

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-00357

**BETWEEN**

**FAROOK NOAH ALI**

Claimant

AND

**TOWHEED BAKSH**

Defendant

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

**Appearances:**

Mr. N. Lutchman by for the claimant

Ms. M. Murray assisted by Ms. L. Persad for the defendant

## **Reasons**

1. On the 15<sup>th</sup> March, 2018 the Court gave the following judgement;
  - i. The Claim is dismissed;
  - ii. The Claimant is to pay to the Defendant the prescribed costs of the Claim based on the value of the Claim being that of One Million, Six Hundred and Eighty-One Thousand dollars (\$1,681,000.00).
2. On that day very brief reasons were delivered orally. These are the written reasons.

### **Brief background**

3. According to the claimant, by written agreement dated the 31<sup>st</sup> January, 2013 he agreed to purchase and the defendant agreed to sell a parcel of land situate at 34 Newbury Hill, Glencoe (“the land”). The claimant alleged that the defendant breached the sale agreement prior to its completion date. That the defendant wrongfully rescinded the sale agreement and forfeited all the monies which was paid by the claimant towards the purchase of the land. As such, by Claim Form filed on the 30<sup>th</sup> January, 2017 the claimant sought damages for loss of profit, damages for loss of bargain and a return of all the monies he paid towards the purchase of the land which amounted to \$1,681,000.00.
4. By Amended Defence filed on the 18<sup>th</sup> July, 2017 the defendant admitted that he entered into an agreement with the claimant for the sale of the land. He averred that at clause 6 of the written agreement, the claimant and he agreed that if the claimant breached any of the terms of the agreement, the defendant would be entitled to forfeit all of the payments made towards the purchase of the land. The defendant further averred that although he notified the claimant in writing that he was to complete the sale agreement by paying the balance due on the purchase price of the land on or before the 31<sup>st</sup> December, 2014 (time being of

essence), the claimant failed to make any payments towards the completion of the sale. As such, it was the case of the defendant that he had a right to rescind the agreement and forfeit the monies paid by the claimant towards the purchase of the land. Moreover, the defendant averred that the total sums paid under the sale agreement was \$1,535,000.00 and not \$1,681,000.00.

### **The case for the claimant**

5. The claimant gave evidence for himself. During cross-examination, he testified that he has been a building contractor for the past forty years. That he is usually contracted by persons to build properties. He further testified that he does not build properties on lands owned by him to sell. That this was the first time he decided to venture into buying lands to build houses to sell.
6. According to the claimant, on the 19<sup>th</sup> December, 2012 (“the 2012 agreement”) he entered into a written agreement with the defendant to purchase the land.<sup>1</sup> In the 2012 agreement, Sadiq Baksh (“Sadiq”) signed on behalf of the claimant as his lawful authorized agent. During cross-examination, the claimant testified that Sadiq is his friend. That Sadiq was his authorized agent to handle the purchase of the land and that this was the first time Sadiq acted on his behalf in the purchase of land. The 2012 agreement provided as follows;

*“I Toweed Baksh acknowledge receipt of the amount of \$50,000.00 from Mr. Noah Ali as a down payment towards the purchase of land known as 34( ) Newbury Hill, Glencoe. Mr. Sadiq Baksh will act as a liaison between Mr. Towheed Baksh and Mr. Noah Ali as Agreed upon by both parties. A legal contract will be drawn up by the owner (Mr. Towheed Baksh) the mortgagor as agreed by both parties.”*

7. The claimant testified that on the 31<sup>st</sup> January, 2013 the defendant presented Sadiq with a document of even date (“the 2013 document”).<sup>2</sup> Sadiq also signed this document on behalf

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<sup>1</sup> A copy of this agreement was attached to the claimant’s witness statement at “1”.

<sup>2</sup> A copy of this document was attached to the claimant’s witness statement at “2”.

of the claimant. According to the claimant, this document was not the legal contract stipulated in the 2012 agreement. During cross-examination, he testified that this document was a draft and not the final agreement and that is why he did not sign same. The 2013 document provided as follows;

*“... As per schedule for payments as agreed by both parties:*

*Received \$50,000.00 TTD as down payment on land*

*Cheque was returned and replaced with \$50,000.00 in cash as acknowledged by Mr. Towheed Baksh*

*1) 200,000.00 TTD on Monday 4<sup>th</sup> February, 2013 (on or before not later)*

*2) 250,000.00 TTD on Wednesday 27<sup>th</sup> March, 2013 (on or before not later)*

*3) 200,000.00 TTD on Monday 1<sup>st</sup> July, 2013 (on or before not later)*

*4) 200,000.00 TTD on Monday 18<sup>th</sup> November, 2013 (on or before not later)*

