

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-01568

BETWEEN

YVONNE ROSE MARICHEAU

Claimant

And

MAUREEN BHARAT PEREIRA

First Defendant

And

RICARDO PEREIRA

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. A. Bostic for the Claimant.

Ms. L. Benoit for the Defendants.

Decision

1. By Notice of Application filed on 28th February 2014, the Claimant applied to the court for orders to:
 - a. Extend the time to file and serve the Claimant's Reply and Defence to Counterclaim pursuant to Part 10.10 of the CPR;
 - b. Strike out the Defendants' Defence and Counterclaim pursuant to Part 26.2(1)(c) of the CPR.

2. At a CMC held on the 8th May 2014, the court ordered that the time limited for filing and serving the Claimant's Reply and Defence to Counterclaim be extended to 9th May 2014. The Claimant duly complied with this order. The application to strike out the Defence and Counterclaim was adjourned to a further CMC on the 14th May 2014. By the 14th May 2014, at the hearing of the CMC, the Claimants had already filed their submissions in writing in relation to the application to strike. The court then ordered that the Defendants were to file and serve submissions in opposition by the 25th July 2014 and an extension of time was subsequently granted for so doing. The Defendants have since complied with the order.

Background

3. By Claim Form and Statement of case filed on the 15th April 2013, the Claimant claimed, *inter alia*, Specific Performance of a contract dated 10th April 2002 and an order that the Defendants execute a Deed of Conveyance transferring a three bedroom Wafda unit situate at 8502 Carlton Ottley Circular, Phase 5, La Horquetta, Arima (hereinafter referred to as 'the property') to the Claimant.

4. The Claimant claimed that on the 8th April 2002 by a written agreement between herself and Raddikha Goberdhan, as agent for the Defendants, the Claimant agreed to purchase the property. Further, that on 10th April 2002 an agreement for sale was entered into with the Defendants for the purchase of the property on the terms of payment of \$70,000.00 and the liquidation of an outstanding loan with the National Housing Authority now called Trinidad and Tobago Housing Development Corporation (hereinafter referred to as 'HDC').
5. According to the Claimant, pursuant to the terms of both agreements, on the 8th April 2002 she paid to the Defendant's agent, Home Searchers Real Estate Agency, the sum of \$70,000.00 and on the 30th April 2002 went into occupation of the property. She averred that she continued making monthly instalments of \$300.00 on the loan with HDC by depositing the sum into the Defendants' RBTT Bank Limited account. Further, that on the 6th April 2011 she made a payment of \$8,655.22 as a final payment on the loan owing to HDC. Again this sum was deposited in the Defendant's RBTT account. By letter dated 25th August 2011 from HDC to the Defendants, it was confirmed that the Memorandum of Discharge was ready for the Defendants to collect. Despite this being the case, and despite requests by the Claimant to complete the agreement for sale, the Defendants have failed to do so. Thus, the Claimant claimed that the Defendants are in breach of the agreements.
6. For the most part, the Defendants admitted the facts surrounding both agreements entered into by the Claimant. The Defendants stated that the Claimant did pay the Defendants' agent \$70,000.00. Further that the Claimant made instalments on the loan with HDC. Although the Defendants stated that a demand had to be made for the final loan payment, the Defendants admitted that the final payment was made.
7. The Defendants placed reliance on the agreement dated 8th April 2002 and particularly a clause which purportedly places responsibility on the Defendants' agent for the return of the \$70,000.00 in the event that the property is not transferred. Further, the Defendants relied on clause 6 of the Agreement for sale dated 10th April 2002 which states that in the event that the Defendants fails to transfer the property after all the payments are made to

HDC the Claimant is entitled to a refund of all money paid by her. The Defendants denied that they breached the agreements and stated that the Claimant ought to have brought an action against its agent for the return of the \$70,000.00. However, the Defendants claimed that by virtue of clause 6 of the agreement for sale, they are entitled to possession of the property upon a refund by the Defendants to the Claimant of the money paid by the Claimant to HDC in the sum of \$27,500.00.

8. The Defendants' counterclaimed for the action to be struck out but also claimed that upon the payment of \$27,500.00 they are entitled to possession of the property.

