THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-01669

BETWEEN

NISHTAR BAKSH

Claimant

AND

CGAS DEVELOPMENT COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. J. S. Mobota instructed by Ms. C. Pippa for the Claimant

Ms. D.A. Prowell instructed by Ms. C. Prowell for the Defendants

Judgment

The Claimant's case

1. The Claimant claims to be a statutory tenant of the Defendant Company in accordance with the **Land Tenants (Security of Tenure) Act**[1] (the Act) in relation to a parcel of land know as Lot 16 Eastern Main Road Sangre Grande and more recently, LP 912, Eastern Main Road, Sangre Grande (the land). The Claimant purchased the interest in the tenancy from his father Ahmad Baksh, deceased, in June 1982. At the time he allegedly purchased the interest, Marlay (1981) Limited (Marlay) owned the land. The office of the company Marlay is given as Eastern Main Road Sangre Grande but the court is unaware whether that is the registered office of Marlay as no such evidence was led. Suffice it to say, that all of the Claimant's transactions with Marlay were conducted at that address through a secretary named Pearl.

2. By letter to Marlay dated the 17th June 1982, Ahamad Baksh informed Marlay that he was desirous of assigning his tenancy and interest in Lot 16 to his son the Claimant and asked that Marlay make the necessary arrangements to effect the transfer. Further, by letter dated 29th June 1982, Ahamad purported to surrender his tenancy to Marlay and at the same time requested that his interest be transferred to the Claimant to whom he allegedly sold his interest. On the very day, (29th June), the Claimant wrote to Marlay confirming his awareness of the terms of the tenancy and his understanding that the building which he was to construct would be used for residential purposes only. All three letters were in typewritten form. The latter two were countersigned by Pearl Cox.

3. The Claimant however alleges that also by way of letter (in manuscript) dated 29th June, 1982 addressed to Marlay, he made a request to purchase the land at a fair price. In that letter he asked that an offer be made to him. This letter is not countersigned.

[1] 1981, Chapter 59:54

4. The Claimant further claims that around March 30th, 1987 he paid the sum of $1,800.00 to Marlay as a survey fee to undertake a survey and he has annexed a receipt which supports his claim in that regard and a copy of the survey plan. This survey was conducted on March 21st, 1987. The Claimant alleges that since his letter of request to purchase, he would visit Marlay on many occasions and make enquires about the purchase price. He also alleges that on every occasion he visited the office to pay rent or building taxes he would also enquire about same.

5. On 9th April, 2002 The Defendant became the owner of the said land by virtue of Deed DE2002 011414 65D001.

6. By letter dated 14th March, 2003 the Defendant's Managing Director Mr. Clifton Gosine wrote to the Claimant informing him that the yearly rent was increased from $1,000.00 to $12,000.00 and that in accordance with the Act he was entitled to purchase the said land at half the market value.

7. The Claimant says that by letter dated 28th March, 2003 he responded to the letter of the Defendant and set out that as his family was in occupation of the land for over one hundred years he anticipated an offer of a fair and affordable price for the said land.

8. According to the Claimant, on five occasions between 28th March, 2003 and July 20th, 2005 his attorney-at-law wrote to the Defendant enquiring about the purchase, however, no response was received until 16th June, 2006 when attorney-at-law of the Defendant wrote to the Claimant informing him that the land was valued at $1,650,000.00 as at April 13, 2006 and the purchase price for the Claimant as the Statutory Tenant in possession would be $825,000.00. All of the letters have been produced in court.

9. On or about 17th March, 2007 the Claimant instructed valuators Quamina and Associates to assess the open market value of the lands at 29th June, 1982 and they found the value to be $250,000.00.

10. By way of notice of the 14th October, 2010 the Claimant purported to renew the statutory lease. Further, by notice dated 2nd August, 2011 the Claimant allegedly served Notice on the Defendant Company to purchase the said land. Subsequent to receipt of the notices by the Defendant, attorney-at-law for the Defendant wrote to the Claimant informing that they were willing to sell the land at half of the market value, in the alternative the Defendant Company was willing to purchase the chattel house from the Claimant. Both notices and the letter have been produced .