*5) Full payment by November 2014 or before at no interest charge, balance of 1.4M TTD*

*6) Mr. Ali understands that any breach of any of these terms can lead to forfeiture of all payments.*

*There will be no interest charge, but a late penalty payment....”*

8. During cross-examination, the claimant was referred to the 2013 document. He testified that the dates outlined in the 2013 document were not binding. That the purpose of the arrangement he had with the defendant was to allow him flexibility in the payment of the monies for the purchase of the land. As such, it was the testimony of the claimant during cross-examination that he did not abide by the dates for payment as outlined in the 2013 document. That he paid the monies due in between those dates and even before the dates that were recorded in the 2013 document.
9. Further during cross-examination, the claimant testified that clause 6 of the 2013 document was not discussed with him. The claimant then testified that he did sign the 2013 document because he was not in agreement with same. The claimant gave this testimony notwithstanding the fact that he agreed earlier that Sadiq acted on his behalf in this matter and that he was not at odds with Sadiq's actions. Subsequently, during cross-examination, the claimant testified that Sadiq signed this document as a witness.

10. During cross-examination, the claimant testified that he made the first payment of \$50,000.00 by cheque and that as his cheque was dishonoured, he replaced the cheque with \$50,000.00 in cash. That although the 2013 document acknowledged receipt of the \$50,000.00, in cash, he paid same prior to the 31<sup>st</sup> January, 2013. He gave Sadiq the \$50,000.00 in cash to give to the defendant. Further during cross-examination, he testified that the \$50,000.00 was not a ten percent deposit of the purchase price of the land which was \$2,300,000.00.
11. On or about January, 2014 the defendant sent a formal contract to the claimant to be executed.<sup>3</sup> This contract was dated the 1<sup>st</sup> January, 2014 and contained an acknowledgement of the funds that were already paid at that time towards the purchase price of the land (“the 2014 contract”). The 2014 contract stated that the payments made at that time was \$1,050,000.00. The claimant signed the contract and returned same to the defendant. However, the claimant did not witness the defendant sign the contract.
12. The claimant continued to make payments towards the purchase price of the land. He testified that those payments were made at the defendant’s request. During cross-examination, the claimant testified that he was aware of the following payments;
- i. The payment of a cheque for \$50,000.00 made by Sadiq through his company Bakshplus Industries on the 5<sup>th</sup> May, 2014;
  - ii. The payment of \$500,000.00 made by Sadiq through his company on the 16<sup>th</sup> June, 2014;
  - iii. A payment of \$70,000.00 by certified cheque made by the claimant on the 8<sup>th</sup> August, 2014; and
  - iv. A payment of \$15,000.00 in cash made by the claimant on the 3<sup>rd</sup> October, 2014.
13. However, the claimant then attempted to retract his statement that he paid the defendant \$15,000.00 on the 3<sup>rd</sup> October, 2014. He testified that the payment of the \$15,000.00 may have been paid sometime before.

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<sup>3</sup> A copy of this contract was annexed to the claimant’s witness statement at “3”.

14. On or around October, 2014 the defendant sent the claimant a letter dated the 1<sup>st</sup> October, 2014.<sup>4</sup> In this letter, it was stated that an agreement was made between the defendant and a third party, Raj Arjoon (“Arjoon”) for the sale of the land in the event that the claimant defaulted on his sale agreement. The letter further stated that the defendant was holding \$500,000.00 from Arjoon in an escrow account as a down payment for the purchase of the land. Moreover, by this letter the defendant demanded that the remainder owed by the claimant on the land be paid by the 14<sup>th</sup> November, 2014. This letter contained the signature of Arjoon.
15. The defendant sent another letter dated the 3<sup>rd</sup> October, 2014 to the claimant outlining the breakdown of the remaining sums owed by the claimant towards the purchase price of the land.<sup>5</sup> This letter contained alleged legal fees of \$255,000.00. During cross-examination, the claimant testified that he told the defendant that he did not understand how the legal fees came about but that he and the defendant did not arrive at any settlement.
16. Upon receiving the abovementioned letters, the claimant immediately contacted the defendant and demanded that he reverse what he had done and to ensure that title to the land had not passed. The claimant became worried that his stake in the land and the money he paid towards the land was jeopardized. The defendant’s behavior led the claimant to believe that he was being conned. As such, the claimant testified that he became very reluctant to pay any more money. During cross-examination, the claimant testified that in November, 2014 he did have the monies to pay the balance outstanding on the land but that he neither informed the defendant that he had the money nor paid same to the defendant because he was under the impression that the land was sold.
17. The claimant made numerous attempts to resolve the issue with the defendant but the defendant did not do anything. In light of the claimant’s failed communications with the defendant, the claimant wrote a letter dated the 21<sup>st</sup> November, 2014 to the defendant.<sup>6</sup> By this letter, the claimant told the defendant that his actions amounted to a breach of contract

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<sup>4</sup> A copy of this letter was annexed to the claimant’s witness statement at “4”.

