of "the remaining lots³". He claimed to have obtained signed Memoranda of Transfer in relation to these lots but as a result of the Defendants' non-performance he has been unsuccessful in obtaining Certificates of Title. He commenced these proceedings by way of Fixed Date Claim seeking Orders that the Memoranda of Transfer be registered and Certificates of Title be issued in his favour.
- [4] The Defendants have admitted that they hold Lots 76, 77 and 78 on trust for Mr. Le Duc and they are properly transferable to him and that admission in effect disposes of one issue in this case. Their case however is that Mr. Le Duc never paid for the remaining lots and although those lots are included in a Memorandum of Transfer, which they signed and which contains a receipt clause, they still belong to the Defendants. They also denied any responsibility for Mr. Le Duc's inability to obtain Certificates of Title or affecting his beneficial rights to the property in any way.
- [5] The three parties are elderly gentlemen, with Mr. De Barbier and Mr. Hibbeln not being in good health. The possibility of having them give evidence by video link was explored but eventually when trial directions were given both Mr. De Barbier and Mr. Hibbeln were excused from attending the trial due to their medical conditions. The court also ordered that Mr. Le Duc would give viva voce evidence at the trial in addition to his affidavit evidence and Mr. De Barbier and Mr. Hibbeln would rely on their affidavits.

³ See post para. 8

Issue

- [6] What the court must determine in this case is whether it can be satisfied on a balance of probabilities that Mr. Le Duc paid the \$5,000.00 purchase price for the remaining lots?

Payment of the purchase price – The Evidence

- [7] Mr. Le Duc's evidence is that when he first met Mr. De Barbier, he became aware that he and Mr. De Barbier were the joint registered proprietors of land at Shaws Estate, which were available for sale.
- [8] Mr. Hibbeln set out in some detail how he and Mr. De Barbier came to acquire lands in Nevis and how subsequent sales of portions of that land were handled. Mr. De Barbier was the one responsible for the day-to-day dealings with the sales. Prospective purchases were recorded in Promise of Sale documents, which Mr. De Barbier was authorized to and would normally sign on his behalf. Many of the transactions occurred when both Mr. De Barbier and Mr. Hibbeln were out of Nevis.
- [9] Once full payment for the lots was received, Mr. De Barbier would instruct Mr. James Claxton in Nevis to prepare the necessary transfer documents and the purchaser would be instructed to contact Mr. Claxton directly to complete the matter. Mr. Hibbeln stated that from time to time he signed Memoranda of Transfer but he was not involved in each sale. He was aware that at some point Mr. De Barbier had signed several blank Promises of Sale and both he and Mr. De Barbier had signed blank Memoranda of Transfer documents which were forwarded to Mr. Claxton with a view to reducing the time for completing the transactions.
- [10] With regard to dealings between the parties, Mr. Le Duc first purchased Lots 76, 77 and 78, the lots which the Defendants have conceded they hold on trust for him.
- [11] The parties agree that on or about 5th April 1966 they entered into an Agreement ["the Agreement"] in which Mr. Le Duc would purchase the remaining lots in the Development from the Defendants. These lots were 26, 28, 29, 30, 37, 38, 40, 41, 42, 45, 46, 54, 55, 56, 57, 58, 59, 60, 62, 69, 71, 72, 73, 93, 102 and the remaining portion of Lot 91 for a total of 26 lots. The agreed purchase price

was \$5,000.00 to be paid to Mr. Hibbeln within twenty-four months. The Agreement was executed before James Claxton, Notary Public and was exhibited as “KKK10”.

- [12] It is however the Memorandum of Transfer of Part of Land bearing, signed by both Mr. De Barbier and Mr. Hibbeln and also dated 5th April 1966, which is the plank on which Mr. Le Duc’s case rests. The Memorandum recites the following:

“We, CHARLES DE BARBIER AND KARL HEINZ HIBBELN, ...in consideration of the sum of Five Thousand Dollars(\$5,000.00) paid to us by Lieutenant Commander Roland Leduc RCN the receipt of which we hereby acknowledge do HEREBY TRANSFER to the said Lieutenant Commander J.R. Leduc RCN all unsold lands formerly owned jointly by Mr. Charles de Barbier and Mr. Karl Heinz Hibbeln and sold by Sunny Island Development Corporation all unsold land as of the 28th January 1966 and numbered as follows as per the revised plans submitted on the 15th February 1966. Lots 26, 30, 37 38, 40, 41, 42, 45, 46, 28, 29, 54, 55, 56, 57, 58, 59, 60, 62, 69, 71, 72, 73, 93, 102 also the remaining portion of Lot 91 as per the original plan. Also all other unnumbered portion of the said S.I.D. with appurtenances thereto.”

