

**REPUBLIC OF TRINIDAD AND TOBAGO:**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV2018-00756

BETWEEN

**Wanfang Yan**

Claimant

AND

**Eshwarlal Beebakhee**

Defendant

**Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell**

Delivered on 20 February, 2020

**Appearances:**

Mr. Mr Gerard Raphael and Ms Lana Chunilal, Attorneys at Law for the Claimant

Ms Rajanlal Joseph and Mr. Robert Boodoosingh, Attorneys at Law for the Defendant

**JUDGEMENT**

**A. Introduction**

1. This case concerns a Claim and Counterclaim arising from Agreements entered into by the parties for sale of two commercial properties each at a price of \$5,500,000 to be paid by instalments over two years. The Claimant is the purchaser under the said Agreements and based on same, she was permitted to enter into possession of the two properties for commercial purposes. She also undertook extensive renovations on the properties.

2. Having completed these renovations and paid all but the last instalment due for the property up to 30 September, 2017, the agreed date for completion, the Claimant sought confirmation from the Defendant that he was prepared to fulfil his closing requirements as the Vendor. Correspondence was sent to him requesting a settlement letter from his bankers regarding an outstanding mortgage on one of the Properties. The Claimant's position is that all that was outstanding based on the Agreements was \$441,654.60, which she was prepared to pay once the Defendant provided the information requested.
3. The Defendant considered the Claimant to have defaulted by not making the final payments and also claimed interest for prior late payments, as well as compensation for the change in the exchange rate vis-a-vis the US dollar. He claims that based on discussion with the Claimant's brother prior to the signing of the Agreements, the purchase price agreed upon was US\$ 2,500,000 or the TT\$ equivalent. He signed authorising a Bailiff to collect \$1,164,783.48 from the Claimant in January 2018 and later, in March 2018, caused the Bailiff to write to the Claimant threatening eviction from the properties.
4. The Claimant seeks specific performance of the two Agreements and injunctive relief preventing the threatened eviction. In the alternative, she seeks the return by the Defendant of the \$10,500,000 paid on account for the purchase price of both properties, plus \$1,770,000 spent on renovations.
5. The Defendant, in addition to alleging the default of the Claimant, counterclaims for the Agreements to be set aside as being inequitable and unconscionable. He further contends that the Claimant is not entitled to any refund of instalment payments made as same must be set off against the rental value of the properties which the Claimant could have benefitted from while in possession.

**B. Issues**

6. The issues arising from the pleadings are as follows:
  - a. What were the terms of the Agreements between the parties and did same include terms alleged to have been discussed prior to signing?

- b. Were the written Agreements entered into in a manner that was inequitable or unconscionable such that they ought to be set aside?
- c. Was the Defendant entitled to treat the Claimant as having breached the Agreements?
- d. If so, was there any basis for the Defendant to set-off the instalments paid by the Claimant against rental values of the properties, such that the Claimant would be entitled to no refund?
- e. If not, is the Claimant entitled to specific performance of the Agreements or damages in lieu thereof? In the event that specific performance is not possible, ought the damages in lieu to include the cost of renovations incurred by the Claimant.

**C. Pleadings and Evidence**

- 7. There is very little difference between the parties regarding the fact scenario relevant to this case. There is no dispute that prior to signing the written Agreements, there were negotiations between the Defendant and the Claimant's brother, Mr. Fu Qiang Yan. The Defendant claims that the brother agreed that the sale price was to be in US dollars and as such with fluctuations in the exchange rate, the TT dollar price increased over the two years. However, the Claimant was not privy to those discussions. In her case, only the terms in the formal transaction that followed are enforceable.
- 8. According to the Claimant, the formal aspect of the transaction commenced when she attended with her husband at the office of her Attorneys at Law, Mr Raphael and Ms. Chunilal. She claims that on that day, only Ms. Chunilal was present and the Defendant attended and duly signed the Agreements.
- 9. By the two written agreements dated the 23 September, 2015, the Defendant agreed to the Claimant's purchase of two properties. The properties were the Cunupia Property, a guest house, and the Enterprise Property, a sports bar, purchased for \$5,500,000.00 each. On the

said 23 September 2015, she paid \$500,000.00 as a deposit on each property. According to the Defendant, the total of \$1,000,000.00 was paid in cash and that made him feel uncomfortable. However, he accepted the payment.