<sup>5</sup> A copy of this letter was annexed to the claimant’s witness statement at “5”.

<sup>6</sup> A copy of this letter was annexed to the claimant’s witness statement at “6”.

and that unless the state of affairs were rectified, legal action would have ensued. Further, by this letter the claimant also raised the issue that despite the agreement for sale, the defendant continued to advertise the land for sale. The defendant failed to respond to this letter.

18. By letter dated the 12<sup>th</sup> December, 2014 the defendant's Attorneys-at-law informed the claimant that he had until the 31<sup>st</sup> December, 2014 to pay the balance of the purchase price which was \$619,000.00 and that time was of the essence.<sup>7</sup> This letter further informed the claimant that if he defaulted to complete the purchase, the defendant would exercise his right to rescind the agreement and forfeit the monies paid on account of the purchase price. According to the claimant, this letter did not address any of the concerns he raised in his letter dated the 21<sup>st</sup> November, 2014. During cross-examination, the claimant testified that he did not pay the monies to the defendant because he did not know if he could have trusted the letter.

19. By letter dated the 29<sup>th</sup> December, 2014 the claimant responded to the defendant's above mentioned letter by stating that he was willing to make good on the agreement and adhere to the payment schedule so long as the defendant provided him with information to prove that the issues he had raised had been dealt with.<sup>8</sup>

20. By letter dated the 7<sup>th</sup> January, 2015 the defendant's Attorneys-at-law rescinded the agreement and retained all of the monies paid by the claimant towards the purchase price of the land.<sup>9</sup> According to the claimant, the sum which was paid by him was \$1,681,000.00.

21. By letter dated the 29<sup>th</sup> January, 2015 the claimant responded to the defendant's letter dated the 7<sup>th</sup> January, 2015 by stating that all the issues he had raised had been ignored, that the defendant's actions had prejudiced his interest in the land and that as such it was not suitable for him to continue to make payments until the issues had been addressed satisfactorily.<sup>10</sup> The defendant did not respond to this letter.

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<sup>7</sup> A copy of this letter was annexed to the claimant's witness statement at "7".

<sup>8</sup> A copy of this letter was annexed to the claimant's witness statement at "8".

<sup>9</sup> A copy of this letter was annexed to the claimant's witness statement at "9".

<sup>10</sup> A copy of this letter was annexed to the claimant's witness statement at "10".

22. According to the claimant, the defendant failed to repay him any of the money which he paid towards the purchase of the land. As a result, by pre-action protocol letter dated the 24<sup>th</sup> October, 2016 the claimant demanded the return of all the monies he paid to the defendant towards the purchase of the land.<sup>11</sup> This letter was premised on the belief that the defendant had duly executed the 2014 contract.
23. By letter dated the 15<sup>th</sup> November, 2016 the defendant's then Attorney-at-law responded to the claimant's pre-action protocol letter by stating that the 2014 contract was not executed.<sup>12</sup> As such, the claimant testified that the defendant did not sign the 2014 contract. According to the claimant, like all other letters sent to him by the defendant, this letter failed to address any of the concerns and/or issues he raised.
24. By letter dated the 28<sup>th</sup> November, 2016 the claimant's Attorney-at-law informed the defendant's Attorney-at-law that an action for the recovery of the monies paid by the claimant to the defendant would be initiated at the High Court.<sup>13</sup>
25. By letter dated the 2<sup>nd</sup> December, 2016 the defendant's Attorney-at-law referred to the claimant's letter of the 28<sup>th</sup> November, 2016 and stated that the claimant's attorney failed to address any of the issues arising out of the claimant's breach of the 2014 agreement, the notice to complete dated the 12<sup>th</sup> December, 2014 and the termination notice dated the 7<sup>th</sup> January, 2014.<sup>14</sup> This letter further stated that the fact the defendant accepted a down payment from a third party during the life of the existing agreement with the claimant had no bearing on the matters outlined in the defendant's letter of the 15<sup>th</sup> November, 2016.
26. According to the claimant, the defendant dishonoured the agreement for sale of the land. The claimant testified that he entered into the agreement so that he would afforded security for the purchase of the land. That he enjoyed no security over the purchase of the land as the defendant caused him to feel as if he was being conned and that the land would have

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<sup>11</sup> A copy of this letter was annexed to the claimant's witness statement at "11".

<sup>12</sup> A copy of this letter was annexed to the claimant's witness statement at "12".

<sup>13</sup> A copy of this letter was annexed to the claimant's witness statement at "13".