11. The Claimant further claims that by letter dated 31st October, 2011 attorney-at-law for the Claimant wrote to the Defendant stating that the material date of notice by the Claimant to the landlord was that of June 29th, 1982 and that therefore the market value of the land at that time being $250,000.00, the Claimant was prepared to pay the sum of $125,000.00.

12. The Claimant claims that to date the Defendant has neglected and or omitted to convey the said parcel the Claimant for the sum of $125,000.00.

The Defendant's case

13. The Defendant avers that it became the freehold owner of the said land by virtue of Deed DE 2002 0114 dated 9th April, 2002 and says that no notice was received from its predecessors in title with regard to the alleged notice to purchase the said land. Further, the Defendant Company avers that if this notice was in fact served in 1982, the Defendant was not the landlord at that time and is therefore not bound by such notice.

14. Further, it is the Defendant's case that even if it is accepted that the Claimant had served notice on June 1982, the passage of some twenty nine years provides to them a defence of limitation of action, in that the Claim would now be statute barred.

15. The Defendant further claims that the Claimant is not entitled to the said lands at and for the price of $125,000.00 but for half the open market value of the land as at the date that the Claimants served notice on the Defendant namely the 2nd August, 2011.

Issues.

By the date of trial, the issues had been agreed by the Claimant and Defendant, as follows:

i. What is the date of service of the Notice by the Claimant on the Defendant to purchase the said parcel of land in accordance with the Act;

ii. Is the Claimant entitled to the Conveyance of the subject parcel of land for half the market value as at 1982 or half the market value as at August 2011;

iii. In the circumstances is the defence of limitation available to the Defendant; and

iv. In all of the circumstances is the defence of laches available to the Defendant.

In that regard, in large measure, the factual matrix set out above is no longer an issue save and except the issue as to whether notice was in fact given to Marlay on the date claimed by the Claimant. If the court finds that no such notice was given, then the notice of the 2nd August (which is not in issue would stand). It is only if the court finds that notice was in fact given in 1982, does the second issue arise.

Issue 1: What is the date of service of the Notice by the Claimant on the Defendant to purchase the said parcel of land in accordance with the Act.

Evidence

1. Evidence was given on the Claimant's case by the Claimant, and his wife Sharem Baksh. Evidence for the Defendant was given by Clifton Gosine, Managing Director of the Defendant Company.

2. The Claimant in his witness statement inter alia, claims that on 29th June, 1982 he made a written request that Marlay sell the land to him. The letter of the Claimant dated 29th June, 1982 to Marlay requesting that the said land be sold to the Claimant at a fair price was admitted into evidence by consent. In his witness statement he also testified that several checks in relation to this request were made and in March 1987 the Claimant was informed that a survey of the land was therefore necessary. The Claimant stated the he was required to pay the sum of $1800.00 for the survey, which he did. The survey was completed on 21st March, 1987.

3. The witness statement of Sharem Baksh corroborated the evidence of the Claimant in material particular.

4. During cross examination of the Claimant on the issue of the letter to Marlay he at first gave evidence that he went to Marlay's office alone then later during cross examination he stated that the letter was written in the office by his wife. The Claimant explained that that he forgot that his wife was in fact with him and that his wife wrote the letter in the office as he asked her to do so. The Claimant in cross examination also testified that after his wife wrote the letter he signed it at the office in the presence of Ms. Cox. When questioned about the fact that Ms. Cox's name does not appear on the letter as having received it, the Claimant testified that Ms. Cox did in fact receive the letter and that he cannot proffer a reason as to why she did not sign for receiving same. When it was suggested to the witness that Ms. Cox did not receive the letter. The Claimant stood by his position that she received same.

5. The Claimant's wife Sharem Baksh during cross examination gave testified that she accompanied the Claimant on that day to deliver the letter to Marlay. Mrs. Baksh testified that she believed that the letter was delivered to Ms. Cox who was Marley's secretary. Ms. Baksh stated that the letter was written at home. She said that on the day in question she and the Claimant went to the office of Marlay and delivered the letter.