10. The agreements provided for the Claimant to have immediate possession and control of the said properties to operate business. The date for completion of the transactions was at the end of two years namely, 30 September, 2017.
11. The balance of the purchase price was to be paid by instalment of \$208,333.41 on the 1st October, 2015 and thereafter twenty-three equal monthly instalments of \$208,333.33 commencing on the 1 November, 2015 and continuing, thereafter, on the last working day of each succeeding month until the remaining balance of \$5,000,000.00 on each property was paid.
12. The written Agreements provided that they constitute the full statement of the contractual rights and liabilities of the parties and they supersede and nullify all negotiations and/or liabilities and/or any written or verbal agreements made between the parties and made between the Defendant and the Claimant's agent, her brother Mr. Fu Qiang Yan, prior to the agreements in respect of the properties and the business, save and except for those expressly provided for in the said agreement.
13. The Defendant's pleaded case is that on the date appointed for signing of the Agreements, 23 September, 2015, he attended the law offices of R.C. Chadeesingh & Co., Attorneys-at-Law situate at Ramsaran Street, Chaguanas, which said law office had done significant legal work for him over the years. He claims that, because the signing took place there, he was under the distinct impression that Mr. Raphael, the Attorney who signed as having prepared the Agreements, worked for the said firm and was looking after his interest. Thus, he signed the said Agreements without carefully examining same. Further, the Defendant maintained that he was never told by Mr. Raphael or Ms. Chunilal that they represented the Claimant and he should get independent legal advice before signing the said Agreements.

14. In the circumstances outlined above the Defendant's case is that he neither had knowledge of nor agreed to certain terms in the written Agreements. These terms include the quantum of the purchase price as stated in TT dollars and that terms, allegedly discussed in prior negotiations with the Claimant's brother as to the price being in US dollars, were not included.
15. The Claimant, in her pleadings in Reply, refutes the Defendant's version of events on the date of signing. She says that the Defendant had been given copies of the Agreements three days in advance of the signing date. She says he was fully aware that Mr. Raphael and Ms. Chunilal were her Attorneys, as the Defendant had not retained them. The Defendant was expected to make use of the advanced copies of the Agreements to seek advice from his own Attorney Mr. Boodoosingh. Mr. Boodoosingh had prepared Draft conveyancing documents for the Defendant in the course of negotiations for purchase of the Claimant's property.
16. It is not in dispute that the Claimant was late in some of her instalment payments over the two year period. The Defendant's Attorney wrote to her on January 3, 2017 complaining *inter alia* of late payments and proposing the imposition of a "late penalty fee" on the instalments. He also raised, for the first time in writing, the issue as to the price having been quoted in US dollars initially. As such, the Defendant's Attorney said the balance to be paid would have to be adjusted "to cater for the fluctuations in the T&T dollar vis a vis the US dollar". There is no pleading or evidence as to any further action taken based on that letter.
17. According to the Claimant, payments were thereafter accepted by the Defendant and all but the last instalment was paid up to date, in time for the completion date in September 2017. In preparation for completion, searches done by the Claimant revealed that, by a Deed of Mortgage registered as DE200401448144D001, the Defendant had mortgaged the Cunupia Property to the Republic Finance and Merchant Bank Limited to secure the principal sum of One Million Nine Hundred Thousand Dollars. The said mortgage remained outstanding up to the trial of this Claim.

