REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry, Tobago)

Claim No: CV 2009-2373

BETWEEN

SEAN EVERT DENOON

CLAIMANT

AND

OLIVER SALANDY

DEFENDANT

Before the Honourable Mr. Justice A. des Vignes

Appearances:
Mrs. Deborah Moore-Miggins for the Claimant
Mr. Lamont instructed by Ms. Marvo Harper for the Defendant

REASONS

Having considered the pleadings herein and the evidence of the Claimant and the Defendant in this matter, I have come to the conclusion that the Claimant's claim should be dismissed with costs and that the Defendant is entitled to the reliefs sought in his Counterclaim. I set out hereunder my reasons for coming to this conclusion:

1. The Claimant's obligation under the agreement for sale was to complete the transaction within 90 days of the date of the agreement. Since the Claimant executed the agreement on the 12th September 2008, the date for completion was the 11th December 2008. By the terms of the agreement, time was of the essence for completion of the sale and therefore,

unless an extension was sought and obtained by the Claimant in accordance with the terms of the agreement that was the date by which he ought to have completed the agreement, failing which the Defendant was entitled to forfeit his deposit.

2. Bearing in mind that this was a written agreement for sale, it is clear from a perusal of the agreement for sale that it was not an express term thereof that the completion of sale was contingent on the Claimant securing finance to complete the sale. Clause 4 of the Agreement expressly provided as follows:

> "*The Purchaser shall pay to the vendor the balance of the purchase money being the sum of Three Hundred and Sixty Thousand Dollars within ninety (90) days of the signing of these presents, time being of the essence of this contract*"

In the light of this unambiguous language of the Agreement, I am not prepared to find that there was an implied term of the agreement that completion of the transaction was subject to the Claimant securing financing for the purchase of the property.

3. The Claimant also alleged in his Amended Statement of Case (paragraph 6) and in his witness statement that *"by the date set for completion the Claimant's application to the Bank for financing had not been completely processed and the Claimant and the Defendant discussed same and it was orally agreed that the Claimant would be allowed the time until he had obtained the financing from the bank to complete the transaction."* However, the Claimant did not specify a date when this alleged oral agreement was made. When I consider that the Claimant wrote to his Attorney on the 11th December 2008, the date set for completion, and failed to make any mention of any such oral agreement for an extension, I am convinced that the Claimant was not speaking the truth. Surely, if the Defendant had agreed to give him such an extension prior to the 11th December 2008, it would have been of paramount importance for the Claimant to so instruct his Attorney so that this fact could be recited in the letter from the Claimant's Attorney to the Defendant's Attorneys. Instead, the reason given by the Claimant to his Attorney for his inability to complete the sale on that day was his inability to secure

financing. Having failed to mention any such oral agreement in his letter to his Attorney dated 11th December 2008, the only reasonable inference I can draw from that omission is that there was no such oral agreement prior to the 11th December 2008 and that the true reason for the Claimant's failure to complete on the 11th December 2008 was his inability to secure financing.

4. I also do not accept the Claimant's evidence at paragraph 6 of his witness statement that he had discussions with the Defendant about an encroachment by the neighbour's wall on the property, that the Defendant accepted there was a problem and agreed that there was a need for a survey to resolve the issue and that for this reason an extension of time to complete was required. According to the Claimant, this discussion took place "*sometime before the 11th December 2008*" when he visited the property with the Defendant. The first observation I wish to make about this evidence is that there was no such allegation made by the Claimant in his Statement of Case filed on the 2nd July 2009 and this only arose for the first time in the Reply to the Defence and Counterclaim filed on the 27th January 2010.

5. Further, when the Claimant wrote to his Attorney on the 11th December 2008, he failed to mention anything about this discussion and agreement. In his letter to his Attorney, the Claimant stated as follows: "*I desire that the Seller provide guarantee that upon purchase of the said property 25,000 sq ft of land is honoured as stated in the contract."* This letter makes no reference to a site visit attended by the Claimant and the Defendant, to any observation of an encroachment by a neighbour's wall on the property, to any agreement by the Defendant that there was a problem and that a survey would be required or to an extension of time being required. Once again, if all of this had in fact occurred, it would be reasonable to expect the Claimant to include this important information in his letter to his Attorney. Accordingly, I find that the only reasonable inference I can draw from the omission of these allegations in the Claimant's letter of instructions to his Attorney is that there was no such discussion or agreement between the Claimant and the Defendant prior to the 11th December 2008 or at all.

