

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015-04304

BETWEEN

NARENDRA MAHARAJ

Claimant

AND

DENNIS MICHAEL LUTCHMAN

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES:

Mr. Anthony Manwah Attorneys-at-Law for Claimant

Ms. Karen E.M. Gonzalez instructed by Ms. Thane Pierre, Attorney-at Law for Defendants

REASONS

INTRODUCTION

1. By his Claim Form and Statement of case, both filed herein on the 17th December, 2015, the Claimant, Narendra Maharaj applied for possession of the subject premises, in respect of which the parties had entered an Agreement for Sale. ¹ The Claimant contended that

¹ The subject premises were described in the Claim Form as being: All and Singular that certain piece or parcel of land situate in the Ward of St. Anns in the Island of Trinidad comprising FIVE THOUSAND SQUARE FEET more or less being portion of the lands described in the Deed registered as No. 3441 of 1941 and bounded on the North by Boodram Maraj on the South by Chandrahance Maraj on the East by El Socorro Road and on the West by Mervin Lauren.

time was of the essence of the Agreement for Sale and that the Defendant had repudiated the Agreement, by failing to make agreed monthly payments.

2. The defendant filed a counterclaim seeking a declaration that the Agreement for Sale was a valid and subsisting agreement. The Defendant also sought an order for specific performance of the Agreement against the claimant. ²
3. On the 8th February, 2018 I dismissed the Claim and entered judgment for the defendant on the Counterclaim. My reasons for so doing are set out below.

Procedural History

4. At an early stage in these proceedings, Mr. Manwah and Ms. Gonzales, learned Attorneys-at-Law for the Claimant and for the Defendant respectively, intimated to the Court that there was no issue of fact and that the court should proceed to determine the claim on written submissions.
5. Accordingly, on the 2nd February, 2017, I gave directions for the filing of a Statement of Agreed Facts and a Statement of Agreed Issues. Contrary to my directions, however, parties filed separate Statements of Fact. On 28th April, 2017, the Claimant filed the “*Claimant’s Statement of Facts*”. On the same day, the Defendant filed an “*Unagreed Statement of Facts*”. Nevertheless, upon perusal of the respective Statements of Facts of

² A defence and counterclaim were filed on 24th June, 2016.

the parties, it was clear that they were identical and therefore formed the factual basis for my decision.

Facts

6. I have set out below the full text of the *Claimants Statement of Fact*:

This statement was in every way identical to the Defendant's statement of Unagreed Facts:

1. *The Claimant is and was at all material times the owner of the freehold parcel of land described in the schedule of a certain deed bearing registered No. DE200100372893 comprising 20 acres more or less (the larger parcel).*
2. *The subject lot of land is part of the larger parcel and comprised 5,000 square feet more or less and is bounded on the North by lands in the occupation of Boodram Maraj on the South by lands in the occupation of Chandrahance Maharaj on the East by El Socorro Road and on the West by lands of on in the occupation of Mervin Lauren.*
3. *At all material times prior to June, 1991, one Meena Joseph was tenant of the subject lot of land and the owner of the several chattels and things erected and standing thereon.*
4. *Subsequent to the death of the said Meena Joseph, one John Lutchman, the legal personal representative of the said Meena Joseph continued as tenant in occupation of the subject land.*

5. *In and about February 2013, John Lutchman died. Since the death of the said John Lutchman, the Defendant and his brother, Carl Lutchman have been in possession of the several chattels and things erected and standing on the subject land.*

6. *For all material times no rent has been paid by the Defendant and/or his brother Carl Lutchman to the Claimant for their occupation of the said chattels and things and/or for the subject lot of land for and on behalf of the Estate of Meena Joseph or for on behalf of John Lutchman or at all.*

7. *By an agreement in writing dated the 17th May, 2004 made between the Claimant therein called the Vendor of the one part and the Defendant therein, called the Purchaser of the other part, the Vendor agreed to sell and the Purchaser agreed to purchase the subject lot upon the terms therein contained inter alia:*

Clause 2 – The purchase price shall be the sum of \$150,000.00 with interest of 10% per annum on a reducing balance for a period of 15 years the sum payable monthly being \$1,611.91.

