REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

H.C.A. NO. S – 765 OF 2003

BETWEEN

SELECT PROPERTIES LIMITED PLAINTIFF

AND

TEXACO (TRINIDAD) LIMITED
NEALCO PROPERTIES LIMITED DEFENDANTS

Before the Honourable Mr. Justice David Alexander (Ag.)

Appearances: Mr. S. Maharaj S.C. and Mr. H. Seunath S.C. for the Plaintiff.
Mr. B. Reid for the First Defendant;
Mr. J. Walker for the Second Defendant.

JUDGMENT

1. There is little dispute on the facts of this action. The Plaintiff, SELECT PROPERTIES LIMITED ("SPL"), the first Defendant, TEXACO (TRINIDAD) LIMITED ("TEXACO") and the second Defendant, NEALCO PROPERTIES LIMITED ("NEALCO") are all companies incorporated under the laws of the Republic of Trinidad

and Tobago. TEXACO is the lessee of property at Gulf View, San Fernando ("the Gulf View Property") described in the schedule to deed of assignment registered as No. 9278 of 1999, for the remainder of a term of 999 years from the 7th July, 1981. NEALCO is a real estate broker which often acts as a real estate agency.

2. By letter dated the 24th March, 2003, from Amit Mirhai one of NEALCO's sales representatives acting on NEALCO's behalf to Vishnu Maharaj SPL's director, NEALCO informed Vishnu Maharaj that they were writing on TEXACO's behalf as its exculsive agent to offer him their sites for sale including the Gulf View property at the price of $4,500,000.00.

3. Vishnu Maharaj, together with Amit Mirhai visited the Gulf View property that same afternoon. By letter dated 25th March, 2003, Vishnu Maharaj informed Amit Mirhai of his acceptance of Mirhai's offer in respect of the Gulf View property at the asking price of $4,500.000.00. The letter further stated "……., we hereby tender a deposit of ten percent and will complete payment in 90 days. This acceptance is based on your representation that the property is freehold and there are no restrictive covenants".

4. On the 27th March, 2003, Amit Mirhai informed Vishnu Maharaj that another party had paid TEXACO a deposit on the Gulf View property as a result whereof NEALCO returned Vishnu Maharaj's cheque to him. By letter of the same date, Vishnu Maharaj wrote to Sharon Inglefield director of NEALCO informing her inter alia that since NEALCO made an offer which he accepted and tendered the required deposit there was a binding contract and that he intended to pursue his full legal rights in respect of that transaction.

5. SPL's attorneys by letter dated 28th March, 2003, called upon NEALCO to give an unequivocal assurance that the Gulf View property would be sold to their clients upon the payment of the balance of the purchase price within 90 days from the 28th March, 2003, and should NEALCO fail to do so on or before the 1st April, 2003, they were instructed to commence legal proceedings against TEXACO and NEALCO.

6. By letter dated 3rd April, 2003, TEXACO's attorneys informed SPL's attorneys that TEXACO was willing to discuss this matter with their client to determine whether a mutually acceptable written agreement for the sale of the Gulf View property might be achieved and enclosed a draft agreement for their consideration.

7. By letter dated 14th April, 2003, SPL's attorneys informed TEXACO's attorneys that their clients were agreeable to the draft agreement but requested that the agreement should be between TEXACO AND SPL instead of TEXACO and Vishnu Maharaj.

8. A further draft agreement was sent by TEXACO's attorneys to SPL's attorneys under cover of letter dated May 13th, 2003, by which time, SPL had already commenced this action.

9. SPL now claims:- (a) a declaration that there is a binding agreement between SPL acting through its servant or agent Vishnu Marahaj and TEXACO acting by itself and/or through its servant or agent NEALCO for the sale by TEXACO of the Gulf View property;

(b) an order that TEXACO do assign to SPL the unexpired term of 999 years in the said property;

(c) damages for breach of contract;

(d) alternatively as against NEALCO damages for breach of warranty of authority;

(e) an injunction restraining the Defendants from assigning, leasing, mortgaging and/or disposing of the said property otherwise than to SPL under the said agreement.

