

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2013-04326

BETWEEN

**AVATAR INVESTMENTS LIMITED**

Claimant

And

**CARIBBEAN STEEL MILLS LIMITED**

First Defendant/Ancillary Defendant

And

**SUSAN BAIN**

Second Defendant/Ancillary Claimant

**Before the Honourable Mr. Justice R. Rahim**

**Appearances:**

Mr. A. Fitzpatrick S.C. and Mr. J. Mootoo instructed by Mr. R. Huggins for the Claimant.

Mr. T. Bharath instructed by Ms. S. Vailloo for the First Defendant.

Mr. R. Armour S.C. and Mr. K. Ramcharan instructed by Matthew Ramcharan & Company for the Second Defendant.

## Decision on Application for Summary Judgment

1. By Notice of Application dated 6<sup>th</sup> February 2014, the Claimant applied for an order for Summary Judgment against both Defendants, of the parts of the claim set out at reliefs (i), (ii), (iii), (vii) and (viii) in its Statement of Case. The First Defendant has not objected to the application and has in fact argued in favour of the grant of the application having regard to the circumstances of this case.
  
2. The Claim is one for, *inter alia*, specific performance of a contract made between the Claimant and the Defendants. The subject of the agreement is a parcel of land situate in the Ward of Arima, more particularly described in Deed of Lease dated 3<sup>rd</sup> April 1997 and registered as No 7626 of 1997 (hereinafter referred to as ‘the said land’) and the buildings situate thereon which houses or did house Caribbean Steel Mills. The said land belonged to one Percival Bain and was by the above Deed leased to the First Defendant for a term of 25 years. The First Defendant erected the steel mill and related offices on the said land. The Second Defendant is a director of the First Defendant. Percival died on the 8<sup>th</sup> June 1997 and the said land was assented to the Second Defendant by Deed of Assent registered as No. DE200402552878.
  
3. It is not in dispute that an agreement was made among the parties in the following terms:
  - a. The Claimant would purchase the freehold interest in the said land and buildings thereon for the sum of TT\$25 million (hereinafter referred to as ‘the purchase price’).
  - b. The Claimant would pay TT\$1.25 million to Messrs. Terra Caribbean as stakeholder on account of the purchase price to be held by the stakeholder for the First and Second Defendants pending completion.
  - c. On completion of the contract, TT\$6 million would be paid directly to the Second Defendant and the balance to the First Defendant.

4. The Claimant claims that the terms of the above agreement were contained in the following:
  - a. A written agreement dated 23<sup>rd</sup> January 2013 made between the First Defendant and the Claimant. This agreement was made subject to obtaining the land owner's (Second Defendant) agreement to participate in the sale of the freehold interest in the said land.
  - b. A letter dated 29<sup>th</sup> April 2013 from the Second Defendant to the Claimant confirming her consent to the sale of the property in the terms outlined in paragraph 3 above and undertaking to execute the relevant Deed of Conveyance to the Claimant.
  
5. Pursuant to the agreement, the Claimant paid the sum of TT\$1.25 million to the Defendants' stakeholder. Through the Claimant's attorney, an engrossed Deed was sent to the First Defendant's attorney for execution by the First Defendant and the Second Defendant. The Deed was forwarded to the Second Defendant for execution, however, by an email of the 28<sup>th</sup> June 2013, the Second Defendant's attorney communicated that the Second Defendant was no longer prepared to execute the Deed unless the sum payable to her was increased to TT\$12 million.
  
6. The Second Defendant does not deny the facts above. It was admitted that a contract was entered into in the terms above and further that the Second Defendant did sign the letter of the 29<sup>th</sup> April 2013. In opposition to the application for Summary Judgment, it was contended initially that the Second Defendant had been diagnosed with cancer in 2005 and as a result has to undergo various medical procedures periodically. Further, that she had undergone a colonoscopy on or about the 25<sup>th</sup> April 2013. The Second Defendant had initially claimed that as a result of her medical issues and procedures, she became anxious and this anxiety clouded her critical faculties and she was vulnerable to pressure applied by the First Defendant. The Second Defendant averred that the First Defendant, with knowledge of the Second Defendant's medical condition, and acting as agent for the Claimant, unduly pressured her into consenting to the agreement. However, in a supplemental affidavit deposed to by Ms. Leandra Ramcharan, this defence was

abandoned. The Second Defendant instead relied on her alternative plea that the agreement was an unconscionable bargain and therefore ought not to be enforced.

7. It is the Second Defendant's case that she was never in favour of the transaction because (1) she was of the view that the said land was more valuable than the price offered by the Claimant (2) that there were other assets which could have been used to liquidate debts owed by the First Defendant (3) the amount offered to her did not represent her fair share based on what she would expect to be the true market value.

