

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV2011 - 02422

BETWEEN

INDAL CHULHAN

Claimant

AND

ALICE PARTAP

1st named Defendant

(By her duly constituted Attorneys
Joan Maharaj and Winston Partap)

CHARLES KHADAROO

2nd named Defendant

SHERRY –ANN KHADAROO

3rd named Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. P. Persad-Maharaj for the Claimant.

Mr. J. Kelly instructed by Ms. J. Partap for the First Defendant.

Mr. G. Raphael for the Second and Third Defendants.

Reasons

1. This was a claim for specific performance of a purported oral and written agreement for sale of a parcel of land and alternatively damages for breach of contract in lieu of or in addition to specific performance.

2. On the 1st February 2013 the court made the following order in this matter:
 - i. *Judgment for the Claimant against the First Defendant for breach of contract.*
 - ii. *The First Defendant shall pay to the Claimant nominal damages for breach of contract in the sum \$7,000.00*
 - iii. *The Claim against the Second and Third Defendants is dismissed.*
 - iv. *The First Defendant shall pay the prescribed costs of the Claimant in the sum of \$14,000.00.*
 - v. *The Claimants shall pay the prescribed costs of the Second and Third Defendants in the total sum of \$14,000.00.*

Background

3. The Claimant and his common law wife, Deanne Legendre resided as tenants in the downstairs portion of the First Defendant's residence, situate at L.P No. 99 Guapo Main Road, Fyzabad at a monthly rent of \$300.00. The Claimant's wife acted as a caregiver to the First Defendant at a salary of \$1,700.00 per month. The Claimant was served with a notice to quit the downstairs apartment on the 24th February 2011, expiring on the 31st March 2011.

4. The First Defendant was, at all material times, the fee simple owner of a parcel of land situate at Guapo Road, in the Ward of Fyzabad comprising 1,055.3 square

metres or 11,360 superficial feet bounded on the North partly by lands of Turnkee now heirs of Sumintra Partap and partly by Fyzabad Guapo Road, on the South by Lot B, on the East partly by Fyzabad Guapo Road partly by an area shaded green and partly by Lot B and on the West by lands of Sorrosotte now heirs of Sumintra Partap (“the said land”). The said land is located adjacent to the First Defendant’s residence.

5. The Claimant’s case was that the First Defendant agreed that in exchange for the Claimant’s wife acting as caregiver to the First Defendant, the Claimant would be given the opportunity to purchase the said land. In or about January 2010, the First Defendant approached the Claimant for the sale of the land. It was agreed after discussions that the Claimant and his common law wife would purchase the said land at the sum of \$227,200.00. This oral agreement was subsequently reduced into writing and signed by the First Defendant. This offer was stated in the written agreement to be valid until 30th April 2010 but was subsequently extended for 90 days. The First Defendant requested a lump sum payment of the purchase price. The Claimant verbally agreed to the purchase of the said land and in reliance of this agreement, the Claimant, *inter alia*, sold a parcel of land which he owned and obtained a bank loan in order to raise sufficient funds for the purchase of the said land.
6. The Claimant averred that although he did not meet the further deadline (30th July 2010) both parties by their conduct mutually agreed to further extend the time for completion. The Claimant claimed in the alternative, that time was not of the essence and no notice calling upon him to complete was ever sent to him.
7. The Claimant claimed that at all times the First Defendant and/or her son (one of her Attorneys) were appraised of the arrangements taking place by the Claimant in raising the purchase price.