<sup>14</sup> A copy of this letter was annexed to the claimant's witness statement at "14".



been sold to a third party. The claimant further testified that the defendant failed at every opportunity to provide reasonable responses to his requests. That he was able and ready at all points to complete the sale.

27. The claimant testified that the defendant's actions and behaviour raised a high degree of suspicion. That the defendant's actions caused him (the claimant) to become circumspect in his dealing with the defendant which in turn caused him to send numerous letters to the defendant which went unanswered.
28. According to the claimant, the defendant was fully aware that he had plans to build four condominium units on the land for rental purposes. That those plans together with potential rental charges and profits were discussed with the defendant. The Construction Supervisor of the claimant's contracting company was present when those discussions took place. Sadiq was also present for several of those meetings.
29. The land has since been sold and the new owner has already started construction on a similar project to that of the claimant. According to the documents disclosed to the claimant by the defendant's attorney, the new owner of the land is not Arjoon.

### **The case for the defendant**

30. The defendant gave evidence for himself. He is a businessman. He testified that sometime in 2012, his friend Sadiq introduced him to the claimant. Sadiq informed the defendant that the claimant wanted to buy the land. Sadiq further informed the defendant that the title to the land would be put in the claimant's name and that he (Sadiq) would be responsible for the payment of the purchase price.
31. According to the defendant, Sadiq agreed to a purchase price of \$2,300,000.00 but asked that the defendant agree to accept payment for the land in instalments over a two year period. Sadiq further asked the defendant to treat the arrangement as a mortgage whereby all the moneys paid under the agreement would be forfeited once any of the instalments was not paid in accordance with the schedule for payments which was eventually agreed

upon. The defendant testified that no interest was charged on the payments because of his religious belief (the court understands this to mean that persons of the Islamic faith are not permitted to receive interest on money loaned) and that Sadiq agreed to those terms.

32. On the 19<sup>th</sup> December, 2012 Sadiq gave the defendant a cheque in the sum of \$50,000.00 towards the purchase price as a show of good faith until they entered into a legal contract. This cheque was drawn on the account of the claimant. The defendant testified that Sadiq and he then signed a letter dated the 19<sup>th</sup> December, 2012 in which they agreed that the purchase of the land in the claimant's name was to be treated like a mortgage in that if any instalment was not paid as agreed, the defendant would be entitled to forfeit the monies paid under the agreement.<sup>15</sup>

33. When the defendant attempted to cash the abovementioned cheque for \$50,000.00, it was dishonoured by the bank.<sup>16</sup> Sadiq then offered to pay the sum of \$50,000.00 to the defendant when they entered into the legal contract. The defendant became enraged by the dishonoured cheque and told Sadiq that he no longer wanted to do business with the claimant. However, Sadiq begged the defendant not to back out of the sale of the land to the claimant and promised that all payments would be honoured.

34. On the 30<sup>th</sup> January, 2013 Sadiq sent an email to the defendant and copied the claimant.<sup>17</sup> This email read as follows;

*"Dear Mr. Baksh,*

*This is just a note to give you an update.*

*1) Mr. Ali (the claimant) will pay an additional 200,000 TTD on Monday 4<sup>th</sup> February, 2013*

*2) Mr. Ali will pay an additional 200,000 TTD on 1<sup>st</sup> May 2013*

*3) Additional 400,000 by the end of 2013*

*4) Full payment by the end of 2014 or before at no interest charge.*

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<sup>15</sup> A copy of this letter was annexed to the defendant's witness statement at "A".

<sup>16</sup> A copy of the dishonoured cheque dated the 18<sup>th</sup> December, 2012 was annexed to the defendant's witness statement at "B".

<sup>17</sup> A copy of this email was annexed to the defendant's witness statement at "C".

*5)Mr. Ali understands that any breach of any of these terms can lead to forfeiture of all payments.”*

35. On the 31<sup>st</sup> January, 2013 Sadiq gave the defendant \$50,000.00 in cash to replace the monies which was not paid by the dishonoured cheque. The defendant accepted the money and Sadiq and he signed an agreement dated the 31<sup>st</sup> January, 2013 (“the 2013 agreement”). According to the 2013 agreement, it was agreed that the purchase price would be paid in the following instalments;

- i. \$50,000.00 in cash on signing;
- ii. \$200,000.00 on or before the 4<sup>th</sup> February, 2013;
- iii. \$250,000.00 on or before the 27<sup>th</sup> March, 2013;
- iv. \$200,000.00 on or before the 1<sup>st</sup> July, 2013;
- v. \$200,000.00 on or before the 18<sup>th</sup> November, 2013;
- vi. Balance of \$900,000.00 on or before November, 2014.<sup>18</sup>

36. The defendant testified that it was made clear in the 2013 agreement that the claimant understood that any breach of any of the terms of the agreement could lead to forfeiture of all payments and that no interest would be charged on the instalments. During cross-examination, the defendant testified that both Sadiq and he made it clear to the claimant that if he defaulted on the payment schedule, the monies paid would be forfeited.