6. The evidence on behalf of the Defendant Company was given by the Managing Director, Mr. Gosine. In his witness statement he stated that upon the Defendant becoming the owner of the said land, the Defendant Company was aware that the Claimant was the statutory tenant of the said land. The Defendant also stated in the witness statement that Marlay did not inform the Defendant of any request to purchase the said parcel of land in 1982 nor was the Defendant informed of any survey having been conducted on the said parcel.

Submissions.

7. The Claimant submitted that the Court should consider the evidence holistically and not focus on minor discrepancies that came out in cross examination. The Claimant submitted that the Court should take into consideration the fact that the evidence was being given some thirty two years after the fact of notice and the witnesses are retirees. As such it is unrealistic to expect that they would recall the exact sequence of events of the day in question.

8. As regards the 1982 request to purchase the land the Defendant put the Claimants to strict proof, as they were not the owners of the said land at that time. The Claimant however submitted that strict proof does change the burden of proof but simply means that the requesting party requires more evidence before admitting the claim. In support of this submission the Claimant relied on the House of Lords case of **Re B (Children)**[2]. The facts of this case are not relevant to this claim and so are not herein set out. Suffice it to

[2] (2008) UKHL 35

say that in that case Lord Hoffman referred to the case of **Re H (Minors)**[3] and sought to clarify confusion caused by the latter case. At paragraph 13 Lord Hoffman stated:

> *" I think that the time has come to say, once and for all, that there is one civil standard of proof and that is proof that the fact in issue more probably occurred than not".*

9. The Defendant also submitted that the recollection of the Claimant and his wife who gave evidence was at best unreliable. The Defendant submitted that in cross examination the Claimant testified that he went to Marlay's office once that day to drop off the letters, subsequently he recalled his wife was with him and she wrote the letter whilst in the office. On the contrary, the Claimant's wife gave evidence that they went to the office on two occasions and that the letter was written at home and taken to the office on the second occasion. The Defendant submitted that this is a material contradiction on a matter to which the Claimant was put on strict proof. The Defendant also submitted that neither witness could explain why the letters were not signed by the person receiving same.

10. The Defendant relied on the case of **Re H (minors)**[4] where Lord Nicholls stated:

> *"This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters".*

11. In this regard the Defendant submitted that the phrase strict proof lacks precision, however the practice is that although the burden of proof remains the same, proof beyond what is nominal is what is required. The Defendant submitted that the proof on the balance of probabilities, subscribed as it was, as being strict proof in this matter must lie

[3] [1996] AC 563
[4] [1996] 1 All ER 1 at page 17

on the higher end of the spectrum as described by Lord Nicholls in the case of **Re H** above. The Defendant contended that the evidence of the Claimant and his wife falls under the threshold of on the balance of probabilities therefore the Claimant cannot rely on the notice given in 1982. However the Defendant Company submitted that the notice given on August, 2011 is valid and as such the Claimant would be entitled to purchase the land as at the value of the land on this date.

Analysis

12. The issue of fact for the court's decision is by no means a difficult or complex one and can be deal with in short measure. The court must ask itself a fundamental question, namely, is there any evidence at all which contradicts the evidence presented by the Claimant on the issue. The answer to that question is a resounding no. The Defendant has presented no evidence whatsoever which attempts to disprove the facts as given by the Claimant and his witness on this issue and in the context of the circumstances if this case the court could not reasonably have expected any such evidence. The Defendant's argument is that strict proof requires a higher threshold which was not satisfied in this case having regard to the apparent inconsistency in the evidence of the Claimant and his witness. Further, they argue that should the letter have been delivered it would have been reasonable to expect that Ms. Cox would have countersigned the letter as having received it.

13. In this regard, the Court is of the view firstly that strict proof is not a standard of proof, nor does the use of such language in a pleading alter the standard of proof by way of increments. To so do would be to artificially alter the standard of proof by the imposition of varying sub categories of proof on a balance of probabilities. In the court's view, putting a party to strict proof simply means that that party is required to prove that aspect of his case by way of relevant and admissible evidence to the standard applicable in law. It is another way of saying that the party who puts another to strict proof does not accept that part of the claim. The court therefore does not agree with the submission of the Defendant in that regard.