8. The First Defendant by power of attorney registered as No. DE201002483862D001 dated 8th October 2010 appointed her children Winston Partap and Joan Maharaj as her duly constituted attorneys. By Deed of Conveyance registered as DE20110181155D001 dated the 28th December 2010 the First Defendant, through her attorneys conveyed to the Second and Third Defendants the said land notwithstanding the agreement made between the First Defendant and the Claimant.
9. The Claimant averred that when the Second and Third Defendants purchased the said land they were aware and had notice of the Claimant's prior claim for the purchase of the said lands.
10. The Claimant therefore claimed, *inter alia*, a declaration that he had entered into a valid and binding agreement with the First Defendant for the purchase of the said land, specific performance of the said agreement, an order to set aside the Deed conveying the said land to the Second and Third Defendants, alternatively damages for breach of contract, a declaration that the Second and Third Defendants had knowledge of the Claimant's prior claim for the purchase of the said land and a declaration that the notice to quit was invalid and cannot terminate the interest of the Claimant.
11. The Second and Third Defendants denied having knowledge of the Claimant's prior agreement for the purchase of the said land and instead averred that they were purchasers for value without notice of any claim or interest of the Claimant. The Second and Third Defendants claimed that after they purchased the said land, the Claimant and his common law wife approached the Second Defendant and asked him if he had purchased the said land. When the Second Defendant told him they had, the Claimant then told the Second Defendant that the land was his. The Second

Defendant subsequently asked the Claimant if he had a deed. Although the Claimant told the Second Defendant he did have a Deed for the said land when he was asked by the Second Defendant to produce the Deed the Claimant did not respond.

12. The First Defendant claimed that the Claimant had approached her for the purchase of the said land in or about January 2010. As a result the First Defendant made an offer in writing to the Claimant for the sale of the said land which the Claimant accepted at the price of \$227,200.00. This offer was to be valid until 30th April 2010. On the 22nd April 2010 the Claimant requested a 90 day extension of the offer, which was granted by the First Defendant. The First Defendant asserted that the extension meant that the offer for sale of the said land to the Claimant would have lapsed on 31st July 2010. The First Defendant claimed that the Claimant failed to fulfil the terms of the offer within the required time and denied that there was ever any agreement to further extend the time period beyond 30th July 2010.

Issues

13. The court therefore identified the following issues for determination:

- i. Whether the First Defendant orally agreed to sell the said land to the Claimant at first preference as part of an arrangement for the care of the First Defendant;
- ii. If the answer to (i) above is yes, whether the Claimant's acts amounted to part performance;
- iii. Whether the written agreement dated 8th January 2010 satisfies section 4(1) of the Conveyancing and Law of Property Act Chap. 56.01 and is therefore enforceable;

- iv. If the answer to (iii) above is yes, whether time was of the essence; and
- v. Whether the Second and Third Defendants were bona fide purchasers for value without notice.

The First Issue

14. This was an issue of fact to be decided on the evidence on behalf of the Claimant and the First Defendant.

15. Ms. Deanne Legendre, the Claimant's common law wife, and the Claimant gave evidence on behalf of the Claimant's case. She testified that she and the Claimant were approached by the Partaps to live in and look after the First Defendant who was elderly. The Claimant testified that this request took place in or about October 2007 and that they were approached by Winston Partap, Joanne Maharaj, Loretta Ogeer and Pran Maharaj. Both the Claimant and Ms. Legendre testified that when they were approached by the Partaps they were approached at their Lum Tak Hill residence.

16. At the time the Claimant and Ms. Legendre were living at Lum Tak Hill, Fyzabad and paying a monthly rental of \$300.00 per month. Ms. Legendre gave evidence that she and the Claimant agreed to relocate to the First Defendant's residence to care for the First Defendant and pay a monthly rental of \$300.00 until they were able to purchase a portion of land next to the First Defendant's residence ('the said land'). Both the Claimant and Ms. Legendre gave evidence that the First Defendant pointed out the boundaries of the intended land and told her when she was ready and the time was right the land would be sold. The Claimant testified that this conversation about the purchase of the said land took place at the First Defendant's home. In cross examination, the Claimant testified that the conversation about his first preference to

purchase the said land took place in the presence of the First Defendant only and that none of her family members knew of the conversation.