10. The first issue raised by the parties is whether NEALCO was authorized by TEXACO to enter into a binding agreement for the sale of the subject property. Both Mr. Walker for NEALCO and Mr. Reid for TEXACO have submitted in essence, that an estate agent has no authority to sell in the absence of authority to do so. In Davies-v-Sweet [1962] 2 Q.B.300. Danckwerts L.J at pg. 305 examined the role of an estate agent:- "……it is well settled that the function of an estate agent is to introduce a purchaser for property which it is desired to sell and ordinarily an estate agent has no authority to enter into or sign a contract on behalf of a vendor. But such authority may be conferred upon an estate agent expressly or may be inferred from the circumstances of the case." In Chadburn v Moore (1892) 67 L.T. 257 Kekewich J at pg. 258 stated "that instructions to a house agent to procure and to negotiate a sale does not amount to authority to the agent to bind his principal by contract."

The question to be answered here is whether NEALCO had expressed authority from TEXACO or authority which could be inferred from the circumstances to enter into a binding contract for the sale of the Gulf View property.

11. In her evidence – in – chief Sharon Inglefield stated (para. 12 of her witness statement) that as TEXACO's agent, NEALCO was charged with finding prospective purchasers for the properties that TEXACO wished to sell. She was a bit more elaborate in her answer to Mr. Seunath in cross-examination, when she said that in relation to this action, NEALCO was engaged by TEXACO "to introduce and market properties owned by TEXACO. I think it is important that we clearly read the exclusive listing contract to review the services of a broker which are outlined therein."

12. According to Inglefield, this exclusive listing contract is the contract by which TEXACO engaged NEALCO. It was the basis of NEALCO's dealings with TEXACO. No one executed this document on TEXACO's behalf, but, based on that contract she proceeded to act on TEXACO's behalf.

13. At paragraph 2:00 of this Exclusive Residential Listing, it is provided that the undersigned ("seller/landlord") hereby instruct and employ you ("Broker") exclusively and irrevocably to Sell/Rent (and/or negotiate to do so) the property described above. NEALCO was authorized to Sell/Rent and or negotiate to do so. The option exercised by NEALCO must in the final analysis be determined from the evidence.

Inglefield's evidence in cross-examination was that she was not authorized to sign a sale agreement on behalf of a vendor. She also spoke of a meeting with Ricardo Milford TEXACO's then Area Manager and Mr. Fojo of Terra Caribbean (another real estate broker) on Ash Wednesday, 2003 in relation to various properties which TEXACO wanted to sell including the Gulf View property. She was asked by Mr. Reid if at that meeting Milford indicated to her that in relation to the properties identified she had to revert to TEXACO in the event that she had prospective purchasers for these properties. Her answer was "yes, I believe so, it was a long time."

14. Amit Mirhai, NEALCO's Sales Representative stated in cross-examination that he had no authority to sell property. He considered his role to introduce and market properties. Milford testified in chief that on Ash Wednesday, 2003, he met with Inglefield and Fojo to discuss the sale of the TEXACO properties including the Gulf View property. At that meeting he informed them that TEXACO would have the final say as to whom the property would be sold. Neither NEALCO nor Terra was authorised to enter into any binding contract for sale with any prospective purchaser of TEXACO's properties.

15. In my view, the evidence leads to the conclusion that NEALCO's role as real estate agent regarding the sale of the Gulf View property was to procure a buyer and to negotiate a sale if necessary. NEALCO had no authority to contract to sell any property. Further, I am also of the view that NEALCO did nothing which would have suggested that it was authorised to sell the Gulf View property.

16. Mirhai's evidence is that on the 24th March, 2003, he telephoned Sylvia Maharaj the wife of Vishnu Maharaj to inform her that TEXACO was interested in selling certain properties and that NEALCO was acting as TEXACO's agent. He told her about the Gulf View property and that he would send her a letter listing the properties and the price for which TEXACO might be prepared to sell. She advised him to send the letter to her husband. Pursuant to this conversation, Mirhai on the 24th March, 2003, wrote to Vishnu Maharaj the following letter:-

Date: 24th March, 2003
TO: Vishnu Maharaj
Fax Number: 657-2726
From: Amit Mirhai
No. of pages including cover:

Re: PRIME COMMERCIAL RETAIL SITES WITH APPROVALS

Further to our telephone conversation, we write on behalf of TEXACO (Trinidad) Limited, as their exclusive agent to offer you their sites for sale as follows:-

-	-	-
-	-	-
-	-	-
Gulf View	30,627 SF	$4,500.000.00
-	_	-

Should you require any further information please contact the writer at 685-8440.

