REPUBLIC OF TRINIDAD AND TOBAGO

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

H.C.A. NO. S-807 OF 2003

BETWEEN

RPL (1991) LIMITED **PLAINTIFF**

AND

TEXACO (TRINIDAD) LIMITED **DEFENDANT**

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

Appearances: Mr. A. Sinanan S.C. and Mr. R. Martineau S.C. for the Plaintiff.
Mr. B. Reid for the Defendant.

JUDGMENT

1. This case is concerned mainly with the sometimes difficult questions whether there was a binding agreement for the sale of land and if so, whether there was some note or memorandum thereof in writing, signed by the person to be charged or by some other person lawfully authorized by him pursuant to section 4(1) of the Conveyancing and Law of Property Ordinance ("the Ordinance") Ch. 56:01 of the Laws of Trinidad and Tobago.

2. The Plaintiff RPL (1991) Limited ("RPL") is and was at the material time the tenant of the Defendant TEXACO (Trinidad) Limited ("TEXACO") in respect of certain premises situate at Gulf View, San Fernando ("the Property").

3. On Saturday the 22nd March, 2003, Peter Mungal Managing Director of RPL upon learning that the Property was for sale, telephoned Gerard Cox at TEXACO's head-office in Barbados and informed him that RPL was interested in purchasing the property. Cox told Mungal that the purchase price was TT $4.5 Million non-negotiable, and asked him to write Ricardo Milford TEXACO's Area Manager in Trinidad about their discussion.

4. On the 24th March, 2003 Mungal wrote to Milford as suggested by Cox the following letter which I reproduce verbatim, since it is crucial to this action:-

> 24th March, 2003
> Mr. Ricardo Milford
> Area Manager - Trinidad/Grenada,
> Maple House
> 3 Sweet Briar Road
> Port of Spain
>
> Dear Mr. Milford,
>
> It has been brought to my attention this morning that TEXACO's property, situated at the Gulf View Industrial Park, and which property is presently tenanted by RPL(1991) Limited, has been listed for sale.
>
> After failing to reach you, I contacted Mr. Cox and discussed the matter with him, expressing my intent to make every effort to purchase the said property, which Mr. Cox informed me, was being sold at the non-negotiable price of Four Million, Five Hundred Thousand Trinidad and Tobago Dollars.
>
> We have already entered into negotiations with our bankers RBTT, and the time-frame for conclusion is within two weeks. Therefore, I am requesting that we be given that much time to convince our bankers and secure the necessary funding to purchase.

Furthermore, should we be successful, the transaction will be very quickly concluded as we are very satisfied and comfortable with TEXACO's legal representative J.D. Sellier & Company, and I am quite sure that the records of the "last search" would have been carefully filed.

Thank you.
Yours faithfully,

Peter Mungal
Managing Director

c.c. Mr. Gerard Cox.

5. On the 25th March, 2003, Allyson Lee, TEXACO's Administrative Co-ordinator, phoned Mungal and told him that if he wanted to purchase the property he would have to make a deposit of TT $450,000.00 within 24 hours as there was another party interested in the property and that the cheque should be made payable to J. D. Sellier & Company, TEXACO's attorneys. According to Lee in her evidence-in-chief - which is denied by Mungal - she also told him that the payment of the deposit would be accepted subject to the preparation and execution of a written agreement for sale. (Emphasis mine).

6. The next day, the 26th March, 2003, Mungal personally delivered to TEXACO, a cheque made out to J. D. Sellier & Company for the deposit in the sum of $450,000.00.

7. Mungal's evidence is later that day he telephoned Lee who told him that everything was now in order, that RPL had three months for completion and she would contact him when the formal agreement for sale was ready for execution.

Lee's evidence on this conservation on the other hand, is that Mungal inquired as to the time frame in which they would be able to close the sale. She told him that the usual period was 90 days. She also told him there was another party interested in the property and that TEXACO had to decide to whom the property would be sold.

8. Some days after, as directed by Lee, Mungal called Ms. Luana Boyack, attorney-at-law at Messrs. J. D. Sellier & Company who informed him that she was negotiating on behalf of TEXACO with SELECT PROPERTIES LIMITED to sell it the property.