18. As at the date for completion of the said transactions on the 30 September, 2017, there was a balance of \$220,827.30 owing by the Claimant on the Cunupia Property and the same figure on the Enterprise Property for a total of \$451,654.60.
19. The Claimant's pleading is that, in light of her concern about the Defendant's outstanding mortgage at the time when her final payment was due, she requested from the Defendant a settlement letter from the Republic Finance and Merchant Bank Limited as she was then ready and willing to complete the said transactions. Having not received a settlement letter as requested, the Claimant decided to withhold the sum of \$451,654.60, the total owing on the said properties.
20. There is no written confirmation of these requests made in September by the Claimant but on 9 October, 2017, another letter was sent by the Defendant's Attorney to the Claimant. The letter indicated that the monthly instalment for October, 2017 was late and purported to impose a 10% late payment fee and an increase in the monthly instalment based on the rate of exchange for the US dollar. The letter was expressly to be treated as a Notice to Quit should the Claimant not agree to the above. Further, the Claimant was informed that the Defendant would not complete the sale transaction unless the points raised in the letter were addressed.
21. The Claimant had her Attorney respond to the Defendant's letter on 24 October, 2017. It was admitted that payments had been late from time to time but the Claimant's Attorney pointed out that there was no penalty interest for late payment provided for in the Agreement. It was further pointed out that no term of the Agreement provided for the purchase price to be based on US dollars. It is here, in this letter, that a written assurance was given of the Claimant's preparedness to complete the sale once a settlement letter from the mortgage bank was provided by the Defendant.
22. There was then continued correspondence between the parties' Attorneys with no resolution reached. The Defendant pleads that the alleged failure of the Claimant to pay her instalments on a timely basis was an effective repudiation of the Agreements. He says

the repudiation was accepted by his Attorney's letter dated 9 February, 2018 and by the retention of a Bailiff to take possession of the properties.

23. After the break down of discussions, the Claimant filed her claim against the Defendant on the 6th March 2018 for specific performance of the said agreements. At that date, despite two letters dated 24 October, 2017 and 30 January, 2018 to the Defendant's Attorney-at-Law, the Defendant had failed and/or refused to provide the said settlement letter.
24. The Defendant, however expressed an intention not to complete either transaction on the payment of the said sum of \$451,654.60 as the Defendant was claiming the sum of \$1,164,743.48 from the Claimant.
25. A breakdown of the sum claimed by the Defendant was provided in a document dated 23 February, 2018 prepared by the Defendant's Attorney-at-Law. It is annexed and marked "D" to the Claimant's Statement of Case.
26. However, even prior to the 23 February, 2018 by the said letter dated 9 February, 2018, the Defendant's Attorney-at-Law indicated that the Defendant was no longer interested in selling the said properties to the Claimant. On the 23 January, 2018, the Defendant had instructed one Rodney Charles, Private Bailiff, to act as his agent to take possession of the said properties and remove any and all persons thereon. He claimed that there was then due and owing, pursuant to the said agreements, the total sum of \$1,110,000.00 being a final payment pursuant to the said agreement together with late payments fees and interest until the month of January, 2018 and other charges.
27. The Claimant's case is that she expended the sum of \$900,000.00 in bringing materials from China to outfit and repair and renovate the Cunupia Property, expended the sum of \$370,000.00 in purchasing materials locally and \$500,000 was paid to Chinese labourers. In his Defence and Counterclaim filed on the 20 April, 2018, the Defendant did not deny the expenditure or put the Claimant to proof of same, however, his case is that there was no agreement that the Claimant could undertake renovations.