Yours sincerely
NEALCO REAL ESTATE

Amit Mirhai
SALES ASSOCIATE

17. Mirhai and the Maharajs on that afternoon went to view the Gulf View property. On the 25th March, 2003, Vishnu Maharaj called Mirhai and indicated that he wanted to purchase the property at the price TEXACO was asking. They met at Grand Bazaar that afternoon when Vishnu Maharaj gave Mirhai a letter dated 25th March, 2003 and a cheque in the sum of $450,000.00 as a deposit on the purchase price. Mirhai told the court that he signed to acknowledge receipt of the letter and the cheque. Mirhai further testified and I think this aspect of his evidence very crucial, that he told Mr. Maharaj that he would pass the cheque on to Ms. Inglefield and that she would let TEXACO know that he wanted to purchase the property. He also told Mr. Maharaj that TEXACO would have to let NEALCO know how it wished to proceed and that a Sales Agreement would have to be prepared by TEXACO's attorneys, J.D. Sellier & Company. It is noteworthy that Mirhai's evidence was neither challenged nor contradicted.

18. Mirhai's evidence clearly demonstrates that he did no more than was necessary to secure a sale of the Gulf View property on TEXACO's behalf. There was nothing in his actions or his dealings with the Maharajs to suggest that he held himself or NEALCO out as being in a position to contract with Mr. Maharaj and/or SPL for the sale of the Gulf View property.

19. The next issue for consideration is whether there was an agreement for sale between NEALCO and SPL. It is contended on behalf of SPL that the evidence as a whole and in particular the evidence of Inglefield support a strategy adopted by NEALCO that would result in both NEALCO and TEXACO emerging unscathed from this action. With all due respect to SPL's attorneys, I reject this contention without reservation. There is no evidence to support that view which was never an issue in this action.

20. Both Mr. Walker and Mr. Reid on the other hand, have submitted that in order to find an agreement between NEALCO and SPL, it must first be determined whether NEALCO's letter of the 24th March, 2003, to Vishnu Maharaj was an offer or an invitation to treat. They both consider that letter to be an invitation to treat. Both counsel are relying on the approach of the courts, that the mere use of the word offer in the letter is not conclusive of an offer having been made. In Clifton v Palumbo [1944] 2 All E R 497 it was held that a letter written by the Plaintiff to R stating "I am prepared to offer you my estate for £600,000…." in all the circumstances did not amount to an offer to sell. Lord Green M.R. at pg. 499 B explained: " Anyone who has had experience of transactions in relation to the purchase of land can recall letters written by vendors saying that they agree to sell at a named price, or that purchasers agree to purchase at a named price. The use of the word "agree" in such a context may or may not involve a contractual result. On the other hand, if you say that the price has been agreed when the contract is being negotiated, you do not use the word "agree" in the sense that any binding contract has been entered into.

All you mean is that particular element in the contract which you are negotiating has been decided. You are agreeing that is the figure which will be put into the contract and then you go on to debate the other matters which fall for discussion. Therefore, words like "agree," "offer," "accept," when used in relation to price are not to be read necessarily as indicating an intention to make, then and there, a contract or an offer as the case maybe. Whether they do or do not must depend entirely on the construction of the particular document."

