THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2010-01502

BETWEEN

ALLYSON WEST

WENDELL WEST **CLAIMANTS**

AND

VIRGINIA CADIZ

GRACE ELLIOT **DEFENDANTS**

BEFORE THE HONOURABLE MR JUSTICE R. BOODOOSINGH

APPEARANCES:

MR COLIN KANGALOO FOR THE CLAIMANTS

MR DAVID ALEXANDER FOR THE DEFENDANT

DATED: 12 July 2013

REASONS

1. This decision was given orally on 6 November 2012. By their claim form and statement of case the claimants sought:

- a declaration that they have rescinded an agreement dated 21 April 2006 between themselves and the defendants for the sale of a certain parcel of land at No. 2 Cade Street Tobago;

- an order for the refund of moneys paid towards the purchase price of the agreement/ property;

- further, or alternatively, damages for breach of contract; and

- a declaration that they are entitled to a lien on the property for the moneys paid.

2. The defendant's counterclaim was for:

- a declaration that the agreement could not have been and was not rescinded by the claimants;

- the rectification of the agreement by the substitution of its schedule with the schedule contained in a draft second agreement;

- specific performance of the agreement as so rectified;

- damages for breach of contract.

Facts

3. The essential facts were these. By an agreement in writing dated 21 April 2006 the claimants agreed to buy from the defendants a certain parcel of land at No. 2 Cade Street in Tobago. The claimant paid a deposit of 50,000 and later made a further payment of 350,000 towards the balance of the purchase price.

4. By letter of 10 June 2008, the claimant's lawyers wrote to the defendant's attorney advising that they had found no good root of title to the property and gave notice of their client's rescission. The claimants rescinded the agreement and demanded the immediate refund of $400,000.00 by letter of 23 June 2008.

5. The defendant's attorneys responded by letter of 30 June 2008 advising that they had made a mistake in the description of the property described in the agreement. They indicated that the parcel described in the agreement was not the property shown to the claimants during the negotiations for sale, but in fact the claimants had been shown another property – the second property - for which the defendants had good title.

6. After some discussions and a visit to the second property by the second claimant, the claimants' attorneys confirmed by letter of April 1, 2010 that the claimants were willing to enter into a new agreement for sale of the second property - on the same terms as the first agreement.

A draft second agreement was sent to the claimants for review and by letter of 16 April 2010 the claimant's attorneys indicated their satisfaction with it.

7. However, before the execution of the second agreement, the claimant's attorney found a lis pendens registered against the first defendant which listed the parent parcel of the second property in its Schedule – that is, the second property was part of the parcel of land described in the schedule to the lis pendens.

8. The claimant's attorneys informed the defendant's attorney of the discovery of the lis pendens and that their clients were no longer willing to execute the second agreement. By letter of 20 April 2010 the claimant's attorneys confirmed their clients' position and indicated that they would be initiating legal proceedings in respect of the (first) agreement as same would become statute barred after 21 April 2010. A pre-action letter was sent to the defendants on 20 April 2010 indicating the rescission of the (first) agreement and demanding the prompt refund of the sum of 400,000.00.

9. By letter of 26 April 2010 the defendants' attorneys indicated that the lis pendens was wrongly placed and asserted that the claimants were not entitled to rescind the (first) agreement and claim a refund. The claimants' attorneys replied by letter of 11 May 2010 indicating that on their investigation of the pleadings in the High Court matter, they could not certify that the action and the lis pendens did not relate to the second property.

Evidence

10. The claimants and their attorney, Ms Candice Jones Simmons, provided witness statements. At the trial Ms Jones Simmons only was cross-examined. For the defendants, only the second defendant gave evidence and was cross examined on her witness statement.

The issue of rectification – Was the first agreement rectified? Can it be rectified?

11. In this claim, the defendants seek to rectify the first agreement and have specific performance of it. They say that the first agreement was rectified by the substitution in its schedule with the schedule contained in the second agreement which describes the second property.

12. Now, rectification applies to a common mistake where what has been agreed by the parties has been wrongly recorded in the written contract without either party being aware of the mistake. By rectification, the agreement or document is made to conform to what was actually agreed between the parties – see **Chitty on Contracts 13th edition, volume 1 para 5 – 107, page 487**.

13. The defendants assert that the original parcel of land was incorrectly described in the first agreement. They say the property described in the second agreement was always the property the parties intended to deal with and which the claimants viewed and agreed to buy during the negotiations for sale. The defendants say neither the claimants nor their attorneys have ever denied that this was the intention of the parties.