Submissions

9. Counsel for the Claimant submitted that the Defendants' Defence and Counterclaim discloses no grounds or defending the claim (Rule 26.2(1)(c) of the CPR). Further, that should the court strike out the Defendant's Defence and Counterclaim, and that the Claimant is entitled to Summary Judgment by reason of the court's power to do so without an application under Rule 15.4 of the CPR.
10. In submitting that the Defendants disclosed no grounds for defending their claim, Counsel argued that the law in relation to an agent receiving deposits for sale of land on its principal's behalf shows that the agent must on demand pay it to the Vendor or according to his instructions. Further, that if the vendor defaults the deposit should be returned to the purchaser, but the purchaser must sue the vendor and not the Agent, for its recovery, even where the money is still in the Agent's possession: *Ellis v Goulton* 1893 1QB 350.
11. It was submitted that the clause in the agreement of the 8th April 2008, between the Claimant and the Defendants' Agent, that in the event that the property is not transferred, the Agents will be responsible to refund the deposit paid by the Claimant of \$70,000.00, is contrary to the law in relation to Principal-Agent relationships. It was submitted that the court is entitled to construe contracts which contain inconsistent, contradictory and repugnant clauses in such a manner so as to give effect to the intention of the parties.

Further, that the court has a discretion to strike out repugnant clauses contained in the contract which defeat the intention of the parties as contained in the contract as a whole, the object of the contract and contradicts a preceding clause in the contract.

12. Of note is the passage quoted by Counsel for the Claimant from the case **Forbes v Git and Ors.** (1922) 1 AC 256 at p. 259:

“If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. But if the later clause does not but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole”.

13. It seems to the court therefore that Counsel’s argument is that the latter clause whereby Home Searchers Real Estate Agency is made responsible for the return of the deposit destroys the obligation created by the provision where they enter the agreement of the 8th April 2002 as **agent for the Defendants**. Thus, it was submitted that the Defendant’s contention at paragraph 8 of the Defence and Counterclaim that the Agent, Home Searchers Real Estate is responsible for repayment of the deposit/part payment is misconceived, contrary to the law and cannot be sustained.

14. Counsel for the Claimant also submitted that the Defendants’ interpretation of Clause 6 of the agreement is insensible and must be rejected. It was contended that the Defendants’ interpretation suggests that they intended at the date of the contract to contract themselves out of their responsibility to complete upon payment in full, when really they were obliged under Clause 4 of the said agreement to transfer the premises to the Claimant upon payment in full to HDC. Counsel argued that Clause 6 was inserted in the contract for the benefit of the Purchaser in the event that the Vendor defaulted for want of title and the Defendants could not rely on it to defeat the intention of the parties and to renege on their responsibility to complete performance.

15. The Defendants’ submissions were extremely brief and somewhat unhelpful to the court. In essence the Defendants submit that the remedy of specific performance was

specifically excluded by way of clause 6 of the contract and the court therefore ought not to permit the remedy at this stage. That based on that rational, the Defendants have disclosed a ground for defending the claim and pursuing the counterclaim. No authorities have been provided in support and the Defendants have sought to rely on a bald and brief submission. Additionally they have not treated with the specific application for summary judgment.

Striking out

16. Rule 26.2(1)(c) provides:

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

...

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim.

17. In **Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others** H.C.387/2007 my brother Kokaram J (with whom I fully agree) explained at paragraph 4.7 and 4.8:

“4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed:

“The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action... (Eg. A claim for damages for breach of contract which does not allege a breach). A statement of case may be hopeless not

only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law”

4.8 Porter LJ in **Partco Group Limited v Wagg** [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include:

*“(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides **Harris v Bolt Burden** [2000] CPLR 9;*

(b) Where the statement of case does not raise a valid claim or defence as matter of law””