14. In relation to the evidence, the court accepts the submission of the Claimant that the effect of the passage of time must be factored in when assessing the testimony of the witnesses. In the court's assessment of the Claimant, it appeared that his memory was not as sound as that of his wife. On several occasions during the testimony of Mrs. Baksh, she appeared to be genuinely making attempts at recall and she has impressed the court as being both credible and reliable. It may well be that her ability to recall is of more reliability because it is her evidence that she was the one who wrote the letter some thirty two years ago. Certainly, as a matter of common sense, the person who would have written the letter would be more likely to recall the circumstances under which the letter was written than someone who did not.

15. So that although there appears to be some conflict on the evidence in this regard, the court accepts the evidence of Mrs. Baksh for its truth and reliability. The court is also of the view that the Claimant is not telling untruths but has had some difficulty recalling precisely what took place, which is to be expected.

16. In relation to the absence of Ms. Cox's signature on the letter, the Court cannot agree with the submission of the Defendant in this regard as it does not as a matter of course follow that the absence of the signature means that the letter was not delivered. Equally, Mrs. Cox's signature does not appear on the letter of the 17th June, 1982 by Ahamad Baksh (although there appears to be another signature), but this does not mean that that letter was not sent to Marlay. In other words, in the absence of evidence to the contrary, it would be speculation on the part of the court if it was to find that the reason for the absence of the signature of Ms. Cox was definitively due to the fact that the letter was not delivered. There may have been several other valid reasons why the signature of Ms. Cox does not appear on that document. She may have neglected to sign for example. But the court should not and will not speculate either way. What is clear, is that the evidence before the court shows that both the Claimant and his wife visited the office of Marlay and delivered the letter and no evidence has been led to the contrary.

17. Additionally, the court is of the view that the fact that a survey was done and a plan drawn supports the evidence of the Claimant's case in material particular. The Claimant has annexed to this statement of case, the receipt under the hand of Marlay for fees paid for the purpose of the survey. In this regard it is to be noted that this receipt is dated the 30th March, 1987 some five years after the letter. This is wholly reasonable having regard to the evidence that the Claimant had consistently asked for a price from Marlay and was told that a survey had to be done first. Further, it could not be that the Claimant was paying for a survey as a tenant alone. It is not the responsibility of the tenant to have the lands of the landlord surveyed and even more, to pay the costs of the survey. That is the responsibility of the Landlord. If however, on the other hand, the survey is being conducted for the purpose of purchase by a party, it may well be the case that the vendor would ask that the purchaser pay the costs of that survey. This is essentially what the Claimant is alleging and it is quite a reasonable proposition in the court's view. This is strong evidence that the Claimant had delivered his letter asking to purchase the land and as a consequence Marlay was having a survey done so that the precise boundaries and area of the land could be ascertained in order to settle on a price.

18. Finally, on this issue, the Defendant submitted that it was aware that there was a statutory tenant but they were not informed of either the notice to purchase the said parcel of land or of the survey. It follows that the Defendant being cognizant of the fact that the Claimant was in fact a statutory tenant in occupation of the said land, should have prior to purchasing the said parcel of land undertaken the required due diligence to search for "hidden encumbrances". The Defendant being aware of the status of the Claimant as statutory tenant ought to have enquired prior to purchasing the said as to whether or not there was in fact a notice to purchase the said parcel of land. Particularly as in this case there appeared to be a concrete dwelling house on the said land. Certainly that fact should have been enough to reasonably put them on enquiry as to the status of the persons residing therein. Therefore, the Court is of the view that the Defendant did have constructive notice of the notice to purchase served in 1982.

19. The Court therefore finds that having regard to the all the evidence, the Claimant has proven that notice was given to purchase the said land on the 29th June, 1982 and that the Defendant had constructive notice of the said notice.

Issue 2 : Is the Claimant entitled to the Conveyance of the subject parcel of land for half the market value as at 1982 or half the market value as at August 2011

In this case the notice to purchase was served on Marlay the then owners of the land on 29th June, 1982. Subsequently on 9th April, 2002 the Defendant Company became the owners of the land and on 14th October, 2010 the Claimant pursuant to section 4 (3) of the Act filed a notice of renewal of the statutory lease. Thereafter on the August 2nd, 2011 the Claimant filed a notice to purchase the said land pursuant to section 9 of the Act.