17. The Claimant gave evidence that when they agreed to move to the First Defendant's residence it was founded on two main conditions (1) that they would not pay more rent than what they had been paying previously and (2) that there was an agreement to purchase the said land when the time was right for the First Defendant.

18. The Claimant explained in his evidence that the agreement was that they would move in to the First Defendant's residence and live upstairs rent free until the downstairs was renovated to accommodate them at which point they would commence paying the \$300.00 rental. Notwithstanding this, Ms. Legendre gave evidence in cross examination that they only moved downstairs because the First Defendant started complaining about their usage of the cooking gas and clothes in the bathroom. She denied that there was any initial agreement that they would move downstairs when it was fixed and then start paying the \$300.00 rent. This evidence was inconsistent with the Claimant's assertion that the rent agreement was part of the preconditions for their relocation to the First Defendant's residence. What is more later in Ms. Legendre's cross examination she reverts to the Claimant's evidence and testifies that there was an agreement for them to assist the First Defendant on the condition that they be given preference for the purchase of the said land and that they would pay a rent of \$300.00 to stay downstairs.

19. Although the Claimant said that the agreement to move was premised on their preference to purchase the said land, Ms. Legendre in cross examination testified that when they were first approached there was no agreement for the sale of the said land. It would appear from what the Claimant and Ms. Legendre testified, that the discussions about the purchase of the land began after they were first approached but before they actually moved into the First Defendant's residence.

20. Ms. Legendre testified that in or about January 2010 the First Defendant approached her and the Claimant about the purchase of the said land. Ms. Legendre gave evidence that the First Defendant wanted all the money at the same time and subsequent to discussions, an agreement was drawn up on the 8th January 2010 for the sale of the said land.
21. Mr. Winston Partap and Mrs. Loretta Ogeer gave evidence on behalf of the First Defendant.
22. Mrs. Ogeer testified that at no point during any discussion with the Claimant and Ms. Legendre was it ever agreed that the First Defendant would give them first preference to buy any lot of land owned by the First Defendant. Mrs. Ogeer gave evidence that the first time she heard of the Claimant's interest in purchasing a plot of land was in or around November 2009 when the First Defendant informed her that the Claimant had made enquiries to purchase a plot of land from her.
23. Mr. Partap's evidence was that sometime in November or December 2009 the First Defendant informed him that the Claimant was interested in purchasing a plot of land as he had inquired of her whether the adjoining plot of land was available for sale. In January 2010 the First Defendant informed Mr. Partap that she had set the sale price at \$20 per square foot.
24. Further, Mrs. Ogeer's evidence was that the First Defendant was very ill in or around the first half of 2007. Consequently, the First Defendant's family decided to hire someone to provide assistance in looking after the First Defendant. Mr. Pran Maharaj suggested the Claimant and Ms. Legendre, as they were looking for a place to rent since they had been given notice to vacate their rented accommodation.

25. Both Mr. Partap and Mrs. Ogeer gave evidence that they visited the Claimant's home in order to discuss whether the Claimant and Ms. Legendre would be willing to look after the First Defendant.
26. The court considered the evidence of the Claimant and Ms. Legendre to be highly inconsistent and unreliable on this issue. Not only were there inconsistencies between the Claimant and Ms. Legendre, Ms. Legendre's own evidence was inconsistent in itself at different points on the same issue. The court could not rely on this evidence.
27. In the circumstances, the court found that the First Defendant did not orally agree to sell the said land to the Claimant at first preference as part of the arrangement to be caretakers of the First Defendant. Further, the court therefore found it more likely than not that the Claimant approached the First Defendant in or around 2009 for the purchase of the said land which resulted in the written agreement.

The Second Issue

28. As a result of the court's finding in respect of the first issue, the second issue did not arise for consideration.

The Third Issue

29. For a contract for the sale of land to be enforceable it must be in writing: *s.4 Conveyancing and Law of Property Act Chap. 56.01*. The section requires that there be (1) a memorandum or note in writing (2) that the memorandum or note is signed

by the party to be charged or by some other person lawfully authorised by him to sign on his behalf.