- [13] Mr. Hibbeln’s stated that the Memorandum of Partial Transfer for the remaining lots was signed and delivered to Mr. Le Duc at the same time as the Agreement and it was the usual blank pre-prepared form which included the standard receipt clause but no payment had been made by Mr. Le Duc. He was emphatic in stating that “[a]t no time whatsoever was I paid any portion of the \$5,000.00. Not one dollar. Not on April 5, 1966. Not any time before. Not any time thereafter.” Mr. Barbier similarly denied had Mr. Le Duc had paid him any portion of the \$5,000.00 purchase price at any time.

- [14] Mr. Le Duc insisted that he had paid the purchase price in full and he challenged Mr. Hibbeln’s assertion that he had failed to do. He sought to confirm that he had made due and exact payment to Mr. Hibbeln for the lots transferred to him by the Memorandum of Transfer and as acknowledged by the Defendants. When he was cross-examined on the payment issue he answered that he had paid \$5,000.00. to Mr. Claxton.

Findings

- [15] Ms. Lee has submitted a Claimant must to prove his case and if he fails to do so, on a balance of probabilities, the court cannot find that he is entitled to the relief that he has sought in his claim. The onus is on him to prove all of the material facts that he has asserted in support of his claim⁴. The critical material fact in this case is whether or not Mr. Le Duc paid the purchase price for the remaining lots and Ms. Lee urged the court that he had failed miserably to discharge his burden.
- [16] In seeking to prove his case Mr. Le Duc has relied primarily on the receipt clause in the Memorandum of Transfer which he contended is conclusive evidence against the Defendants. The court should look no further as “when a transaction has been reduced to or recorded in writing either by requirement of law or agreement by the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document⁵. This is clearly however a statement of a general position and nothing more. There was also some reliance placed on **Johnson v Humphrey**⁶ to suggest that no oral or informal evidence could be led on the terms of the Memorandum of Transfer as it is not permissible in law. I cannot see how **Johnson**⁷ assists in the argument, as it deals with a specific English statutory provision.
- [17] Ms. Lee submitted that a long established principle of law supports an entirely different position with regard to the conclusive nature of a receipt clause. In the 1919 case of **Burchell v Thompson**⁸ Lush J stated:
- “There was a time when Courts of common law and Courts of equity were distinct, and their practice differed. Formerly it was thought that at common law, if the receipt clause was contained in a deed, there was an estoppel. It has long been clearly recognized, however, that there is no estoppel, in the one case any more than the other. Even before the Judicature Act 1873, a party to a deed was not in every case stopped from setting up the truth.”*
- [18] A receipt clause is not conclusive that the money has in fact been paid and evidence can be given of the whole or part of it⁹. Neither proposition has been rebutted on Mr. Le Duc's. It is therefore

⁴ Robbins v National Trust Company Limited and Ors. [1927] A.C. 515 at 520

⁵ Phipson on Evidence 8th Ed. Chapter 45 at page 564

⁶ [1946] All E.R. 460

⁷ Supra.

⁸ [1920] 2K.B. 80 at 86

⁹ Halsbury's Laws of England 4th Edition Reissue Volume 13 at para. 223

open to the Court to examine the evidence in this case and find as fact that despite the receipt clause that the purchase price had in fact not been paid. The consequence of such a finding would mean that the Defendants would be taken as having a lien on the remaining lots for their purchase money¹⁰.

- [19] In addition to the documentary evidence, Mr. Le Duc's affidavit evidence and testimony on cross-examination where he insisted that he had paid the purchase price and the affidavit evidence of both Mr. De Barbier and Mr. Hibbeln denying that he had would be relevant to the issue.
- [20] In considering Mr. Le Duc, Ms. Lee has urged the court to disregard his evidence as being entirely unreliable for the following reasons: he gave three different sums for the amount he paid for the remaining lots; he referred to having paid both Mr. De Barbier and Mr. Claxton; and referred to different dates on which the payment was made.
- [21] My view is that Mr. Le Duc never actually vacillated on the issue that he paid \$5,000.00 for the remaining lots and his reference to \$4,000.00 related to his explanation that the Second Memorandum of Transfer "*mentioned a consideration of \$1.00 because [he] had already paid an amount of \$4,000.00 to Mr. De Barbier ...*". However at paragraph 5 of his Affidavit in Support of the Application for the Issue of a New Certificate of Title, which was exhibited as "**RL22**", he did refer to a figure of \$1,695.00 as the purchase price he paid for the remaining lots.
- [22] As to who Mr. Le Duc actually paid the purchase price, his evidence is in fact contradictory and the discrepancy was not addressed in re-examination.
- [23] Now to examine the Defendants' evidence that Mr. Le Duc did not pay for the remaining lots. Both Mr. De Barbier and Mr. Hibbeln make emphatic statements to that effect. Mr. Hibbeln sought to dismiss the receipt clause in the Memorandum of Transfer with the explanation that he and Mr. De Barbier had customarily signed such Memoranda in blank and this appeared to be one of them. He does not go on to give any further details.