37. During cross-examination, the defendant was referred to the 2013 agreement. The defendant testified that the payment schedule in this agreement was drafted to give the claimant leeway to pay for the land. He agreed that as stated in the 2013 agreement, he did change the payment schedule due to his financial obligations. It was then put to the defendant that the purpose of the payment schedule was not to give the claimant leeway to make payments but that it was drafted to meet his financial obligations. The defendant responded by stating that the land was supposed to be sold immediately but that as Sadiq wanted to help the claimant, he (the defendant) went ahead and agreed to incorporate a

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<sup>18</sup> A copy of this agreement was attached to the defendant’s witness statement at “D”.

payment schedule into the agreement. That it was only obvious that if a person was taking two years to pay for his land, he would make some sort of arrangement based on his financial obligations.

38. On the 4<sup>th</sup> February, 2013 Sadiq gave the defendant a certified cheque for \$170,000.00 and an ALICO Ltd. company cheque for \$30,000.00. Sadiq informed the defendant that ALICO Ltd. was the claimant's company. The defendant testified that the company cheque was dishonoured and that Sadiq later gave him \$30,000.00 in cash to replace it.<sup>19</sup>

39. On the 27<sup>th</sup> March, 2013 Sadiq gave the defendant another cheque from ALICO Ltd. for the sum of \$250,000.00. This cheque was also dishonoured.<sup>20</sup> On the 5<sup>th</sup> April, 2013 Sadiq replaced that cheque with a certified cheque for the same amount. On the 1<sup>st</sup> July, 2013 Sadiq gave the defendant another certified cheque for the sum of \$250,000.00.

40. According to the defendant, up to July, 2013 the sum of \$750,000.00 was paid under the 2013 agreement. The defendant testified that he told Sadiq that he did not feel comfortable working with the claimant as his cheques were not being honoured. Sadiq promised the defendant that he (Sadiq) would make the remaining payments through his company, Bakshplus Industries Limited ("Bakshplus"). On the 1<sup>st</sup> November, 2013, Sadiq made a payment of \$150,000.00 which brought the total paid up to then to \$900,000.00.

41. The defendant testified that after receiving all of the abovementioned dishonoured cheques from the claimant, he prepared a formal sale agreement dated the 1<sup>st</sup> January, 2014 ("the 2014 agreement"). According to the defendant, the 2014 agreement outlined the terms already agreed upon and acknowledged the moneys already received.<sup>21</sup> The defendant further testified that the sum of \$1,050,000.00 stated in the 2014 agreement as being received by him up to that time was inaccurate. That he in error counted the \$150,000.00 he received from Sadiq on the 1<sup>st</sup> November, 2013 twice and incorrectly came up with a

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<sup>19</sup> A copy of the dishonoured cheque dated the 4<sup>th</sup> February, 2013 was annexed to the defendant's witness statement at "E".

<sup>20</sup> A copy of the dishonoured cheque dated the 27<sup>th</sup> March, 2013 was annexed to the defendant's witness statement at "F".

<sup>21</sup> A copy of the 2014 agreement was annexed to the defendant's witness statement at "G".

total of \$1,050,000.00 instead of a total of \$900,000.00. As such, it was his testimony that as at January, 2014 he had received the sum of \$900,000.00 towards the purchase price of the land.

42. The defendant testified that by the 2014 agreement, the balance due was \$1,250,000.00 and that the claimant agreed to pay that balance ninety days after the date of the agreement which was the 31<sup>st</sup> March, 2014 (“the completion date”). The defendant further testified that clause 6 of the 2014 agreement made it clear that the moneys paid towards the purchase price of the land would be forfeited should the claimant default in payment of the instalments due under the agreement.
43. A few days after the completion date, the defendant contacted Sadiq and demanded that he pay the balance of the purchase price. The defendant further informed Sadiq that failure to pay the balance would result in the forfeiture of the monies paid. The defendant testified that Sadiq begged him to hold his hand and stated that he would need some time to come up with the rest of the money.
44. On the 5<sup>th</sup> May, the 6<sup>th</sup> June, the 8<sup>th</sup> August and the 3<sup>rd</sup> October, 2014 Sadiq paid the defendant \$50,000.00, \$500,000.00, \$70,000.00 and \$15,000.00 respectively. Consequently, the amount paid by the claimant and Sadiq totaled to the sum of \$1,535,000.00.
45. On the 1<sup>st</sup> October, 2014 the defendant wrote to the claimant informing him that he would sell the land to Arjoon if he (the claimant) did not pay the sum of \$885,000.00 no later than the 14<sup>th</sup> November, 2014.<sup>22</sup> By letter dated the 3<sup>rd</sup> October, 2014 the defendant outlined for the claimant how he arrived at the sum of \$885,000.00.<sup>23</sup> The sum of \$630,000.00 was the balance of the purchase price and the sum of \$255,000.00 was for legal fees. The defendant then deducted the sum of \$15,000.00 which the claimant paid to him on the 3<sup>rd</sup> October, 2014 and so this letter stated that a balance of \$870,000.00 was due and owing under the agreement for sale.