14. The claimants have not admitted there was a mistake in the description of the original property or that the intention was always to purchase the second property. They do not state in their witness statements whether they had visited any property before executing the first agreement.

15. It is only in submissions that counsel for the claimants say that the claimants visited a certain property which was described in the original agreement and, thereafter, visited a second property which was supposed to have been the subject of the second agreement. Counsel submits there was no mistake in any verbal expression regarding the properties agreed to be sold and there was no wrongly recorded parcel of land in the original agreement between the parties.

16. From the evidence, what is clear and unchallenged, is that following the defendant's communication to the claimants by letter of 30 June 2008 that they had made a mistake with the description of the land in the first agreement, there were discussions between the parties about the sale of another parcel of land – the second property – which the defendants say was the

accurate parcel of land, and for which they had good title to. By this letter they also proposed the correction/amendment of the first agreement to reflect what they say was the accurate parcel of land.

17. Having visited and inspected the second property, the claimants' attorneys confirmed by letter of April 1, 2010 that the claimants were willing to enter into a new/revised agreement for sale of the second property - on the same terms as the first agreement. A draft second agreement was sent to the claimants for their review and execution. And by letter of 16 April 2010 the claimant's attorneys indicated their clients' satisfaction with it.

18. From the evidence, and despite the different terms used by the parties to describe it, the second agreement was in the court's view clearly a new agreement – albeit on the same terms as the first – for the sale of the second property. The money paid towards the purchase price of the first agreement was to be applied to the new property/agreement. Whether the defendants' intention or proposal was to correct or amend the original agreement, what the parties eventually agreed to was the execution of a new agreement on the same terms as the first (see letter of April 1 2010 and D's response).

19. Further, on a balance of probabilities, I cannot find on the evidence that the description of the property in the first agreement was a common mistake and that the intention was always to purchase the second property, which the second agreement sought to rectify. The claimants were

not cross-examined and the evidence of the second defendant sheds no light on this point. I therefore accept the claimants' evidence.

20. It also seems strange if the second property was the property intended to be purchased all along, and the claimants had in fact viewed that property originally, that they would find it necessary to visit and inspect it again before agreeing to a revised agreement. In all the circumstances, I therefore do not find that the original agreement was rectified or ought to be rectified by the substitution of its schedule with the schedule in the second agreement.

Was the agreement properly rescinded?

21. Given my finding above, the only relevant agreement that can be enforced or could be rescinded is the first/ original agreement. The second agreement was never executed. The question that remains therefore is whether the original agreement was properly rescinded by the claimants.

22. By letter of 23 June 2008 the claimants rescinded the original agreement having found no good root of title to the Cade Street property. This initial rescission appears to have been overridden by the subsequent discussions relating to the second property/agreement. As noted above, it was clearly the intention that the second agreement would replace the first on the same terms as before, and the moneys paid would have been applied to the second agreement. It is not

surprising therefore that the claimants did not go through with the rescission or seek to recover the moneys paid under the first contract.

23. However, following the discovery of the lis pendens in relation to the second property, the claimants again on 20 April 2010 indicated their immediate rescission of the original agreement and demanded the refund of the sum of 400,000. As at that date it appears that the defendants had not established a good root of title to the Cade Street property. In my view, therefore, the claimants' rescission of the original contract - whether on 23 June 2008 or 20 April 2010 - was valid and proper, the defendants' having failed to establish a good root of title to the property.

24. Given my findings above, the issues of the limitation period and lis pendens in relation to the second property do not have to be resolved. Suffice it to say, it was well within the claimants' rights and reasonable of them not to execute the second agreement until they were satisfied that the lis pendens did not relate to the second property. Also, the claimants' rescission on 20 April 2010 was reasonable in light of their initial valid rescission and to ensure that their claim for a refund was not statute barred.

Disposition

25. There will be judgment for the claimants. The counterclaim is dismissed. It is therefore ordered that:

- It is declared that the claimants have rescinded the agreement dated 21 April 2006 between claimants and the defendants for the sale of a certain parcel of land at No. 2 Cade Street Tobago.

- The claimants are to be refunded the sum of $400,000.00 paid towards the purchase price of the property.

- The claimants are entitled to a lien on the said property for the said sum of $400,000.00.

- The defendants must pay the claimants prescribed costs.

Ronnie Boodoosingh

Judge