28. The Defendant's denial that this was agreed is not supported by the written Agreement. Implicitly paragraphs 13 and 14 make clear that it was the parties understanding that having been allowed to take possession of the properties, the Claimant was permitted to embark on renovation works. This is so because paragraphs 13 and 14 provide that, in the event of default by either side, the Claimant would be entitled to compensation for "any alterations and/or improvement works which the Purchaser may have caused to be carried out on the property".
29. In addition to the parties filing Witness Statements, which reflected the case for each side as summarized above, further evidence was presented under cross-examination of the witnesses. Counsel for the Defendant sought to discredit the Claimant under cross-examination in two main respects. These two aspects of the cross-examination were intended to prove that the Defendant had good reason to believe that Mr. Raphael was acting for him and had not had the opportunity to seek independent advice.
30. Firstly, Counsel for the Defendant sought to establish that the Claimant was not telling the truth about having given the Agreements to the Defendant three days prior to the signing date. He attempted this by getting her to agree that she did not do business on weekends, then by use of a Calendar pointing out that three days before September 23, 2015 was a Sunday. This did not discredit the Claimant, however, as she had only said in her Witness Statement that it was approximately three days before. Furthermore, she agreed that this could have been on a Sunday. The only minor variation in her account was in that she admitted not to have given the Agreements directly to the Defendant. Instead she gave them to her brother who did so.
31. Secondly, counsel for the Defendant challenged the Claimant as to her account that Mr. Raphael, who the Defendant claims misled him, was not even present when the Agreements were signed. He questioned how he could have signed as preparing the Agreements if he was not present and the Claimant did not instruct him. The Claimant was resolute that he was not present for the signing with the Defendant and that she had given her instructions to Ms Chunilal who worked with Mr. Raphael. She agreed that Mr. Raphael signed but not that he was present.



32. There were two witnesses for the Defence, the Defendant himself and his Operations Manager, Vimal Menon. The main highlight of the evidence of Mr. Menon was the information he gave regarding the estimated income generation of the two properties. This was relevant to the Defendant's claim for a set-off; however, no documents were produced to support the sums spoken of by Mr. Menon.
33. The Defendant himself was extensively cross-examined. The main thrust of the questioning was to discredit the Defendant's case that he did not know he needed independent advice. This was achieved. Under-cross examination, the Defendant admitted that he was a businessman and had the experience of entering into numerous contractual transactions prior to signing the Agreement with the Claimant.
34. The Defendant also had an Attorney-at-Law, Mr. Boodoosingh, who had been working for him for ten years. While asserting that he didn't get a chance to read the Agreements at the law office, the Defendant admitted that, even after signing, he did not take them immediately to his Attorney. He waited five days because "he had an issue" and the Attorney was ill. He admits that his Attorney, at that time, did go through the terms with him. He did not then tell his Attorney he did not accept the terms.
35. Incomprehensibly, though Mr. Chadeesingh was not present for the signing, the Defendant said that he trusted Mr. Chadeesingh, in response to being asked why he did not read the Agreements before signing. He admits that he did not pay anyone to prepare the Agreements.
36. In all the circumstances, the Defendant's evidence as to believing that Mr. Raphael represented him was discredited. It was clear he knew he had not retained him and that he had his own Attorney who explained to him all the terms. Yet he proceeded to treat the Agreement as valid for two years, accepting payments totalling more than \$10,000,000.00.

37. The Defendant also admitted that from 3-4 weeks after the Agreements were signed he noticed that renovations commenced on the properties. He continued to collect instalments for two years without protest.

38. The Defendant was also discredited as to whether he treated the Claimant as having defaulted in her contractual obligations, as, even at times when the Claimant was late in making payments, he accepted same without protest. The Defendant was also discredited as to the specific allegation at Paragraph 5 of his Defence that, in November 2016, the Claimant was \$832,000.00 in arrears and thus effectively repudiated the Agreements. It was made clear from his answers under cross-examination that, as at the end of November 2016, the Claimant was not in arrears with her monthly payments in the amount of \$832,000.00 or at all.

#### **D. Submissions**

39. The parties filed submissions in writing which closed on 20 January, 2020. Counsel for the Claimant submitted that, on the evidence, the Claimant should be accepted as a witness of truth as to any point in dispute between the parties. Generally, the Defendant was discredited in that he gave evidence under cross examination that contradicted the account in his pleadings of instalments in arrears. Counsel also highlighted that the evidence of his supporting witness, Mr. Boodoosingh, as to when he sought his advice on the Agreements contradicted the Defendant's testimony under cross-examination.