¹⁰ Winter v Anson [Lord] E.R. Vol. 38 658 at 660

[24] Mr. Hibbeln, as did the Defendant in **United Dominions Trust Ltd. v Western and Another**¹¹, signed a blank form. The court held in that case that it is the duty of the signatory to ensure that the completed document represented his true contractual intention. They approved this statement¹² by Lord Wilberforce in **Saunders v Anglia**:

“... the correct rule is that ...a person who signs a document and parts with it so that it may come into other hands, has a responsibility, that a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor ...”

[25] As to what other evidence the court might consider on the payment issue in their submissions, the Defendants relied on the proposition that where there is a contract which is purported as being fully expressed in writing, whether required by law to be so or not, proof may be given of a prior or contemporaneous oral agreement or warranty, which forms part of the consideration of the main contract¹³. There is no evidence as to any oral agreements between the parties so this is entirely irrelevant.

[26] In analysing the evidence, I find Mr. Le Duc to be consistent when it comes to the payment of the \$5000.00 purchase price. Where different sums are mentioned, one is explained and one is not. His evidence differs on who he paid but not that he paid the purchase price. The payment process accorded with what Mr. Hibbeln described as being entirely customary with their sale transaction. There was an Agreement, the purchase price was paid, Mr. Claxton came into the picture and a Memorandum of Transfer. The fact that the Agreement spoke of a 24 month period for payment did not mean that the payment could not be made on the first day of the 24 month period. It would be in order that both documents could bear same date if payment was in fact made on that date, being 5th April 1966.

[27] There are discrepancies in his evidence but I do not find that they discredit Mr. Le Duc's evidence to the extent that it cannot be relied upon.

¹¹ [1975]3 All ER 1017

¹² Ibid at 1022 and 1023

¹³ Phipson on Evidence, 15th Ed. Para. 42-25

- [28] What both Mr. De Barbier and Mr. Hibbeln have stated in relation to the payment of the purchase price amount to no more than bare denials, this is critical in the context of the existence of the receipt clause.
- [29] I found Mr. Hibbeln's explanation to be dismissive or even casual, when one considers the binding nature of the document. Rights and obligations to both Mr. Le Duc and the Defendants arise out of its terms. Mr. Hibbeln's concerns with some of the practices employed by Mr. De Barbier in their business transactions or the need to reduce transaction time in no way absolve him of his duty to satisfy the court that in signing a blank Memorandum of Transfer Form, he had acted prudently. The evidence from the Defendants is not at a level that I can find that it is sufficient to sustain a challenge as to what is contained in the document. To deprive, a purchaser like Mr. Le Duc of his rights, the evidence must be cogent bordering on indisputable.
- [30] I think Dr. Browne at the end of the trial wrapped up the case in this way "*...the issue in the case is whether this gentleman paid for the land. ...Did he pay for the land and can [they] disprove that he did not.*" Bearing in mind however, that there is no onus on the Defendants to prove anything.
- [31] On my analysis, I am satisfied on a balance of probabilities that Mr. Le Duc has proved that he paid the purchase price of \$5,000.00 for the remaining lots.
- [32] Although, this case has decided the issue of Mr. Le Duc's entitlement to apply for Certificates of Title based on the Memoranda of Transfer to in relation to Parcels 76, 77 and 78 and the remaining lots in favour of Mr. Le Duc. It is important to note that his application is subject to the relevant statutory provisions.

Costs

- [34] This matter does not involve a claim for a monetary sum. There was a claim for damages for non performance of agreement but it was not pursued at trial.

[35] In accordance with **Rule 65.5[1][2][b][iii]**, I find the value of the Claim to be EC\$50,000.00 and award prescribed costs to Mr. Le Duc in the sum of EC\$14,000.00 in accordance with **Appendix B** of the Rule.

Order

[36] In light of the Defendants' admissions at paragraph [4] and my conclusions at paragraphs [31] and [35] I make the following orders;

- a. That the Memoranda of Transfer executed by Charles De Barbier and Karl Heinz Hibbeln in favour of Mr. Le Duc in relation to Parcel 76, 77 and 78 are to be registered, subject to compliance with any relevant statutory provisions.
- b. That the Memorandum of Transfer of Part of Land executed by Charles De Barbier and Karl Heinz Hibbeln on 5th April 19666 in favour of Mr. Le Duc in relation to the remaining lots, is to be registered, subject to compliance with the relevant statutory provisions.
- c. Prescribed costs are awarded to Mr. Le Duc in the sum of \$EC14, 000.00.

Ianthea Leigertwood-Octave
High Court Judge