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<sup>22</sup> A copy of this letter was annexed to the defendant’s witness statement at “H”.

<sup>23</sup> A copy of this letter was annexed to the defendant’s witness statement at “I”.

46. According to the defendant, neither Sadiq nor the claimant made any further payment under the agreement for the sale. Consequently, by letter dated the 12<sup>th</sup> December, 2014 the defendant's lawyer demanded that the claimant pay the balance of \$619,000.00 which was the sum the defendant's lawyer informed the defendant was due and owing on the sale agreement.<sup>24</sup> By this letter the claimant was also given final notice to complete the purchase of the land and to pay the balance of the purchase price of \$619,000.00 on or before the 31<sup>st</sup> December, 2014 time being of essence.

47. The defendant testified that the claimant failed to pay him the sum of \$619,000.00 to complete the sale. As such, by letter dated the 7<sup>th</sup> January, 2015 the defendant's lawyer notified the claimant that the agreement for sale of the land was rescinded.<sup>25</sup> The defendant testified that he was advised by his lawyer that the moneys paid under the agreement for sale was instalments and that he (the defendant) was entitled to forfeit the monies as the claimant had defaulted on the agreement.

### **Issues**

48. The issues in this case were as follows;

- i. Whether there was a legally binding agreement between the claimant and the defendant for the sale of the land;
- ii. If there was a legally binding agreement, whether there was a breach of the agreement by either the claimant or the defendant; and
- iii. Whether the defendant was entitled to forfeit the money paid to him.

**Issues 1 & 2** – *whether there was a legally binding agreement between the claimant and the defendant for the sale of the land and if so, whether either the claimant or the defendant breached that agreement*

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<sup>24</sup> A copy of this letter was annexed to the defendant's witness statement at "J".

<sup>25</sup> A copy of this letter was annexed to the defendant's witness statement at "K".

## **The submissions of the claimant**

49. The claimant submitted that as document dated the 31<sup>st</sup> January 2013 sets out all the required criteria for an agreement for sale of land, it was a legally binding sale agreement between the defendant and him for the sale of the land (“the agreement”). That he was not relying on the 2014 agreement as same was not executed by the defendant. The claimant further submitted that that Sadiq did sign this agreement on his behalf. Moreover, the claimant submitted that as he failed to comply with the notice to complete, he breached the contract.

## **Findings**

50. Upon an evaluation of the evidence, the court found that the document dated the 31<sup>st</sup> January, 2013 was a legally binding agreement between the claimant and the defendant for the sale of the land (“the 2013 agreement”). That it was pellucid that Sadiq was acting on behalf of the claimant in the purchase of the land as both parties had accepted that to be the case.

51. The court further found that claimant was attempting to deceive the court when he testified during cross-examination that he did not comply with the payment schedule outlined in the 2013 agreement. The cheques dated the 4<sup>th</sup> February and the 27<sup>th</sup> March, 2013 which were made out to the defendant and which were dishonoured but replaced thereafter, clearly showed that the claimant attempted to comply with the schedule set out in the 2013 agreement. It means that the inference is that he considered this document to be the agreement for sale and he acted upon it. Equally, the defendant accepted the payments made pursuant to that particular payment schedule.

52. In the 2013 agreement, it was stated that the time to complete the sale of the land was November, 2014. By letter dated the 1<sup>st</sup> October, 2014 the defendant demanded that the remainder owed by the claimant on the land be paid by the 14<sup>th</sup> November, 2014. Further, by letter dated the 12<sup>th</sup> December, 2014 the defendant gave the claimant a final notice to

complete the purchase of the land by paying the outstanding balance of \$619,000.00 on or before the 31<sup>st</sup> December, 2014. This letter clearly stated that time was of essence. As such, the defendant extended the time for completion of the sale of the land and made time of essence for the completion. It was clear on the evidence that the claimant failed to comply with the notice. The court therefore found that the claimant was in breach of the contract.