40. More specifically, Counsel for the Claimant contended that the Claimant must be believed when she says that the Agreements were given to the Defendant approximately three days before the signing date, allowing for him to read them and get legal advice. Her version that Mr. Raphael was not present for the signing is also accepted as more credible.

41. The Claimant's submission that she was more credible was based on the evidence that the Defendant had been untruthful as to being deprived of independent advice, thereby invalidating the contract terms he did not agree with due to his having signed same by mistake.

42. It was submitted that the Defendant has failed to establish a proper case of mistake especially in circumstances where the Defendant had not pleaded or proven that either the Claimant or her Attorneys did anything to mislead him. He admits that he did not retain Mr. Raphael and Ms Chunilal, the Claimant's Attorneys. Accordingly, any mistake or misunderstanding there may have been on his part arose because of his admitted lack of reasonable care in signing the agreement without knowing all its terms.
43. The submission for the Claimant is that five days after the signing of the Agreements, the Defendant claims to have taken them to his Attorney. Thereafter, there was no protest. The Defendant accepted all instalments of the purchase price. Accordingly both the Defendant and his Attorney knew and accepted the terms.
44. The Claimant's submission regarding her alleged repudiation of the Agreements by late payments is that at the time for completion of the transactions, all payments were up to date, save for the final instalment. That was withheld because the Claimant was awaiting production of a settlement letter from the Defendant.
45. This stance was, according to Counsel for the Claimant, a reasonable one which was not in breach of the Agreements. Searches conducted had shown that there was a mortgage on the Defendant's title with a balance outstanding to be settled. Citing **Brandon Steam Laundry Co v Hanna (1909) 9 WLR 570**, Counsel argued that the Claimant was not obliged to complete the transaction until the Defendant could produce a release of the mortgage or at least a settlement letter.
46. The Defendant's closing submissions were based on the premise that there was credible evidence that Mr. Raphael, having acted, not only for the Claimant but also for the Defendant, had not given him the opportunity to seek legal advice. It was in that context that the Defendant was contending that the terms in the written Agreements had not been agreed to by him and thus the Agreements should be set aside.
47. The Defendant submitted that Mr. Raphael acting for both vendor and purchaser was a prohibited practice and "the requirement that an unrepresented party to such an

agreement be advised of the need for him to have independent legal advice before executing such an agreement is a long-established principle in the common law world.” Counsel cited in support the decision of Sir William Douglas CJ., in **Straker v Ramnath Hansraj Maraj (1984) 39 WIR 22** and the Privy Council decision in **Demerara Bauxite Company Limited v Louisa Hubbard and Others [1923] A.C. 673 at p 681**. The said authorities were, however, inapplicable to the instant circumstances.

48. In **Demerara Bauxite**, the parties to the land transaction were in an attorney-client relationship, which made independent legal advice necessary. Similarly, in **Straker**, the claimant’s attorney acted on behalf of the claimant as vendor, himself as purchaser and other purchasers in the same transaction. These facts are not comparable to the present case where the Defendant merely alleges that he had the impression that Mr. Raphael was acting on his behalf due to the location of the signing.

#### **E. Findings**

49. On a review of the pleadings and evidence, the findings on the issues identified above must be determined in the Claimant’s favour.

##### *The contractual Terms*

50. The Defendant presented no cogent evidence that established the precise terms he may have discussed with the Claimant’s brother who acted as her Agent. In any event, there is no pleading or evidence that the Claimant herself was privy to such discussions. The only evidence before the Court on what the Claimant agreed to for the purchase of the properties is in the written Agreements that she signed. The Agreements, in clear simple terms, expressly excluded any non-included terms that may have been discussed with the Claimant’s brother from being part of the Agreement.

51. It is my finding that, between the parties, the terms of the Agreements were limited to those stated in the written contracts. As such, the purchase price was stated in TT dollars, there was no penalty interest for late payments and the Claimant was permitted to enter into possession, operate business and renovate the premises. There was no provision for rent to be paid to the Defendant.