6. In any event, bearing in mind the express terms of the agreement for sale, those terms could not be varied orally and could only be varied in writing by way of a supplemental agreement signed by the parties: **Conveyancing and Law of Property Act, s. 4; Noble v. Ward [1867] L.R. 2 Ex. 135 @ 137; McCausland v. Duncan Lawrie Ltd [1997] 1W.L.R. 38 @ 45.**

7. The agreement expressly conferred on the Defendant the option to rescind the agreement if the Claimant failed to complete the sale within 90 days. It also conferred upon the Defendant the discretion to extend the time for completion upon the written request of the Claimant for a period of not less than 14 days, time being of the essence. It is not in dispute that the Claimant did not make a written request for an extension of time prior to the date for completion. In fact, prior to the date of completion, by letter dated 3rd December 2008, the Defendant's Attorney wrote to the Claimant's Attorney reminding him of the date for completion of the transaction and warning that "*should your client fail to close the transaction on the due date, our client would consider the agreement to be at an end and exercise his right to forfeit the deposit…."* Notwithstanding this warning, the Claimant failed to submit a deed of conveyance for the approval of the Defendant's Attorney or to tender the balance of $360,000 by the 11th December 2008 or to seek an extension of time for completion pursuant to clause 6 of the Agreement. Instead, the Claimant's Attorney wrote on the 15th December 2008, 4 days after the date set for completion, seeking an extension of time to the 9th January 2009 to complete. On the same day, the Defendant's Attorneys refused this request and made it clear that the Defendant considered that the contract was at an end. The Defendant's Attorneys then stated that *"in keeping with Clauses 4 and 7 of the Agreement for Sale, your client's deposit will be forfeited if the balance of the purchase money in the amount of $360,000 is not paid within seven (7) days of receipt of this letter which will be sent by facsimile transmission."* In my opinion, since by the express terms of the agreement, time was of the essence, the Defendant's Attorneys were entitled to treat the contract as at an end based on the Claimant's failure to pay the balance of the purchase price on the 11th December 2008. In coming to this conclusion, I consider that the case of **Rightside**

Properties Ltd v. Gray [1974] 2 All ER 1169 cited by the Claimant's Attorney is distinguishable on its facts since, in that case, time was not of the essence of the contract.

8. Accordingly, based on my earlier finding that prior to the date for completion, the Claimant had not sought or obtained an extension of time beyond the 11th December 2008, the Claimant was in breach of the terms of the agreement by failing to pay the balance of the purchase price, thereby entitling the Defendant to rescind the agreement. When the Claimant's Attorneys refused his late request for an extension of time, they made it clear that the Defendant considered the contract was at an end and this amounted to a rescission of the agreement.

9. Thereafter, the Defendant's Attorney gave to the Claimant the option to complete the transaction within seven (7) days and thereby avoid the forfeiture of the deposit. This offer was not an extension of time pursuant to clause 6 of the Agreement. Clause 6 contemplated that the Defendant would be entitled to rescind the agreement if the Claimant failed to complete the sale within 90 days but, if the Claimant made a written request for an extension of time, the Defendant could extend the time for a period of not less than 14 days. When the Defendant's Attorney communicated the Defendant's rejection of the Claimant's request for an extension of 29 days, (from the 11th December 2008 to the 9th January 2009), they made it clear that they considered that the agreement was at an end. Therefore, since time was originally of the essence, this offer of an option to complete within seven days was not an extension of time pursuant to clause 6 but a gratuitous offer by the Defendant of an accommodation which the Claimant could accept by paying the balance within the stipulated seven days and completing the sale. In the circumstances surrounding the grant of this additional period of time to the Claimant, therefore, I consider that time was of the essence in relation to this extended deadline of 7 days. **Stickney v. Keeble [1915] A.C. 386; Lock v. Bell [1931] 1 Ch. 35 @ 44; Buckland v. Farmer & Mooday [1979] 1 W.L.R. 221**

10. In the circumstances, when the Claimant failed to pay the balance of the purchase price within 7 days, this offer lapsed and thereafter the Defendant was well within his rights to forfeit the Claimant's deposit of $40,000.

11. The Claimant also alleged at paragraph 9 of the Amended Statement of Case that the Defendant orally agreed with the Claimant to grant an extension of time and the Claimant's Attorney, by letters dated 30th January 2009 and 4th February 2009 wrote to the Defendant's Attorney seeking confirmation of the extension granted. However, the Claimant only annexed a letter from his Attorney dated February 4, 2009 which stated as follows:

> "*Our client has instructed us that he has agreed directly with the Vendor that the time for completion of the transaction be extended to Friday the 27th February 2009. By way of a formal variation of the agreement for sale dated the 14th August 2008, please sign and return to us the additional copy of this letter."*

12. However, the Claimant did not give any evidence in his witness statement of any such direct conversation and agreement with the Defendant subsequent to the letter dated 15th December 2008 from the Defendant's Attorneys whereby they refused the Claimant's request for an extension of time to the 9th January 2009. Accordingly, in the absence of any evidence to support this pleading, I am constrained to find that the Claimant has failed to prove this allegation and that the Defendant did not override his Attorney's rejection of the Claimant's request and agree to any such extension.