Clause 3 – The Vendor shall show a good marketable title to the freehold premises and the sale is subject to the payment by the Vendor of land taxes due up to date of completion. The Vendor shall produce to the Purchaser all receipts evidencing such

up to date payments no later than ten working days before the date herein fixed for completion.

Clause 4 – The Purchaser upon payment in full on before the 17th April, 2019 at which time the Vendor shall execute and deliver a proper Deed of Conveyance of the freehold premises to the Purchaser or to whom the Purchaser shall appoint.

Clause 6 – If the purchaser defaults in completing the sale the Vendor shall be entitled to forfeit the deposit as liquidated damages in full and final settlement of the Vendor's claim.

Clause 7 – Time shall be of the essence with respect to this Agreement.

8. *The Defendant made payment of the monthly instalments in the sum of \$1,611.00 on 17th May, 2004 and 21st June, 2004 respectively but thereafter fell into arrears of the monthly instalments.*
9. *The Defendant has made payment amounting to \$70, 924.04 which have been accepted by the Claimant and in respect of which the Claimant has issued receipts. The last payment made by the defendant was on the 7th July, 2009 in the sum of \$3,300.00 for instalments up to the month of December, 2007 which the Claimant accepted and in respect of which the Claimant issued a receipt.*
10. *The Claimant informed the Defendant by letter dated the 30th April, 2014, that the agreement for sale was no longer valid, null and void.*

11. *The Claimant wrote to the Defendant and his brother the said Carl Lutchman on the said 30th April, 2014, inter alia, advising that the statutory lease of the estate of Meena Joseph/John Lutchman has ended on the 31st May, 2011; demanding that the Defendant and his brother deliver up the subject premises within 6 months that the statutory tenancy of the estate of Meena Joseph/John Lutchman has ended on the 31st May, 2011 and indicating his willingness to negotiate a sale at the open market value.*
12. *Prior to 30th April, 2014, the Claimant did not call upon the Defendant to remedy his arrears in payment and did not serve notice on the Defendant that the agreement was at end.*
13. *The Defendant responded both on the 31st May and 3rd July, 2014 to the Claimant's two letters denying that the agreement for sale was no longer valid, null and void; advising that completion was set for 17th April, 2019 and indicating that he was ready willing [sic] and able to complete by paying the outstanding balance with interest as provided by the agreement for sale.*
14. *The claimant's attorney-at-law wrote to the Defendant's attorney-at-law by letter dated 23rd April, 2015 re-iterating that the agreement had terminated and offered to refund the Defendant the said sum of \$70, 924.00 on the condition that the Defendant vacated the subject lot of land within 45 days.*

15. *The Defendant has not responded to the letter of 23rd April, 2015.*
16. *The Defendant and his brother Carl Lutchman are still in possession of the subject lot of land”.*

Issues

7. Contrary to my direction, parties filed separate Statements of Issues. The Claimant in his Statement of Issues, identified four (4) matters for the courts consideration. The Defendant’s Unagreed Statement was more expansive and listed six (6) issues for adjudication.³
8. The central issue was whether the clause 7, by which parties agreed that time would be of the essence, was applicable to monthly payments or to the final completion date on the 17th April, 2019.
9. The second issue which arose, assuming that the first issue was resolved in favour of the Claimant, was whether the Claimant had waived his right to insist on time being of the essence, by accepting late and accumulated payments.
10. The third issue was whether the letters of the 30th April, 2014, from the Claimant to the Defendant, effectively brought the Agreement to an end.

Discussion

³ See the Claimant Statement of Issues filed on 28th April, 2017 and the Defendants Statement of Unagreed Issues filed on the 28th April, 2017.