21. Mr. Walker also referred me to Bigg & Anor v Boyd Gibbins Limited (1971) 1 WLR 913 and Harvey v Facey (1893) AC 552. In Harvey v Facey the appellants telegraphed "Will you sell us B.H.P.? Telegraph lowest cash price," and the respondent telegraphed in reply "Lowest price for B.H.P. £900." And then the appellants telegraphed, " We agree to buy B.H.P.for £900 asked by you. Please send us your title-deed in order that we may get early possession," but received no reply. It was held that there was no contract. The final telegram was not the acceptance of an offer to sell for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied. Lord Morris reasoned at pg. 555:- "The contract could only be completed if L. M. Facey had accepted the appellant's last telegram. It has been contended for the appellants that L.M. Facey's telegram should be read as saying "yes" to the first question put in the appellant's telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question, viz; the price.

The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of the opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."

22. In Bigg v Boyd Gibbins Ltd the court ordered specific performance after finding a binding agreement formed from letters exchanged between the parties starting with the Plaintiff's letter which stated for a quick sale I would accept £26,000. The Defendants replied accepting the offer, with the third letter from the Plaintiff informing the Defendants that the Plaintiff and his wife are both pleased that you are purchasing the property. Russell L. J. found that these letters and the plain impression conveyed to his mind was that the language used was intended to and did achieve the formation of an open contract.

23. It is submitted on SPL's behalf that the fundamental distinguishing factor between an offer and an invitation to treat is that the former displays a contractual intent while the latter is merely an indication that the party is open to negotiation. In support thereof the following cases were cited: Gibson v Manchester City Council (1979) 1 W L R 294. Storer v Manchester City Council (1974) 1 W L R 1403; Bigg & Anor v Boyd Gibbing Ltd (1971) 1 W L R . 913. In Gibson v Manchester City Council the court did not find a concluded agreement where the Respondent filled out an application form for the purchase of a council house as advised by the city treasurer's letter to him which stated "if you would like to make formal application to buy your council house, please complete the enclosed application form and return it to me as soon as possible…."

The Court found the letter as one setting out the financial terms on which it may be the council will be prepared to consider a sale and purchase in due course. In Storer v Manchester City Council on the other hand, the Court found an agreement for sale where the council forwarded a form of agreement for sale to the tenant which he should sign as an indication of his acceptance. The Court held that an offer was contained in the town clerk's letter which included the agreement and the acceptance was made when Storer did sign and return it as he did.

24. The cases cited demonstrate that a Court should only find a binding contract for sale when there is offer and acceptance; whether there is, depends on the construction of the documents. In this action I do not find that there was a binding contract between NEALCO and Vishnu Maharaj or indeed between NEALCO and SPL. NEALCO's letter to Vishnu Maharaj dated the 24th March, 2003, in my opinion, was not an offer to sell, it was an invitation to Vishnu Maharaj to make an offer to purchase; it was an indication of the price at which TEXACO was prepared to sell, the other matters to be included in the contract were to be discussed if Vishnu Maharaj were in agreement with the price quoted. In the absence of further evidence, it is difficult to find an offer in Mirhai's letter.

25. As to whether there was an agreement with SPL, the letter of the 24th March, 2003, was addressed to Vishnu Maharaj. On that date, both Inglefield and Mirhai informed the Court that they had no prior knowledge of SPL.

I accept their evidence. SPL enters the fray when Vishnu Maharaj writes to Mirhai on the 25th March, 2003, on SPL's letterhead which he signs as Director. But Maharaj does not in this letter state that the is acting for and on behalf of SPL. In the first paragraph he writes "I hereby accept your offer." In the second paragraph, Vishnu Mahraj writes "In accordance with your request, we hereby tender a deposit of ten percent….." I do not think that "We" in that context refers to SPL, but to Vishnu Maharaj and his wife Sylvia since the cheque for $450,000.00 was drawn on the First Citizens Bank Limited joint account of Sylvia Maharaj or Vishnu Maharaj. Vishnu Maharaj's letter dated 27th March, 2003, to Inglefield also confirms my opinion that his dealings with NEALCO up to that point were in his own capacity and not on behalf of SPL. Except for this letter being written on SPL's letterhead and signed by Vishnu Maharaj as Director, there is no mention therein that he was acting on SPL's behalf. In the circumstances, I find that NEALCO dealt with Vishnu Maharaj and not SPL.