Submissions

20. The Claimant relied on **sections 4 (2), and 5 (5) of the Act** which provides:

> *4 (2) A statutory lease shall be a lease for thirty years commencing from the appointed day and, subject to subsection (3), renewable by the tenant for a further period of thirty years.*
>
> *5 (5) "The tenant shall have an option to purchase the land at any time during the term of the statutory lease at a price not exceeding fifty per cent of the open market value of the land without the chattel house ascertained at the date of the service on the landlord of notice of purchase under section 9(1)".*

21. In this regard the Claimant submitted the abovementioned sections must be read together in that the act did not intend to create two leases, therefore when the Claimant renewed the statutory lease all rights and options to which he became entitled during the first 30 years would continue in the latter 30 years. As such, the Claimant submits that the land should be conveyed for half the market value as at 1982 when notice was first served. In

the alternative as at the value in 1987 when payment was made by the Claimant for the survey.

22. The Defendant submitted that the word "renewable" in section 4 (2) of the indicates that the original lease would endure for thirty years, however upon certain conditions being satisfied it could be renewed for a further 30 years. When the lease is renewed a new lease is granted.

23. The Defendants also submitted that section 5 (5) of the Act states that the purchase is exercisable at any time during the term of the statutory tenancy. The Defendant is therefore submitting that the interpretation of these words is that if the lease ends so does the option to purchase and the Claimant cannot therefore now enforce an option to purchase under a lease which has since expired.

Analysis

24. The Court having found above that the 1982 notice to purchase was in fact given to Marlay, it means that notice to purchase was validly given during the term of the statutory lease which began in July 1981. The delivery of notice by the Tenant that he wishes to exercise his option to purchase under section 5(5) and the subsequent action by Marlay in having the tenant pay for a survey to be conducted shows quite clearly that Marlay was in the process of facilitating the exercise of that option by the tenant. The intention of the section 5(5) could not in the court's view have been to give to a tenant an actionable option to purchase under a lease only to have that option lapse when a new lease is granted. The grant of the new term of years operates from the immediate expiry of the first term of years. Should the submissions of the Defendant be the correct position in law, then all that a Landlord would have to do would be to postpone the sale of the land (despite notice being given of the option to purchase), until a new term of years has begun so that he could secure a much better market value for the land. This could not have been the intention of an Act which when taken in its historical context was meant to

protect persons who over many years had built their homes on rented lands. Indeed this interpretation lends itself to protection of and advantage by the landlord as opposed to security for the Tenant.

25. Further, Section 4(4) of the Act reads;

> *Upon service of the notice by the tenant under subsection (3), the statutory lease shall be deemed to be renewed for a period of thirty years subject to the same terms and conditions and to the same covenants, if any, as the original term of the statutory lease but excluding the option for renewal.*

The option to purchase is a term of the statutory lease. The renewal of the lease is deemed to have occurred upon service of the notice to renew. It means therefore that while a new term of years begins, the new term is subject to the same terms of the previous lease (save and except for the option to renew). The option to purchase is not now a new or additional or second option to purchase but one that continues from the old lease into the new lease, the old lease having been renewed. That being the case, so long as notice of the option to purchase is given, no further notice is needed. To look at it another way, should the Tenant have given notice to purchase shortly before the expiration of the first term, there would be no need for him to once again give notice when the new term begins. The notice given does not lapse so long as he remains a tenant. The notice to purchase is based on an entitlement granted to a Tenant due to his legal status as a tenant. What is integral is that at the time of the giving of notice to purchase, the person seeking to renew had the jurisdiction so to do in the capacity as a tenant. In this case, at no time was the Claimant not a tenant so that his notice given in 1982 must stand and must be the date from which the parties are to reckon the purchase price.