53. Additionally, the court found that the fact that the defendant held \$500,000.00 from Arjoon in escrow as a down payment for the land did affect the marketability of the defendant's title to the land. The court so found because letter dated the 1<sup>st</sup> October, 2014 clearly stated that the defendant's agreement with Arjoon would only become effective in the event the claimant defaulted on the agreement. Consequently, the court found that the fact that the defendant held the money in escrow did not entitle the claimant to refuse to complete the sale agreement.

**Issue 3** - *whether the defendant was entitled to forfeit the money paid to him*

54. Clause 6 of the agreement provided as follows;

*“Mr. Ali understands that any breach of any of these terms can lead to forfeiture of all payments.”*

55. The claimant submitted that clause 6 was ambiguous. That such a clause must state unequivocally why that particular amount of money is being forfeited and the purpose the sums are being forfeited, be it for liquidated damages or any other damages. As such, it was the submission of the claimant that clause 6 was not an effective forfeiture clause.

56. The court found that clause 6 was clear and unambiguous and that it was similar to the usual clause used in that it was up to the vendor to determine whether he exercises the right of forfeiture or not. That the use of the words “*can be forfeited*” was not fatal to the forfeiture clause coming into effect. The court further found that the claimant clearly understood clause 6 and that the effect of non-payment or non-completion would lead to the forfeiture of all payments.



57. According to the claimant, the customary deposit which is ten percent is the sum ordinarily forfeited for a breach of a sale agreement. Consequently, the claimant submitted that he is entitled to a refund of all the monies he paid towards the purchase of the land save and except ten percent of the purchase price. In so submitting the claimant relied on the cases of Workers Trust & Merchant Bank Ltd. v Dojap Investments Ltd<sup>26</sup> and Gary Legge & another v Chris Ramsawack & another.<sup>27</sup> However, the facts of those two cases were distinguishable from this case in manner set out hereafter.

58. The case of Workers Trust supra the bank (as mortgagee) agreed at an auction to sell certain land to D. A deposit of twenty-five per cent (\$2,875,000) was required and paid. The rest of the purchase price was to be paid within fourteen days and time was expressly made of the essence. The contract also provided for the forfeiture of the deposit for any failure to comply with the terms of the contract of sale. D failed to make payment of the rest of the purchase price on the due date and the bank notified it that the contract had been rescinded and the deposit forfeited. D instituted proceedings for relief against the forfeiture of its deposit. Zacca CJ dismissed D's claim. The Court of Appeal, however, ordered the bank to repay fifteen per cent out of the twenty-five per cent deposit, but refused to make any order as to interest. The bank appealed to the Privy Council against the order of the Court of Appeal giving relief against the forfeiture of the deposit. The Privy Council dismissed the appeal. Their Lordships held as follows;

*“... it was well established that forfeiture of a deposit paid under a contract for the sale of land fell outside the general rule prohibiting the forfeiture under contractual provisions of a sum of money (penalty) for breach of contract; but it would be abusive to attach the incidents of a deposit to the payment of a sum of money unless such sum was reasonable as earnest money; the customary practice in Jamaica of a 10 per cent deposit in respect of a sale of land had been replaced since the introduction of the transfer tax (7.5 per cent of the consideration on the sale of land) in 1984 and in practice the contractual deposit was now normally at least 17.5 per cent; on the facts of the present case, however, there was*

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<sup>26</sup> (1993) 42 WIR

<sup>27</sup> CV2013- 00249

*no requirement for the deposit to include any sum in respect of transfer tax (and in practice it was unconscionable to forfeit deposits to the extent of 7.5 per cent, so far as that represented transfer tax); the evidence in the present case fell short of showing that a forfeitable deposit of 25 per cent was reasonable and the provisions for the forfeiture of such a sum, not being a true deposit by way of earnest, was plainly a penalty and the full sum (less any damage actually suffered by the bank by breach of contract) should be refunded by the bank; interest having duly been claimed by D, it should be paid at the contractual rate from the date of rescission).”*

59. As such, the case of **Workers Trust** supra dealt specifically with Jamaican legislation and further, the facts of the present case relate to part payments and not to a deposit only.
60. In the case of **Gary Legge** supra at paragraph 26 Seepersad J stated that the law recognizes that deposits have to be treated differently from instalments, as instalments are recoverable. However, the forfeiture clause in that case was quite different from the case at hand. That forfeiture clause specifically stated that the deposit made by the purchaser may be forfeited and retained by the vendor whereas in the case before this court the forfeiture clause related to **all payments made** as opposed to a deposit.
61. In the present case, the court found that the reason for having such a forfeiture clause in these circumstances was that of the grant of the facility which contained a material benefit to the purchaser which fell outside of the usual contract for sale provisions relating to payment. There was an extended period provided by the vendor for the payment of the purchase price in parts. In the usual contract for the sale of land, a ninety-day period is agreed for completion after the deposit has been paid. In this case, the period for completion set out in the 2013 agreement was twenty-two months. It was clear on the evidence both on the terms set out in the 2013 agreement and on the evidence of the defendant that the extended period for completion, being an extraordinary benefit to the claimant without any benefit to the defendant was agreed in an effort to facilitate the claimant’s ability to pay.