26. I agree with Mr. Reid's contention that since NEALCO had no authority to bind TEXACO as I have found, then there is no agreement or memorandum or note thereof, in writing signed by TEXACO or by some other person lawfully authorized by TEXACO to do so as is required by section 4 (1) of the Conveyancing and Law of Property Ordinance (the ordinance) CH 27 No. 12 of the Trinidad and Tobago Revised Ordinances which provides:-

> "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 lawfully authorized."

27. Another issue to be considered is whether the subsequent negotiations between TEXACO and SPL through their attorneys resulted in a binding contract. This issue arises as a consequence of the letter dated 3rd April, 2003, from J.D. Sellier & Company, TEXACO's attorneys to SPL's attorneys, informing them that TEXACO was willing to discuss this matter with SPL with a view to arriving at a written agreement for the sale of the Gulf View property. A draft agreement between TEXACO and Vishnu Maharaj was enclosed for consideration with a request to be informed whether SPL was willing to discuss the matter with TEXACO and to negotiate the enclosed proposed agreement.

28. SPL's attorneys responded in the affirmative by letter dated 14th April, 2003, which also requested an amendment to the draft agreement to reflect TEXACO and SPL to be the parties thereto. Neither party executed this draft agreement which was expressed to be subject to the approval of the vendor and purchaser as these words appear at the bottom of each page of the draft agreement.

29. Mr. Reid on this issue submits that since this draft agreement was clearly subject to contract, it did not constitute an agreement and as a consequence, the negotiations leading thereto did not amount to an agreement or a memorandum or a note thereof as required by s. 4(1) of the Ordinance. In support, Mr. Reid relies upon Tiverton Estates Ltd. v Wearwell Ltd [1974] 1 All E R. 209 wherein it was held that in order to satisfy the requirements of s. 40(1) of the U.K. Law of Property Act 1925 – which is identical to s. 4(1) of the Ordinance – it was necessary for the note or memorandum relied on to contain not only the terms of the contract but also an express or implied recognition that a contract had in fact been entered into. A document setting out the terms of the alleged contract which was expressed to be, or formed part of correspondence expressed to be, 'subject to contract' would not, therefore, constitute a sufficient memorandum. I agree with Mr. Reid's submission.

Since the words "subject to contract" have been held by the Courts to mean that negotiations are continuing until the execution of a formal contract, the draft agreement in this action is neither contract nor memorandum in writing as required by s.4(1) of the Ordinance. Likewise, as the correspondence which culminated in the draft agreement do not contain the terms of the agreement nor recognize a contract having been made, the Ordinance is not satisfied. Indeed, there could be no agreement also by reason of the parties to the agreement not being correctly identified in the draft agreement.

30. The final issue to be dealt with is whether NEALCO is liable for breach of warranty of authority. One who expressly or impliedly warrants that he has the authority of another is liable in contract for breach of warranty of authority to any person to whom the warranty is made and who suffers damages by acting on the faith of it , if in fact he had no such authority: Chitty on contracts 26 edn. pg. 64 para. 2585. Having found that NEALCO did nothing to suggest to Vishnu Maharaj or SPL that it was authorized to contract for the sale of the Gulf View property, it follows and I hold that NEALCO is not liable to SPL for breach of warranty of authority.

31. By way of recap, my findings are:-

(i). NEALCO was not authorized by TEXACO to enter into a binding agreement for the sale of the Gulf View property.

(ii). NEALCO's function as TEXACO's real estate agent was to procure a buyer and negotiate a sale of TEXACO's property.

(iii). There was no contract made between NEALCO and Vishnu Mahraj or NEALCO and SPL for the sale of the Gulf View property.

(iv). There was no agreement or memorandum or note thereof in writing signed by TEXACO or some other person lawfully authorized by TEXACO to do so as required by S. 4(1) of the Ordinance in respect of an agreement between NEALCO and SPL in the first instance and between TEXACO and SPL in the second instance.

(v). NEALCO is not liable for breach of warranty of authority.

32. I order each and every claim by SPL against TEXACO and NEALCO be dismissed with costs to be paid by SPL to TEXACO and NEALCO fit for advocate attorneys to be taxed in default of agreement.

Dated this 30th day of April, 2009.

David Alexander

Judge (Ag).