13. The Claimant submitted that the Defendant's title was defective and that the Defendant was in breach of his obligation to produce a good and marketable title. In so submitting, the Claimant relied upon the allegation made at paragraph 7 of the Amended Statement of Case that by letter dated 15th December 2008, the Claimant's Attorney requested the Vendor to produce a survey plan of the land and evidence that there was no encroachment onto the property. The Claimant also gave evidence that prior to the 11th December 2008 he spoke with the Defendant about an encroachment by the neighbour's

wall on the property, that the Defendant accepted there was a problem and agreed that an extension of time to complete was required. I have already rejected the Claimant's evidence in that regard so I need not reiterate my reasons for so doing. In respect of the Claimant's reliance on his Attorney's letter dated 15th December 2008, therefore, it would mean that this was the first date on which the Claimant's Attorney was raising this matter and it is apparent that the Claimant was not making a clear and specific allegation with respect to an encroachment upon the Defendant's parcel of land. Instead, the Claimant's Attorney requested a cadastral sheet and "*evidence that any encroachment thereon by neighbouring occupants be remedied."* In my opinion, this request, having been made for the first time after the date fixed for completion, was not made in time and could not excuse the Claimant's failure to complete by that date. In any event, such a request did not amount to a requisition or objection by the Claimant in relation to the Defendant's title to the property but purported to call upon the Defendant to satisfy the Claimant that there was no encroachment on his property. If the Claimant had made a valid requisition or objection to the Defendant's title, he could then have applied to the Court under section 7 of the Conveyancing and Law of Property Act in a summary manner for an Order to compel the Defendant to answer his requisition or objection. However, the Claimant did not make any valid requisition or raise any objection to the Defendant's title or make any such application to the Court.

14. Therefore, the facts in this case are distinguishable from the facts in **Horton v. Kurzke [1971] 1 WLR 769** where there was in fact an adverse claim to a grazing tenancy over part of the land which was the subject of the contract for sale. Further, the facts here are very different from the facts in **Re Sansom and Narbeth's Contract [1910] 1 Ch. 741** where the purchaser prepared and submitted a draft conveyance containing a plan with dimensions marked thereon and the vendor refused to convey by reference to the plan. Swinfen Eady J., in coming to his conclusion that the vendor was obliged to execute the conveyance by reference to the plan, cited with approval the following passage from Williams on Vendor and Purchaser:

'*With respect to the parcels or description of the property sold, it appears that the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract be misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstance the vendor could not refuse to convey the land by the new description."*

Here, the Claimant did not conduct any survey of the land and did not adduce any credible evidence that there was any encroachment upon the Defendant's land. Further, he did not present a draft conveyance to the Defendant which referred to dimensions based on the plan prepared by his surveyor.

15. The Claimant's Attorney also argued that "*if the Purchaser feels that the amount of land on the ground is, by reason of encroachment or otherwise, not in keeping with the amount he agreed to purchase, the Vendor has a duty to allay his fears if called upon to do so."* I do not accept this proposition to be a correct statement of the law. The Defendant, as the vendor, was obliged to produce a good and marketable title to the land that he agreed to sell to the Claimant. "***The obligation to make a good title requires the vendor to show that he alone, or with the concurrence of some person or persons whose concurrence he can compel, can convey the whole legal estate and equitable interest in the land sold, free from encumbrances except those disclosed by the contract***": **Barnsley's Conveyancing Law and Practice (4th Ed.) at p. 266.** The Claimant's request for a cadastral sheet and evidence that any encroachment by neighbouring occupants be remedied does not constitute a challenge to the capacity of the Defendant to convey the whole legal estate and equitable interest in the land.

16. Accordingly, I find that the Claimant has failed to establish that as at the date for completion, the 11th December 2008, the Defendant had a defective title and/or that the Defendant was in breach of his obligation to produce a good and marketable title.

17. For these reasons, I hereby dismiss the Claimant's claim and award judgment to the Defendant on his Counterclaim. I also award the Defendant prescribed costs on the Claim and the Counterclaim to be assessed by the Registrar, in default of agreement, pursuant to Rule 67.5 of the Civil Proceedings Rules 1998, as amended.

Dated the 2nd day of April, 2012

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André des Vignes
Judge