11. In the paragraphs which follow, I have set out the law and my findings in respect of each issue.

Time of the Essence

12. The general rule is that time is not of the essence of agreements for sale of land. It is not so, unless expressly provided or if the nature of the subject matter or surrounding circumstances so dictate. Where there is an express provision that time is of the essence, its effect depends on the construction of the contract. See *J.T Farrand, Contract and Conveyancing 3rd Edition page 176.*

13. Where time has been made the essence of the contract and the purchaser fails to complete by the stipulated time, the vendor may treat the purchaser's failure as a repudiation of the contract. At the House of Lords, in *Johnson v Agnew*⁴, Lord Wilberforce formulated the rule in this way:

“In a contract for sale of land, after time has been made or has become the essence of the contract, if the purchaser fails to complete, the vendor can treat the purchaser as having repudiated the contract,....accept the repudiation and proceed to claim damages for breach of the contract, both parties being discharged

⁴ Johnson v Agnew [1979] 1 ALL ER. 883

from further performance of the contract or he may seek from the court an order for specific performance with damages....”⁵

14. In these proceedings, the parties expressly agreed that time would be of the essence at clause 7 of the Agreement. Clause 7 simply provided:

“Time shall be of the essence with respect to this Agreement”

15. At Clause 4 of the Agreement, the parties agreed on a completion date in these words:

“ The Purchaser upon payment in full, on or before the 17th April, 2009, at which time the Vendor shall execute and deliver a proper Deed of Conveyance....”

16. Prior to completion, the parties agreed on a method of payment in these words, at clause 2:

“The purchase price shall be the sum of ONE HUNDRED AND FIFTY THOUSAND DOLLARS....with interest of 10% per annum on the reducing balance for a period of Fifteen years the sum monthly shall be \$1611.91.

17. I considered the true construction of the Agreement for Sale. It was my view that, the date by which time was made the essence of the contract, was the final completion date of 17th April, 2019. This was the date which was contemplated by the parties at clause 4 of the

⁵ Ibid at page 889 C.

Agreement for the final payment by the purchaser, as well as, the execution and delivery, by the vendor, of a proper deed.

18. Clause 2, by contrast provides, not the deadline for payment, but the method by which the total purchase price may be paid. There is no stipulation as to the date of each succeeding month, by which the agreed monthly sum should be paid. Because parties were not specific as to the dates of the monthly payments, it was my view that time could not be of the essence in relation to these payments.
19. It follows therefore, that it was my view, that in this Agreement, the parties agreed that time would be of the essence by the 17th April, 2019. Should the purchaser fail to make payments in full by that time, the vendor would be entitled to treat the Agreement as at an end and seek damages for delay in payments.

Waiver

20. In the event that I was wrong in the above finding, I proceeded to consider the issue of waiver. Following the execution of the Agreement on the 17th May, 2004 the Defendant made payments for three months: May, 2004 and June, 2004 and July, 2004. Thereafter, the Defendant fell into arrears in respect of monthly payments.
21. However, the Defendant made late lump sum payments totalling \$70, 924.04. On 7th July, 2009, the Defendant made payments of arrears up to December, 2007. These payments were accepted by the Claimant, although they had fallen outside of the agreed schedule for

making payments. There were no further payments and the Claimant attempted to bring the agreement to an end by his letter of the 30th April 2014.

22. It was my view that by accepting payments, which were far removed from the schedule, as agreed in the Agreement for Sale, the Claimant had waived his right to insist on the monthly instalments.

23. The learned authors of *Halsbury's Laws of England* have defined waiver in this way:

"In this context waiver is the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived.

See Halsbury's Laws Of England Volume 9, 4th Edition Contract paragraph 571.

24. Waiver can be expressed or implied. Waiver may be implied from conduct which is inconsistent with the continuance of the right. See *Halsbury's Laws of England Volume 16, 4th Edition Equity paragraph 1471*).