9. By letter dated 28th April, 2003, RPL's attorneys wrote TEXACO requesting inter alia its confirmation in writing that it would honour its agreement with RPL to sell RPL the property. In response, Milford on TEXACO's behalf wrote the following letter dated 5th May, 2003:-

> RPL (1991) Limited
> No. 25 Royal Road
> San Fernando
>
> Attention: Mr. Peter Mungal.
>
> Dear Sir,
>
> Re: Our property situate at Gulf View, la Romain
>
> We thank you for your interest in purchasing the property at caption.
>
> Regrettably we are unable to sell you the said property and hereby return your deposit RBTT Bank Limited cheque No. 0007520 in the sum of TT $450,000.00 which was accepted by us subject to a proper written agreement for sale being prepared by our Attorneys-at-Law and executed by the parties, as is the norm in transactions of this nature. (Emphasis Mine).

10. RPL did not accept the return of its deposit and immediately returned it to TEXACO, who again tried to return it to RPL's attorneys who also refused to accept it and returned it to Messrs. J. D. Sellier & Company. This cheque was never presented for payment.

11. On the 9th May, 2003, RPL filed a writ in this action seeking a declaration that there is a binding agreement partly oral and partly in writing between RPL and TEXACO for the sale of the property and a decree of specific performance of this agreement for sale among other reliefs.

12. The Defendant is contending that for there to be a valid agreement for the sale of the subject property there must be an agreement, or some memorandum or note thereof, in writing signed by TEXACO or by some other person lawfully authorized by TEXACO to do so in order to comply with section 4(1) of the Ordinance 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."
>
> The Defendant's submission is that there is no such agreement or memorandum or note in writing that would satisfy the provisions of the Ordinance, that being the case, RPL's claim fails. On RPL's behalf it is submitted that there is a binding agreement with a memorandum or note thereof as required by section 4(1) of the Ordinance which consists of Mungal's letter dated 24th March, 2003, to Milford offering to purchase the property, the cheque whereby the deposit was tendered, TEXACO's letter of the 5th May, 2003, written by Milford to Mungal returning the deposit and a statement or report of Amit Mirhai dated 28th March, 2003.

13. The first issue to be considered, is whether there was an agreement between the parties for the sale of the property. A binding agreement is made when there is acceptance of an offer. In short, an offer is defined as a definite promise to be bound, while the contract between the parties is constituted by the due communication to the offeror of an unconditional acceptance: Emmet on Title 18th edn. Pgs. 42 & 43. There is no dispute or denial that Mungal's letter to Milford dated 24th March, 2003, contained an offer to purchase. The question is whether by Lee informing Mungal if he wanted to purchase the property, he had to pay a deposit within 24 hours as there was another party interested in the property and that the deposit would be accepted subject to the preparation and execution of a formal agreement in writing there was an unconditional acceptance of Mungal's offer. I think that there was.

14. The principle to be understood from the authorities on "subject to contract" is that if the words are used when the parties are still in negotiations there is no contract, but if there is definite acceptance of an offer with all the material terms agreed the use of the words "subject to contract" will not prevent the formation of a binding contract. Counsel for the Plaintiff cited a number of precedents on this principle. In Kelly v Park Hall School Limited [1979] 1 I.R. 340 the court found an oral agreement binding despite the use of the words "subject to contract" since the oral agreement contained all the material terms of the sale of the Defendant's land. In his judgment Hamilton J. at pgs. 348 - 349 quoted the following passage from Halsbury's Laws of England (3rd ed. Vol. 8 p. 76 :- "Where there is a definite acceptance of an offer, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal shape does not relieve either party from his liability under the contract. It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up….. There is no completed contract if the acceptance is "subject to the approval of terms of contract" or

"subject to a formal contract being prepared and signed by both parties as approved by their solicitors" or "subject to contract" or contains similar expressions". Hamilton J. also quoted the following statement of Lord Blackburn in Rossiter v Miller (1878) 3 App cas 1124 at pg. 1151:-"But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." Hamilton J. stated that he accepted this principal of law.