## **Law**

8. The Claimant's application is grounded in Rule 15.2(a) of the CPR. There is no dispute among the parties as to the law as it relates to the grant of summary judgment.
9. The principles to be applied in deciding whether or not to give summary judgment have been summarised in **Federal Republic of Nigeria v Santolina Investment Corp** [2007] EWHC 437 (CH). Lewison J stated (at [4]):

*"i) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

*ii) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

*iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*

*iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly*

*if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*

*v) However, 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 that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

*vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

*vii) Although there is no longer an absolute bar on obtaining summary judgment when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of a finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: Wrexham Association Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237 at [57].”*

See also the judgment of Justice of Appeal W. Kangaloo in **Western Credit Union Co-Operative Society Ltd v Ammon** (Civ App 103/2006 from para 79.

10. The court is concerned with whether the Second Defendant’s defence of unconscionable bargain has a realistic prospect of success. Although the court is not tasked to conduct a mini trial, consideration of the evidence before the court on the application, including any contemporaneous documents, and the evidence that can reasonably be expected to be

available at trial is important. Would a fuller investigation of the instant case when other evidence is available, affect the outcome at trial.

## **Submissions**

### **Claimant**

11. Counsel for the Claimant argued that what exists is a composite agreement whereby the First Defendant agreed to sell its steel mills and buildings and leasehold interest in the land and the Second Defendant her reversionary interest in the land; that the agreement created two separate and independent obligations on the parties. Further, that the entire agreement was conditional upon the First Defendant obtaining the promise of the Second Defendant to participate in the sale of the freehold interest. Thus, it was contended that the Second Defendant's obligation under the agreement was to transfer all of her interest in the lands for TT\$6 million.
  
12. On the issue of the Second Defendant's diagnosis of cancer and the alleged resulting undue influence, Counsel for the Claimant noted that the Second Defendant was diagnosed with cancer in 2005 and underwent treatment. Further that there is no medical evidence in relation to her diagnosis in 2005. Counsel also pointed out that the Second Defendant signed the letter consenting to the sale in 2013.
  
13. With respect to the defence of unconscionable bargain, Counsel submitted that the Second Defendant bases her claim of unconscionable bargain on an alleged agency relationship between the Claimant and the First Defendant, with the First Defendant allegedly acting as agent for the Claimant. Counsel contended that the Second Defendant relies on clauses 2 and 4(b) of the agreement for this relationship of agency. Accordingly, it was submitted that the first hurdle the Second Defendant must overcome is to demonstrate that, on any possible construction of the terms they refer to or any other terms of the agreement, the First Defendant was acting as the agent of the Claimant. It was argued by attorney for the Claimant that when one looks at the terms of the agreement it unequivocally contradicts the contention of the Second Defendant that the

First Defendant was the Claimant's agent. Further that even if the court were to hold that the First Defendant was an agent of the Claimant, it could not be said that the knowledge they acquired in another capacity becomes the knowledge of the principal so as to fix the principal (the Claimant) with responsibility for any of the alleged acts the Second Defendant says were done by the First Defendant.

14. Counsel also submitted that it is not possible to find that there was an unconscionable bargain because the case for the Second Defendant does not meet the essential criteria giving rise to unconscionable bargain as follows:

**1. The Second Defendant has not demonstrated they she was at a disadvantage or that there exists some kind of disadvantage.**

There was no disadvantage as the Second Defendant was legally assisted. She obtained full legal advice as is evident from the terms of both letters from her attorney abroad.

**2. There must be an exploitation of that disadvantage by the Claimant or its agents.**

This has not been demonstrated. The negotiations were conducted by her Attorney.

**3. The transaction must be so oppressive so as to be unconscionable.**

There is no question of the transaction being oppressive. The price of TT\$6 million was negotiated by her through her attorney acting on her behalf. This is reflected in email correspondence dated 1<sup>st</sup> February 2013 and 6<sup>th</sup> February 2013.

First Defendant

15. Counsel for the First Defendant submitted that the courts function having examined the evidence is to determine whether fuller investigation would produce a different outcome. It was contended on behalf of the First Defendant that it would not.

16. Attorney for the First Defendant argued that the only way the Second Defendant's defence of unconscionable bargain can succeed is by proof that the Claimant knew of the circumstances in which the Second Defendant alleged she was in and sought to take advantage of those circumstances. This is because the agreement was made between the Claimant and the First Defendant and the Claimant and the Second Defendant; there was no privity of contract between the First Defendant and the Second Defendant. In relation to the obligation contained in the contract recording the undertaking by the First Defendant to get the Second Defendant's consent, Counsel for the First Defendant contends that this is typical of commercial contracts. Counsel submitted that this is typical in transactions where title is not in the hands of the seller but would be obtained by the time of completion. Counsel submitted therefore that the agreement anticipated that consent could not be obtained, at the particular time as the First Defendant was only possessed of a leasehold interest with the reversion vested in the Second Defendant.