25. Even where there is no express waiver the person entitled to the right may so conduct himself that it becomes inequitable to enforce it (this is sometimes called implied waiver). In such cases, the right is lost on the ground of either estoppel or of acquiescence whether by itself or accompanied by delay. See *Halsbury's Laws Of England Volume 16, 4th Edition Equity paragraph 1471*)

26. It was open to the Claimant to revive his right to monthly instalments, by giving reasonable notice of his intention to the Claimant. [*See Halsbury's Laws of England Vol. 16 paragraph 1471*]
27. In my view, it was however, unconscionable on the part of the Claimant to seek to bring the agreement to a sudden end by the letter of the 30th April, 2014, after having allowed lengthy lapses of monthly payments, coupled with uncomplaining acceptance of the late accumulated payments. In such circumstances, the Defendant could reasonably have formed the view that the Claimant was longer insisting on the agreed method of payment.
28. It was the right of the Claimant at all times to retract the implied waiver. In order to do so however, he ought to have provided reasonable notice of such retraction to the Defendant. In fact, however, the Claimant provided no notice and simply attempted to bring his Agreement to end by his letter of the 30th April, 2014.

The Letters of the 30th April, 2014:

29. Related to the issue of waiver, was the impact of the two letters of the 30th April, 2014, which were sent on behalf of the Claimant to the Defendant.
30. By a letter of 30th April, 2014, Attorney-at-Law for the Claimant wrote to the Defendant seeking to terminate the Agreement. I have set out the full text of the letter:

“30th April, 2014

Mr. Dennis Michael Latchman

No. 34
El Soccoro Main Road
San Juan

“Without Prejudice”

Dear Sir,

*RE: PURCHASE AGREEMENT ENTERED INTO FOR THE PURCHASE
OF PARCEL OF TENANTED LAND KNOWN AS LOT NO. 34, EL
SOCCORO ROAD, SAN JUAN FROM THE ESTATE OF CHANKA
MAHARAJ NOW NARENDRA MAHARAJ BUT SUBJECT TO THE
TENANCY OF MEENA JOSEPH*

*I act on behalf of my client Narendra Maharaj in the matter at caption,
which was referred to me for consideration and I will now deal with it in
turn.*

*On the 17th May 2004 you entered into an agreement for the purchase of
Lot No. 34 El Socorro Road, San Juan from my client for the purchase price
of One Hundred and Fifty Thousand Dollars (\$150,000.00) at an interest
rate of ten 10% percent per annum for fifteen years with a monthly
instalments of One Thousand Six Hundred and Eleven Dollars and Ninety
One Cents (\$1611.91) from the 17th May 2004 until the entire purchase
price would have been liquated on the 17th August 2019.*

Arrears of Monthly payments

I am further instructed that your last monthly payment towards the purchase was made on 7th July 2009 which brought you up to date with payments to December, 2007, leaving the balance which was left un serviced for 6 years and as such circumstances this agreement is no longer valid, null and void.”

By this letter of 30th April, 2014, however, the Claimant did not attempt to provide any or any reasonable notice of his intention to insist on monthly payments.

31. The second letter of the 30th April, 2014 was pre-action protocol letter, which purported to end the statutory tenancy which had been held by the late Meena Joseph.
32. It was my view that the second letter of the 30th April, 2014 was ineffective in the context of the Agreement for Sale, since the Defendant had occupied the subject premises pursuant to the Agreement for Sale and not pursuant to the statutory tenancy, which had been held by the late Meena Joseph and John Latchman.
33. It was, therefore, my view that by accepting periodical payments on an *ad hoc* basis the Claimant waived his right to insist on the scheduled monthly payments. Although it remains open to the Claimant to notify the Defendant that he intends to withdraw the waiver of the monthly payments, it was my view that the Claimant would be required to provide reasonable notice of this intention. He had not done so prior to filing this claim. It was

therefore my view that the Defendant was entitled to regard the schedule of monthly payments as having been waived.

34. It was therefore my view that the Claim should be dismissed and that there should be judgment for the Defendant on his counterclaim.

Dated this 9th day of April, 2018.

M. Dean-Armorer
Judge