18. This is a case founded in contract. The Defendants have accepted that a contract was entered into and have accepted the terms of the agreements as annexed to the Claimant’s Statement of Case. The Defendants have also accepted that the Claimant has fulfilled her obligations under the contract (payment of deposit and clearing off of loan to HDC).
19. The Claimant says that the Defendants have not performed their obligation under the contract. That is, to transfer the property, on the fulfillment of the Claimant’s obligations. The Defendants do not deny that they have not transferred the property. On the face of the Defence, no explanation for non-fulfillment of their obligation has been proffered.
20. The ways in which a contractual promise may be discharged may be classified under two basic headings: (1) **discharge in accordance with the contract**; and (2) **discharge 'against' the contract**. The former covers: (a) discharge by performance; and (b) discharge as a result of an event stipulated in the contract. The latter covers: (i) termination for breach or by subsequent agreement; (ii) rescission for misrepresentation; (iii) discharge by frustration; and (iv) discharge as a result of certain miscellaneous events such as merger and (in some cases) death or bankruptcy: *Halsbury’s Laws of England. Volume 22 (2012) 5th Edition, para. 491.*
21. The Defendants have not pleaded that they have discharged their obligations by performance. In this regard, the court agrees with the submission of Counsel for the

Claimant that the Defendants cannot rely on Clause 6 of the Agreement for Sale of the 10th April 2002 to renege on their responsibility to complete performance. The intention of such a clause is to protect the interests of the purchaser and not to aid the vendor in going back on the terms agreed to under contract. Additionally, the intention could not have been that of ousting the equitable remedy of specific performance. It is in those circumstances that the court finds that the Defendants' pleadings do not reflect discharge as a result of an event stipulated in the contract.

22. Further, the Defendants' pleadings do not at all raise any of the methods of discharge against the contract as set out at paragraph 19 supra. This is what would be expected to defend such a claim for breach of contract but it is patently absent. Thus, the court is of the view that the Defendants' Defence and Counterclaim discloses no ground for defending a claim for breach of contract.

23. Where an agent in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party, whether he had in fact authority to make it or not; but a personal liability may be imposed upon him by the express terms of the contract, by the ordinary course of business, or by usage: *Halsbury's Laws of England. Volume 1 (2008) 5th Edition, para. 158*. However, by reason of the agency relationship, liability on the part of the agent to repay can only arise when the third party becomes entitled as against the principal for repayment. It follows therefore that the Defendants pleading that the Claimant ought to have brought an action against its agent for the return of the \$70,000.00 is not maintainable.

24. For the foregoing reasons, the court finds that Defendants' Defence and Counterclaim discloses no ground for defending a claim for breach of contract and will strike out the Defence and Counterclaim.

Summary Judgment

25. Under Rule 15.4(2) the court may exercise its powers to give summary judgment without a notice of application at any case management conference.
26. Further, it has been said that there exists an overlap between striking out and summary judgment and the court can treat an application to strike out as if it were an application for summary judgment: **Moroney v Anglo-European College of Chiropractic** [2009] EWCA Civ 1560.
27. That being said, the test for summary judgment is whether the Defendant has a realistic as opposed to fanciful prospect of success: **Swain v Hillman** [2001] 2 AER 91. In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial ***Royal Brompton NHS Trust v Hammond (No 5) [2001] EWCA Cave 550.***
28. When the court considers the matters accepted in the Defendant's Defence and Counterclaim and what was discussed in paragraphs 17 to 21 above, the court can see no reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the court or would affect the outcome of the case.
29. For these reasons, the judgment of the court is therefore as follows:
- a. The Amended Defence and Counterclaim filed on the 15th November 2013 is struck out;
 - b. Judgment for the Claimant in the following terms:

- i.* The Defendants are to execute a Deed of Conveyance, prepared and delivered by the Claimant's attorney, transferring the three bedroom Wafda unit situate at 8502 Carlton Ottley Circular, Phase 5, La Horquetta, Arima to the Claimant, within 30 days of the delivery of the Deed by the Claimant's attorney.
- ii.* In default of the Defendants executing the Deed of Conveyance the Registrar of the Supreme Court of Trinidad and Tobago is to execute the Deed on the Defendants' behalf.
- iii.* The Defendants are to pay to the Claimant the costs of the application in the sum of \$3,500.00.
- iv.* The Defendants are to pay to the Claimant 55% of the prescribed costs of the claim in the sum of \$7,700.00.

Dated this 29th day of September 2014

Ricky Rahim

Judge