17. Attorney for the First Defendant submitted the following points on the issue of unconscionable bargain:

- a. That there is no evidence of the Claimant's financial position.
- b. The Second Defendant was not poor.
- c. That there is no evidence of the value of the land to conclude that there had been an undervalue.

### Second Defendant

18. It was submitted on behalf of the Second Defendant that the threshold guideline for summary judgment must be applied with caution given the nature of the Second Defendant's Defence. Counsel contended this case ought to go to trial in order that the court examines the evidence carefully.



19. Counsel for the Second Defendant argued that the undertaking given by the First Defendant to seek the consent of the Second Defendant indicates a relationship of agency. Further that the Second Defendant is not a party to the principal agreement on which this court is being asked to order specific performance against the Second Defendant (agreement dated 23<sup>rd</sup> January 2013) and that she only knew of it after the fact. That this is an agreement by which the First Defendant contracts to sell the Second Defendant's land to the Claimant. Attorney for the Second Defendant contended that by that agreement the First Defendant expressed an unequivocal obligation to the Claimant that they obtain the Second Defendant's consent to being bound by this agreement signed without her knowledge. Thus, acting as the agent of the Claimant in that regard therefore, it is the case of the Second Defendant that several representations were made to her by Mr. Simonette and Ms. Carrmuddeen, (both Attorneys-at-law) on behalf of the Claimant knowing her to be in ill health, knowing her to be suffering from anxiety and from the condition of insomnia.

### **Findings**

20. The terms of a contract may be contained in more than one document, for example where made subject to standard terms. Terms in one document may be incorporated into a contract thus by reference to the contract. Individual contracts may be subject to a master contract, even though they do not refer to it. All that is required is a clear intention of the parties that the terms contained in that one or more documents be incorporated into their agreement: see *Halsbury's Laws of England, Volume 22 (2012) 5<sup>th</sup> Edition para 286*.

21. The court is of the view that this is the effect of clause 1 of the agreement dated 23<sup>rd</sup> January 2013 (page 2 of agreement) and the letter signed by the Second Defendant dated 29<sup>th</sup> April 2013. The agreement of the 23<sup>rd</sup> January 2013 is conditional upon the Second Defendant's subsequent agreement and the letter of 29<sup>th</sup> April 2013 specifically refers to and incorporated the agreement. Thus, the court does not agree with the submission of

attorney for the Second Defendant that the Second Defendant was not a party to the agreement of the 23<sup>rd</sup> January 2013.

22. As stated above therefore the court's concern on this application is whether the facts before it and in the court's estimation the facts likely to come before it at trial are such as to give the Second Defendant's defence of unconscionable bargain a realistic chance of succeeding.

23. The court has jurisdiction, independent of the principles of undue influence, to set aside unconscionable bargains. It is an equitable jurisdiction and is raised whenever one party to a transaction suffers from certain kinds of disability or disadvantage: **Taran Maharaj v Shirley Neemah (as Legal Personal Representative of Robert Neemah, deceased); Gerald Neemah** H.C.S.1649/2001. Thus, relief is granted to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other: ***Halsbury's Laws of England (VOLUME 22 (2012) 5TH EDITION para 298***. The jurisdiction will not be exercised unless the purchaser was guilty of unconscionable conduct; it is not sufficient that the parties had unequal bargaining power or that the terms of the bargain were more favourable to one party than to another: **Rasheed Mohammed v Dheerajie Benny** CV.2007-205. Further, relief will not be granted solely on the grounds that the transaction is unfair or improvident.

24. In ***Bank of Bermuda Ltd v Pentium*** Civil Appeal No 14 of 2003 BVI it was stated:

*“A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled,*

*without more, merely so say in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."*

See *Copyright Music Organisation of Trinidad and Tobago (formerly Copyright Organisation of Trinidad and Tobago) v Columbus Communications Trinidad Limited Trading as "FLOW* CV. 2009-04722