15. Then there is Bolton Partners v Lambert [1888] 41 Ch D. 295 wherein it was held that the fact that a simple acceptance of an offer contains a statement that the acceptor has instructed his solicitor to prepare the necessary document does not render the acceptance a conditional acceptance. In Bonnewell v Jenkins [1887] 8 Ch. D. 70 the Plaintiff stated in his letter of offer to lease certain premises"this offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Fry J. and the Court of Appeal held, that, notwithstanding the reference to a future contract, the two letters which passed between the Plaintiff and the Defendant's house agent constituted a complete contract. And in Lewis v Brass [1877] 3 Q.B.D. 667, the head note provides:-

"An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language."

16. Counsel for the Defendant contends that Kelly v Park Hall School and Bonnewell v Jenkins can be distinguished from this instant action in that in the former, there was no denial of the existence of an oral agreement and there were documents signed by the Defendants which constituted a sufficient memorandum to satisfy the statute of frauds whereas there is no such agreement in this action nor is there any document signed by TEXACO that would constitute a sufficient memorandum to satisfy section 4(1) of the Ordinance. Similarly, in the latter, there was a sufficient memorandum to satisfy the statute of frauds unlike the present action. I beg to differ. In this action, Mungal's letter of the 24th March, 2003, refers to the parties to the agreement i.e. RPL and TEXACO, it mentions the purchase price of $4.5 Million and the property for sale which RPL occupies as tenant. Lee speaks to Mungal on the 26th March, 2003, and informs him of the deposit of $450,000.00 and on the 27th March, she tells him of a period of 90 days for completion. I do not think that it is necessary to decide whether Lee told Mungal that the deposit would be accepted subject to the preparation and execution of a formal agreement, since whether she did or did not, does not in my view affect my finding that a binding agreement was made. Milford's letter of the 5th May, 2003, refers to "the sum of TT $450,000.00 which was accepted by us subject to a proper written agreement for sale being prepared by our Attorneys-at-Law and executed by the parties," Neither Milford nor Lee states that this agreement had to be approved by the parties or their solicitors.

Further, I cannot contemplate what other terms one can consider material that were to be included in this agreement which were not already agreed. It is my opinion that these words indicate a mere desire to reduce into writing what was already agreed and do not negate the existence of a binding agreement.

17. I am also of the opinion that in the present action there is a sufficient note or memorandum of an agreement in writing signed by TEXACO as is required by the Ordinance.

18. As indicated earlier, it is submitted on RPL's behalf, that the following documents when read together constitute a sufficient note or memorandum to satisfy the statute:-

1) The letter dated 24th March, from Mungal to TEXACO;
2) The cheque issued and tendered to TEXACO's attorneys by way of deposit in the amount of $450,000.00;
3) TEXACO's letter of May 5th to RPL.

19. Counsel for RPL again cited several authorities in support of his submission. I do not propose to examine them all here, since I do not think that there is any denial of the principle allowing for the reading of documents together that there should be a document signed by the party to be charged which refers to the other documents to be read.

20. In Cave v Hastings (1881) 7 Q.B.D. 125, Field J. at pg. 128 stated:- "It has long been established that the whole of the agreement need not appear on one document, but the agreement may be made out from several documents …… in Dobell v Hutchinson 3 A & E 355 Lord Denman, C.J., there says -

"The cases on this subject are not at first sight uniform; but on examination it will be found that they establish this principle, that when a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." In Timmins v Moreland Street Property Co. Ltd [1958] Ch. D. 110 Jenkins L.J. at pg. 130 explained:- "in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40."

21. Milford's letter of the 5th May, 2003, to RPL is captioned "Our property at Gulf View La Romain" it also states "thank you for your interest in purchasing the property at caption". These references in my view undoubtedly relate to Mungal's letter of offer of the 24th March, 2003. Milford's mention of the deposit cheque of course refers to RPL's cheque dated 26th March, 2003, which was tendered by Mungal to TEXACO as a deposit on the purchase price of the property. It is my opinion that these documents can be read together since they are mentioned impliedly and expressedly in Milford's letter which was written and signed on TEXACO's behalf.

I find that these documents when taken together constitute a note or memorandum in writing as required by the Ordinance.

22. The next submission on RPL's behalf is in the event that the court holds there is no sufficient memorandum of the contract to satisfy the Ordinance, RPL has sufficiently performed the contract in part to entitle it to specific performance. In this regard, reliance is placed on the equitable doctrine of part performance to which section 4(2) of the Ordinance refers:-

> 4(2) "This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the Court."