*Alleged Unconscionability of the Agreements*

52. On a balance of probabilities, the Defendant has failed to prove either that there was anything misleading or unfair in the manner of execution of the Agreements or that the terms were unconscionable. The explanations given by the Defendant as to why he thought that the Claimant's Attorneys were also acting on his behalf defied logic. He presented no evidence that he retained them.
53. The contention that he believed Mr. Raphael was working for another Attorney, Mr. Chadeesingh, because the signing took place in that Attorney's building, does not lend credibility to the Defendant's case. He also did not retain Mr. Chadeesingh for the transaction and it is not in dispute that he was being advised by his own Attorney, Mr. Boodoosingh, at all times prior to the signing of the Agreements.
54. The actions of the Defendant after signing further tended to prove the Claimant's case that he was well aware of all the terms. This is so because despite claiming to have disagreed with same, he collected instalments over two years and stood by while the Claimant incurred renovation expenses. He purported to rely on the Agreements when he engaged the services of a Bailiff to enforce its terms.

*Alleged breach by the Claimant*

55. The Defendant failed to establish that at any time before September 2017, which was the closing month, the Claimant was in arrears with her instalments. The Claimant, on the other hand, has established that withholding the final payment at that time was not in breach of the Agreements. She was entitled to take this measure while awaiting the settlement letter requested, thereby ensuring that the Defendant was prepared to meet his closing obligations.

*Set-off of Rental values*

56. In light of the findings above, the Claimant's case must succeed. This renders moot the issue as to whether the Defendant, had he succeeded in setting aside the transaction, would have been entitled to set-off rental income against the full quantum of instalments and renovation expenses to be paid to the Claimant. There was, however, no provision for

rental payments in the agreement and no expert evidence presented as to rental values for the properties. The testimony of the Defendant's supporting witness was vague, unconvincing and unsupported by any documentary evidence as to the estimated income the properties earned.

*Claimant's entitlement to Specific Performance or damages in lieu to include renovations costs*

57. In all the circumstances, the Claimant is entitled to Specific Performance of the Agreements. In the event that the Vendor is not in a position to conclude the sale transactions, the Claimant is entitled to damages in lieu. The quantum would however be limited to the full repayment of all instalments paid towards the purchase price as the Claimant presented no cogent evidence to support the quantum of expenses incurred in renovations.

#### **F. Conclusion**

58. The Claimant has proven her case for Specific Performance. She has successfully defended against the Counterclaim by proving that she did not breach the Agreements and that there was no basis for the Agreements to be set aside.

59. It is, therefore, hereby ordered as follows:

- i. Judgement for the Claimant on her claim and on the counterclaim with costs in the amount of \$14,000 for each to be paid by the Defendant to the Claimant on the prescribed basis.
- ii. An Order of Specific Performance of the Agreements which must be complied with forthwith by the Defendant.
- iii. The Claimant shall forward to the Defendant's attorney-at-law within fourteen (14) days of the date hereof deeds of conveyance for approval and execution by the Defendant within seven (7) days of the delivery to him of the said deeds.
- iv. In default, the Registrar of the Supreme Court is hereby empowered to execute the said deeds.

- v. An Injunction is granted restraining the Defendant whether by himself, his servants and/or agents from evicting and/or attempting to evict the Claimant from the said properties.
- vi. An injunction restraining the Defendant whether himself, his servants and/or agents from entering the properties and obstructing, restricting, preventing or otherwise interfering with the Claimant's lawful entry to the properties, or causing any act or thing to be done such as will or is calculated to prevent or interfere with the Claimant's use, enjoyment, occupation and possession thereof.
- vii. The monies paid into Court by the Claimant on 27 February, 2019 shall be paid out to the Defendant after the execution of the said deeds by the Defendant less the sum of \$28,000.00 which is to be paid out to the Claimant.
- viii. Liberty to Apply.
- ix. Stay of execution for twenty-eight (28) days

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Eleanor Joye Donaldson-Honeywell  
Judge

Assisted by: Christie Borely, JRC1