25. The court is of the view that on the facts before the court, there is not sufficient evidence of unconscionable bargain. Of paramount importance in this case, is that the documentary evidence shows that negotiations for the sale were carried out through the Second Defendant's Attorney-at-law in the United States, Mr. Leonard Koenick of the firm of Kivitz & Liptz. In fact the negotiations on the sum payable to the Second Defendant were on going before the letter of the 29<sup>th</sup> April 2013 was signed by the Second Defendant.
26. What is more, the Second Defendant has failed to demonstrate any impairment of mind or impoverished state and the court has no reason to reasonably anticipate that such evidence will be forthcoming if this matter goes to trial. To do so would be in the court's view, to speculate as ample opportunity has been given for so doing during the hearing of this application and despite the fact that the Second Defendant has filed affidavits and at least one has been filed on her behalf, no such evidence has been forthcoming. To this must be added the facts that independent legal advice was rendered and parties appeared to be negotiating on an even footing. (See email dated 6<sup>th</sup> February 2013 from Garvin Simonette to Mr. Leonard Koenick attached to affidavit of Faikah Carmudden which clearly demonstrates the negotiations which led to the sum payable to the Second Defendant being increased from TT\$3.5 million to US\$1 million).
27. Further, the fact that the Second Defendant has said that she is of the view that the said land was more valuable than the price offered by the Claimant and that the amount offered to her did not represent her fair share based on what she would expect to be the true market value simpliciter, is grossly insufficient to demonstrate to the court that that

is in fact the case or that such evidence will be forthcoming. There simply appears to be no factual basis presented for so alleging.

28. Additionally, there is nothing in the agreement which can be construed as indicating an agency relationship between the First Defendant and the Claimant. It would seem to the court that the undertaking of the First Defendant to obtain the agreement of the Second Defendant to participate in the sale was one of convenience of practicality and convenience, the Second Defendant being a minority shareholder of the First Defendant. In her defence, the Second Defendant averred that she has not been involved in the running of the First Defendant and has always relied on information and advice provided to her by the other officers of the First Defendant. Thus, a conclusion that the First Defendant undertook to obtain participation of the Second Defendant as agent for the Claimant in the face of no evidence in support or no evidence which can reasonably be expected to be elicited in that respect is less probable than a conclusion that it was an arrangement of convenience and practicality.

29. The court also agrees with the submission of attorney for the First Defendant that without the establishment of an agency between the First Defendant and the Claimant, the Second Defendant's defence to the breach of contract claim by the Claimant, cannot be maintained and, even with a fuller investigation at trial, will not succeed. The Second Defendant must be able to prove that in the transaction, she was under a particular disadvantage and **the Claimant**, (whether through an agent or otherwise) has treated with her in an unfair manner. The court's jurisdiction will not be exercised unless **the purchaser** was guilty of unconscionable conduct, whether by himself or through an agent. It therefore means that the assertion in the affidavit of the Second Defendant that Ms. Carrmuddeen and Mr. Simonette both told her that if she did not sell, the bank was likely to take the property, is of no assistance to her unless a link has been established by way of agency. While the court must consider evidence expected to be available at trial, the court can see no evidence likely to indicate a relationship of agency. Without the link of agency the defence of unconscionable bargain has no realistic prospect of success.

30. The court has also considered in this case that the facts demonstrate that the parties were involved in a commercial transaction for a considerable sum of money. But more importantly, this case is distinguishable from the case where an ordinary lessee would seek to transfer the remainder of his lease for valuable consideration and at the same time agree to obtain the consent of the unrelated landlord to sell the reversion to the purchaser. If these were the circumstances the complexion of the case may well have been somewhat different. In this case however, the reversioner is also a minority shareholder in the First Defendant Company whose assets are being disposed of in the face of financial hardship being experienced by the company's business. It is in those circumstances that the Second Defendant would have obtained advice from her foreign lawyers in relation to what is essentially a business transaction in respect of which she would have made a business decision that was in her best interest at the time being informed of the relevant facts.

31. For these reasons, the judgment of the court is therefore as follows:

*a.* Judgment for the Claimant in the following terms:

- i.* The Defendants are to execute a Deed of Conveyance transferring their respective interests in that parcel of land situate in the Ward of Arima, more particularly described in Deed of Lease dated 3<sup>rd</sup> April 1997 and registered as No 7626 of 1997 and the buildings situate thereon to the Claimant on the payment by the Claimant of the balance of the purchase price of TT\$25 million as follows:
  1. TT\$17.75 million to the First Defendant; and
  2. TT\$6 million to the Second Defendant.
- ii.* In default of the Defendants executing the necessary Deeds in compliance with this order, the Registrar of the Supreme Court of Trinidad and Tobago is to execute the said Deeds on behalf of the Defendants or either of them.

- b.* The Second Defendant is to pay to the Claimant the costs of the application to be agreed by the parties or quantified by a Registrar in default of agreement.
  
- c.* 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 18<sup>th</sup> day of September 2014

Ricky Rahim

Judge