30. It was not in dispute that by letter dated 8th January 2010 the First Defendant made an offer in writing to the Claimant for the sale of the said land which the Claimant accepted at the price of \$227,200.00. This offer was stated in the letter to be valid until 30th April 2010. The Claimant then orally accepted the terms of this offer. On the 22nd April 2010 the Claimant requested a 90 day extension of the offer, which was granted by the First Defendant. This meant that the offer for sale of the said land to the Claimant was now valid until the 31st July 2010.
31. For the letter of the 8th January 2010 to be considered a sufficient memorandum in writing, it must contain (1) a description of the parties (2) a description of the property and (3) the consideration: **Vitti F Kelly v Dewar Ramdeen a/c Deo Ramdeen; Ralph Rahaman; Joyce Rahaman H.C.3935/1984**. If it is found that such a memorandum exists it must be signed by party to be charged, in this case the First Defendant, in order to be enforceable.
32. Whether the letter was a sufficient memorandum was a simple issue to be determined on an evaluation of the letter itself, taking into consideration the requirements in paragraph 31 above.
33. When the court perused the letter, it was observed that the letter did contain the particulars necessary for a memorandum within the meaning of section 4 of the Act, *viz a viz*, it clearly stated that the First Defendant offered for sale to the Claimant a parcel of land marked in an attached cadastral map measuring 1-55.3 square metres at the price of \$227,200: **Vitti F Kelly v Dewar Ramdeen a/c Deo Ramdeen; Ralph Rahaman; Joyce Rahaman (supra)**.

34. The court found therefore that the letter of the 8th January 2010 was a sufficient memorandum in writing and therefore capable of enforcement.

The Fourth Issue

35. The memorandum stated as an essential term, the date by which the offer was to expire. Where a party wishes that a particular term be an essential term upon which the agreement is based it must be expressly stated in the agreement for sale.

36. Where a contract fixes a date for completion and one party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non-essential term. The date fixed for completion cannot be treated as a mere target date. As a result the innocent party may immediately thereafter give a notice that the other party is in breach of contract and make time of the essence: ***Bidaisee v Sampath Civil Appeal No. 165 of 1985.***

37. It is settled law that for time to be of the essence it must be so stated in the contract. However, although time is not originally made of the essence in the contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time, and such a notice may be served immediately after the contractual date for completion has passed: ***Halsbury's Laws of England Volume 42. Fifth Edition, para 120.***

38. Where a contract fixes a date for completion and one party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non-essential term: ***Halsbury's Laws of England Volume 42. Fifth Edition, para 120.*** In the present case, although time was not made of the essence, either expressly in the memorandum or subsequently by the First

Defendant sending to the Claimant a notice after the date for completion had passed, the contract does fix a date for completion. The Claimant, having failed to abide by this date, is deemed to be in breach of that non-essential term.

39. However, the court noted that there was no counterclaim by the First Defendant in this regard, as such the Claimant was not found liable to the First Defendant for damages for breach of contract.

40. The Claimant contended that after the 30th July 2010, both parties, by their conduct mutually agreed to further extend the time for completion. At this stage, the Claimant claimed the Defendant was awaiting an updated WASA bill and the Claimant was awaiting approval of the bank loan.

41. The Defendant denied that there was any agreement to extend the completion date. Further, the Defendant avers that there was no need for an updated WASA bill to transact a sale of land. The Defendant claimed that although she knew the Claimant was pursuing a loan for the purchase of the said land, after the 30th July 2010 all communication from the Claimant ceased.

42. In this regard the court considered the evidence that when an extension was previously requested and granted, it was reduced into writing in the memorandum evidencing the agreement for sale of the said land. There appeared to have been no such attempt to reduce into writing any further extension as claimed by the Claimant. On the evidence there appeared to be no explanation for same.