The following are suggested as RPL's acts of part performance:-

(1) The payment of the deposit in the sum of $450,000.00;

(2) RPL's continuing in possession of the property notwithstanding its lease has come to an end with TEXACO acquiescing in this continued possession.

23. J. T. Farrand in Emmet on Title 18th ed. At pg. 67. describes the doctrine of part performance:- "When the contract had been partly performed by the parties thereto, and acts had been done which must, from their nature, have been referable to the contract, equities arose which could not be administered unless the contract was regarded. In such a case the court had jurisdiction, notwithstanding the statute of frauds to enquire into the actual contract which had been made, and having discovered by parol evidence the terms of that contract, to enforce its performance."

For the doctrine to be applicable, the act of part performance relied on must be that of the party seeking to enforce the contract and not of the party sought to be charged. The act must then be clothed with the following characteristics:- (a) it must be unequivocally referable to a contract as alleged; (b) it must be such an act as would render non-performance a fraud; and (c) the contract must be one which can be enforced by the Court.

24. Counsel for TEXACO accepts that the payment of money may amount to a sufficient act of part performance as the House of Lords held in Steadman -v- Steadman [1976] A.C. 536, but, submits that the fact that RPL suffered no detriment it cannot rely on the doctrine. The issue here is whether RPL can rely on the tender of the deposit as an act of part performance when TEXACO failed to present RPL's cheque for payment. Counsel for RPL responsed that RPL did all that it was requested to by delivering the cheque within the stipulated period, that the encashment of the cheque was within the domain, power and control of TEXACO and moreover, the tender of a cheque constitutes conditional payment and if the payee through indolence or otherwise chooses not to encash it, then it does so at its peril and can derive no advantage. Counsel relies on the case of Heywood v Pickering [1874] 9 L.R.Q. B. 428 in which Blackburn J. stated at pg. 431:- "I think that the rule must be made absolute. It is clear law that a payment by cheque is prima facie only a conditional payment. It does not operate as a payment unless the cheque is paid, or the holder by his conduct makes the cheque his own; it is then equivalent to absolute payment. In the present case the question is, has there been such laches in dealing with the cheque on the part of the Plaintiffs as to discharge the Defendants?

25. Counsel for RPL also cited Hopkins v Ware [1869] L.R. 4 Exch. 268 where the

head note provides the rule that "A creditor who takes from his debtor's agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time; and if he fails to do so, and by his delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque." In light of these authorities I agree with counsel for RPL that TEXACO's failure to present the cheque being no fault of RPL cannot now be used to RPL's disadvantage by preventing RPL to rely on the tendering of the cheque as an act of part performance.

26. I also agree with counsel for RPL that Mungal's delivery of RPL's cheque to TEXACO was an act of part performance. This act was performed by RPL, the party seeking to enforce the contract. There is no doubt that the delivery and amount of the cheque refers to the alleged contract; this act is such as would render non-performance a fraud in that TEXACO would be able to resile unscathed from its obligation to perform its side of the contract to the detriment of RPL, who would be the loser of the bargain; and I see nothing about this contract which prevents its enforcement by the Court.

27. The other act of part performance relied on by RPL in my opinion does not qualify as such. RPL was not put in possession of the property as a result of the agreement nor is there any evidence that it remained in possession as a consequence thereof. The evidence is that RPL's possession and occupation of the property was by reason of RPL's tenancy which commenced on the 8th February, 1999, and which has since continued.

28. I don't see the need to consider the other matters raised by counsel for RPL since nothing turns on them.

29. RPL has succeeded in its claim against TEXACO, and the Court's orders are as follows:-

1. It is declared that RPL has a binding and enforceable agreement with TEXACO for the sale by Texaco to RPL of the property described in the writ of summons.
2. Specific performance of the said agreement for sale.
3. It is declared that RPL is entitled to remain in possession of the said property until completion of the said agreement.
4. Texaco to pay RPL's costs of the action fit for two senior counsels to be taxed in default of agreement.

Dated this 30th day of April, 2009.

David Alexander

Judge (Ag).

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