62. Further, it was clear on the agreement that the deposit was a separate amount from the other scheduled payments which were in fact part payments on the purchase price which the defendant agreed to receive in such a manner. In the courts' view, forfeiture of those payments did not amount to a penalty within the meaning so ascribed by *Lord Browne-Wilkinson* at **pages 6 and 7** of the *Workers Trust* case.

*“The question therefore arises whether the court has jurisdiction to relieve against the express provision of the contract that the deposit of 25% was to be forfeited. Although there is no doubt that the court will not order the payment of a sum contracted for (but not yet paid) if satisfied that such sum is in reality a penalty, it was submitted that the court could not order, by way of relief, the repayment of sums already paid to the defendant in accordance with the terms of the contract which, on breach, the contract provided should be forfeit. The basis of this submission was the view expressed in a considered obiter dictum of Romer L.J. in *Stockloser v. Johnson* (supra).*

*In that case there was a contract for the sale of quarry machinery to the plaintiff, the purchase price to be paid by instalments. The contract provided that in the event of a default in payment of the instalments, the vendor could retake the machinery and all instalments of the price previously paid should be forfeit. Pursuant to the contract, the plaintiff took possession and used the machinery but defaulted in payments of an instalment. The defendant forfeited the instalments already paid. In the action, the plaintiff sought to recover the instalments, alleging that their forfeiture was a penalty. The Court of Appeal unanimously held that the forfeiture did not constitute a penalty on the facts of that case but went on to express conflicting views, obiter, as to whether, if the forfeiture had been a penalty, the court had jurisdiction to order repayment. Somervell L.J. and Denning L.J. expressed the view that there was such jurisdiction. Romer L.J. held that there was no general right inequity to mend the parties' bargain and that, even where there was jurisdiction to relieve from forfeiture, that could only be exercised by allowing a late completion to a party who was in default in performance but willing and able to carry out the terms of the contract belatedly.*

*Their Lordships do not find it necessary to decide which of those two views is correct in a case where a party is seeking relief from forfeiture for breach of contract to pay a price by instalments, the party in default having been let into possession in the meantime. This is not such a case. In the view of their Lordships, since the 25% deposit was not a true deposit by way of earnest, the provision for its forfeiture was a plain penalty. There is clear authority that in a case of a sum paid by one party to another under the contract as security for the performance of that contract, a provision for its forfeiture in the event of non-performance is a penalty from which the court will give relief by ordering repayment of the sum so paid, less any damage actually proved to have been suffered as a result of non-completion: Commissioner of Public Works v Hills [1906] A.C. 368. Accordingly, there is jurisdiction in the court to order repayment of the 25% deposit”.*

63. This court found therefore that the part payments were not for the purpose of providing a security for completion and so the forfeiture was not a penalty. So that the facts of the present case were essentially different to the facts of that case however when the general principle set out therein is applied, in conjunction with the evidence, the defendant succeeds on the issue.
64. In so finding, the court would have accepted the testimony of the defendant under cross examination on that issue set out at paragraph 37 hereof which bears some repeating. The defendant testified that the payment schedule in the agreement was drafted to give the claimant leeway to pay for the land. He agreed that as stated in the 2013 agreement, he did change the payment schedule due to his financial obligations. It was then put to the defendant that the purpose of the payment schedule was not to give the claimant leeway to make payments but that it was drafted to meet his financial obligations. The defendant responded by stating that the land was supposed to be sold immediately (so that he would have collected the purchase price either immediately or within a reasonable period) but that as Sadiq wanted to help the claimant, he (the defendant) went ahead and agreed to incorporate a payment schedule into the agreement. That it was only obvious that if a person was taking two years to pay for his land, he would make some sort of arrangement based on his financial obligations.

65. In that regard the court found that the parties having been on even footing when they entered into the agreement, they both agreed (as they are entitled to do with any bargain) that all payments would be forfeited and that they did so with the full knowledge of the consequences.

66. Further, the claimant failed to demonstrate that the defendant was the party who breached the contract. As such, the court found that as the claimant was the one who breached the agreement, the defendant was entitled to forfeit the sums paid to him under the bargain made by both parties at arm's length.

67. For these reasons, the court therefore disposed of this claim in the manner set out at paragraph 1 above.

Dated this 23<sup>rd</sup> day of July, 2018

Ricky Rahim  
Judge