43. The court was of the opinion that this was a salient factor to be considered in determining whether there was an agreement to extend by way of conduct. Further, it

appeared on the evidence that it was only in November 2010 that the mortgage loan was ready in any event. On the evidence, there seemed to have been no previous communication by way of conversation with the First Defendant about a further extension of the time for completion. All that existed was the Claimant's testimony that both parties had agreed by conduct to extend. The conduct used to support such a contention in this case, was in the court's view, insufficient to form a basis for finding that there was an extension by way of mutual agreement. The continued enquiry into the WASA bill by the son of the First Defendant does not imply that the First Defendant had agreed to extend the time for completion to an unascertained date.

44. The court therefore found that there had been no further extension of time past beyond the 30th July 2010.

The Fifth Issue

45. A breach of a non-essential term does not, however, entitle the innocent party to treat the said breach as a repudiation of the contract, justifying rescission and to rely on same as a ground for avoiding an action for specific performance by the party in breach. It is only if the party, after being served with a notice to complete within a reasonable time is in breach and fails to complete within that reasonable period fixed by the notice (which in effect makes time of the essence) that the innocent party can treat such failure as a repudiation of the contract justifying rescission: ***Bidaisee v Sampath*** (*supra*). The agreement between the Claimant and the First Defendant was still enforceable even after the breach of the non essential term for completion and capable of specific performance.
46. Specific performance will not however be ordered in respect of a contract for the sale of property when the vendor has sold it to an innocent third party without notice of

the claimant's interest: *Ferguson v Wilson (1866) 2 Ch App 77*. This is the essence of a plea of bona vide purchaser for value without notice.

47. A plea of bona fide purchaser is an available defence to a subsequent purchaser to an action to specific performance. The plea of bona fide purchaser for value is available to a purchaser who, at the time of the purchase, obtains a legal estate without notice of a prior or existing equitable claim or interest. The purchaser must have acquired the legal estate (by a conveyance) which gives him priority over the earlier interest. It is an established principle of equity that “such a purchaser’s plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this court: *Pilcher v Rawlins (1872) 7 Ch App 259, 269*. The onus of proof is on the party making the plea of bona fide purchaser.

48. The Second and Third Defendants testified that on the 28th December 2010, they purchased the said land at the price of \$230,000.00 and by Deed of Conveyance registered as DE20110181155D001 dated the 28th December 2010 they were vested with the legal title for the said land. The Second and Third Defendants claimed that this purchase was done without their prior knowledge or notice of the Claimant’s interest in purchasing the said land.

49. The Claimant testified that by letter dated 13th December 2010, his attorney wrote to the First Defendant asking for specific performance of the agreement for sale. The Claimant testified that by letter dated 21st March 2011 he was informed by the Second Defendant that he had purchased the said land. However, the Claimant testified that prior to this, in November 2010, he spoke to the Second Defendant and he (the Claimant) informed the Second Defendant of interest in the said land and the prior agreement with the First Defendant for the purchase of same.

50. The Second and Third Defendants denied ever receiving the letter dated 13th December 2010, and further denied that there was any discussion with the Claimant about his interest in purchasing said land. Further, the Second Defendant testified that it was only on the 15th January 2011 that the Claimant approached him and enquired whether the Claimant had purchased the land. The court accepts this evidence there being no reliable evidence to the contrary.

51. The Claimant asserted that in January 2010 when he entered into the agreement he began stock piling old galvanize, iron and wood and placed the items on the said land. In this regard, the Second and Third Defendant testified that although they live approximately 200 feet away for the said land, they never saw the Claimant or his wife cleaning, pruning or storing materials on the said land. The Second Defendant however testified that after they purchased the said land, by letter dated 21st March 2011 they wrote to the Claimant asking that he remove a stack of used galvanize sheets from the said land. When probed in cross examination about when he noticed the stack of galvanize, the Second Defendant testified that he could not recall when he first noticed galvanize on the said land. Although the Second Defendant admitted that he went onto the said land in November 2010 he gave evidence that he paid no attention to any stack of galvanize.