Issue 3: In the circumstances is the defence of limitation available to the Defendant

Submissions

26. The Claimant relied on section **9 (10) of the Act** which provides:

> *"In the event of any default by the landlord or the tenant in carrying out the obligations arising from a notice under subsection (1), the other of them shall have the like rights and remedies as in the case of a binding contract for sale".*

27. With regard to this section the Claimant submitted that an important distinction must be drawn between statutory and contractual defaults under the act. The Claimant contends that "any default" in this section must be confined to contractual default where there is a binding contract for sale. In this regard payment by the Claimant to Marlay for the survey cannot constitute part performance or acceptance of an offer, this was merely a preliminary to the parties entering contractual relations. Therefore the Claimant contends that the Claimant's option to purchase continued to subsist throughout the years and should not be ousted by the defence of limitation.

28. The Defendant submitted that the effect of section 9 (10) of the Act is that it confers rights and remedies available under contract law to the parties under a notice to purchase. The Defendant contends that unless a contrary contract period is stated then the four year limitation period conferred by statute is applicable, as such if the notice was duly served on 29th June, 1982 then the rights and remedies accuring under same would have expired in 1986.

29. The Defendant contends that the Claimant did nothing after 1987 to enforce any rights or remedies under the notice. Further no mention was made of this notice until 31st October, 2011, 24 years after the payment for the survey was done.

Analysis

30. The rights conferred by section 9(10) of the Act confer unto the parties all the rights associated with a binding contract for the sale of land without the need for formalities

which must be present in the creation of such a contract ordinarily. Not only does it confer rights to the parties but it also confers remedies so that once notice is given pursuant to section 5(5) in the manner prescribed by section 9(1), the landlord must perform certain obligations set out in section 9, failing which the tenant is deemed to have acquired the right to seek remedies ordinarily exercisable by parties to a contract for breach and/or the enforcement of that contract. That is in fact the case here. The Claimant's submission that there was no concluded contract cannot succeed as once notice is given, the remedies associated with a legally constituted contract are deemed to have accrued to the parties by operation of law. Therefore by virtue of section 3 of the Limitation of Certain Actions Act Chap 7:09, the period for brining such a claim to exercise such a remedy on the contract has long since expired. As a consequence the Claimant cannot enforce the notice given in 1982.

Issue 4: In all the circumstances is the Defence incorporating the doctrine of laches to the Defendant

31. The equitable doctrine of laches arises when there is a substantial delay along with circumstances which make it inequitable to enforce the claim: see **Snell's Equity**[5]. Having regard to the finding of the court above and the facts set out hereunder, this issue does not arise.

32. On 14th March, 2003 the Claimant was informed that the Defendant Company was now the owner of the said land. On 14th October, 2010 the Claimant renewed the statutory lease and on the 2nd August, 2011 he served notice that he was interested in purchasing the land. On August 2nd, 2011 the Claimant filed a notice to purchase the land. The evidence of the Defendant shows that since this date there has been correspondence between both parties but no purchase agreement has been entered into.

[5] 13th edition, page 35

33. Nothing prevents a tenant who has failed to pursue his remedy for breach of contract within the relevant limitation period from giving another notice of intention to exercise his option to purchase so long as he is a statutory tenant at the date of such notice. So that in this case, the Claimant is entitled to enforce the contract, no steps having been taken by the Defendant as mandated by section 9, upon receipt of the Notice. He is therefore entitled to enforce the purchase of the land at half of the market value as at the 2nd August, 2011. However, the Claimant does not seek such relief from this court and the court will therefore make no such order.

34. In relation to costs, the Defendant has asked that the value of the claim be set at the value of the land given by way of valuation in 2006. In this regard, Rule 67.5(2) sets out the criteria for determining the value of the claim for the purpose of costs. In the case of the Claimant, it would be the amount ordered to be paid. This does not here apply. In the case of the Defendant, it would be the amount claimed by the Claimant in his claim form or the amount of damages. This was a claim for a declaration and consequential orders. It was not a claim for a specific sum. As a consequence prescribed costs would have to be ordered on the basis of the claim being one for $50,000.00 and not that submitted by the Defendant.

Disposition

For these reasons the court shall dismiss the claim and order that the Claimant pay to the Defendant the prescribed costs of the claim in the sum of $14,000.00.

Dated the 30th October 2014

Ricky Rahim

Judge