52. Counsel for the Claimant contended that the stock pile was 6 feet in height and would be obvious to any prospective purchaser.

53. Notwithstanding the evidence of the Claimant that he had, *inter alia*, galvanize sheets on the said land and the Second and Third Defendants' evidence that they lived some 200 feet from the said land, the evidence was that they wrote to the Claimant in March 2011 for the removal of the galvanize. There is no evidence that the Second and Third Defendants observed the galvanize sheets prior to the purchase of the said land.

54. Further, the Claimant asserted, and in fact the evidence showed that he wrote to the *First* Defendant in December 2010 asking that the agreement be specifically performed. There *was no evidence that the Second and Third Defendants* had been either written to or were in receipt of this letter.
55. The Claimant's evidence was that in November 2010 he became aware that the Second Defendant intended to purchase the land. The Claimant claimed that at that point he told the Second Defendant about his agreement with the First Defendant to purchase the land. On this point, Counsel for the Second and Third Defendants submitted that if, as the Claimant claimed, he was suspicious and concerned and had evidence that the Second and Third Defendants intended to purchase the said land then he should have so stated in his letter dated 13th December, 2010 to the First Defendant and he should also have written directly to the Second and Third Defendants and more effectively he should have instituted proceedings immediately and filed a *lis pendens* in relation to his claim to the said land.
56. The court agreed with Counsel's submission. The court did not believe the Claimant when he testified that he had knowledge of the Second and Third Defendant's intention to purchase the said land and that he told the Second and Third Defendants of his interest. The court was of the view that if this was in fact so, just as he wrote to the First Defendant for specific performance of the agreement, so to he would have written to the Second and Third Defendants to protect his interest further. What is more, no action was even taken by the Claimant to deliver the letter of the 13th December 2010 to the Second and Third Defendants.
57. The court found on the evidence, that the Second and Third Defendants did not have knowledge of the Claimant's prior interest. The Second and Third Defendants were therefore bona fide purchasers for value without notice.

58. Notwithstanding this finding, the court considered that subsequent impossibility or frustration brought about by the conduct of one of the parties will as a rule amount to a breach of contract by him and will not excuse his non-performance, though it may release the other party from his obligation to perform his promise: *Halsbury's Laws of England. Volume 22, Fifth Edition para 467*
59. Thus, the acts of the First Defendant by her subsequent sale of the said land to the Second and Third Defendant at a time where the contract subsisted between the Claimant and herself amounted to a breach of the contract for sale for which the Claimant was entitled to damages.
60. Although the primary purpose of damages for breach of contract is to offer the promisee the value of performance, to recover more than nominal damages he must prove loss. The Claimant failed to prove any particular loss from the breach of contract by the First Defendant. No evidence was given in this regard nor has any submission been made in this respect although it was clear that this court was at this stage trying the issues of both liability and damages.
61. The Claimant has said that he and his common law wife acted to his detriment from December 2007 to August 2010. While this may be so in relation to the Claimant's wife's employment by the First Defendant, it does not extend to the agreement for sale. This is particularly so in light of the court's finding that there was no oral agreement for the sale of the said land as a pre-condition for the Claimant's wife taking up employment with the First Defendant.
62. The court considered the sum of \$7,000.00 adequate compensation in making an award of nominal damages for breach of contract by the First Defendant. This, the court considered to be reasonable having regard to the usual range of nominal damages in this jurisdiction: *Jacob & Polar v Samlal CV 2005-00454*.

63. Finally, in relation to the issue of costs, the court treated the claim as one for \$50,000.00 in accordance with Part 67.5. In relation to the costs of the Second and Third defendants, the court took into account the fact that the Defences were identical and were in essence presented as one. So too were the issues, evidence and representation in relation to those Defendants.

64. For the preceding reasons the court made the order appearing at paragraph 2.

Dated this 25th day of March, 2013

Ricky Rahim

Judge