

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Sub-Registry San Fernando)

Claim No. CV2019-03731

BETWEEN

ERIC J. MOONILAL

ALDRICK MOONILAL

Claimants

AND

SEETA PITYMAN

JEEWAN MOONILAL

Defendants

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: June 22, 2021.

Appearances:

Claimants: Mr. A. Ashraph instructed by Ms. H. Lochan

Defendants: Mr. A. Ali instructed by Ms. D. Samaroo and Ms. S. Beach

JUDGMENT

Introduction

1. The claimants in this claim are siblings. The first defendant is their sister-in-law (brother's wife), and the second defendant is their nephew.
2. The claimants claim is that they are entitled to specific performance of an agreement for sale for a parcel of land.

The Claim

3. On December 1, 2016 the parties to the claim executed an agreement for sale of Lot No. 2 Hibiscus Drive, Pond Street, La Romaine ("the subject property") for the sum of \$100,000.00. Lot No. 2 which measured four hundred and seventy-one point four square metres¹. It is described as:

ALL AND SINGULAR that certain piece or parcel of land situate in (sic) at Hibiscus Drive Pond Street, La Romain in the Ward of Naparima, in the Island of Trinidad comprising ONE LOT measuring 471.4 square meters referred to as 2 upon the annexed survey plan dated 23/07/15 shown and coloured pink (being portion of a larger parcel of land described in the Schedule to the Deed registered as Protocol Deeds No. DE201100224052) and bounded on the North-East by an Estate Trace on the North-West by other lands of Palmiste Estates Limited Field Canaan 28 on the South-West by an Estate Trace and (sic) which said piece or parcel of land is shown

¹ See exhibit "C" of the SOC namely a survey plan dated February 3, 2017 from the Ministry of Food Production and Marine Affairs, Lands & Surveys Division.

coloured pink on the survey plan thereto attached and described in the Schedule to the Deed registered as DE201100224052.

4. It must be noted, that although the subject property before this court relates to Lot No. 2, there are two other agreements for sale which were executed on December 1, 2016, in respect of Lot No. 3 and Lot No. 5.
5. In relation to Lot No. 2, a deposit and part payment of \$50,000.00 was made by the claimants, the balance in the sum of \$50,000.00 to be paid within ninety days of the date of the agreement for sale². It is undisputed that the subject property is presently valued at \$500,000.00.
6. Although the claim lies in respect of Lot 2, the sale of Lot 5 is of some relevance as shall be set out later on. The second claimant and the defendants agreed to a sale of Lot 5 at the purchase price of \$60,000.00 and a down payment of \$40,000.00 was made.
7. The claimants allege that the defendants agreed to pay all legal fees as well as stamp duty in relation to the sale of Lot 2. It is undisputed that the agreement contains no contractual obligation that the defendants pay the stamp duty or the legal fees³.
8. When it came time to complete, the issue of which party was liable to pay stamp duty⁴ arose (see below) and the defendants refused to pay

² See exhibit "A" of the SOC namely clause 1 of the agreement for sale.

³ See exhibit "A" of the SOC namely the agreement for sale dated December 1, 2016 executed between the parties.

⁴ See exhibit "C" namely an undated Deed between the parties with an endorsement, *Building is dilapidated: Assessed as land only, non-residential, S/D 35,000.00*

the stamp duty so that there was no conveyance of Lot No. 2 to the claimants.

9. By letter dated April 4, 2019 Attorney for the claimants wrote to the defendants calling upon them to complete the agreement⁵. The defendants replied to the said letter and purported to rescind the agreement⁶. Subsequent correspondence between the parties appeared to demonstrate that the claimants were willing to complete the sale and would pay the legal fees and stamp duty but that the defendants maintained their position that the agreement had been terminated.

10. Accordingly, the claimants' claim is that they have suffered loss and damage without particularizing same. They are seeking *inter alia* the following:

- i. Specific performance of the agreement;
- ii. Damages for breach of the agreement;
- iii. Damages for loss of bargain.

The Defence and Counterclaim

11. The defendants denied that they agreed to pay stamp duty and accepted that they only agreed to pay the legal fees. They also assert that the claimants breached the agreement by failing to pay the remaining balance of the purchase price after the Deeds for Lot No. 2 and No. 5 were executed, insisting that they would pay the balance only after the Deeds were registered.

⁵ See exhibit "F" namely a letter dated April 4, 2019 addressed to the defendants calling upon them to complete the transaction pursuant to clause 5 of the agreement. The letter also purportedly gave the defendants Notice that time of the essence came into effect.

⁶ See exhibit "G" namely a letter dated May 21, 2019 rescinding the agreement between the parties.

12. According to the defendants, their Attorney, Mr. Deena informed them that caveats would be filed to protect their interests. Notwithstanding this, the defendants contend that they unwillingly executed a Deed of Conveyance for Lot No. 2.
13. Owing to the claimants' refusal to pay the assessed stamp duty, the defendants terminated the agreement for sale and attempted to return the deposit and part payment of \$50,000.00 paid on Lot No. 2, after a deduction for the sum of \$20,000.00 being the balance of the purchase price outstanding on Lot No. 5 and owing by the second defendant.
14. It is therefore the case for the defendants that the breach of the agreement by the claimants entitled the defendants to rescind the agreement. They have therefore counterclaimed for a declaration that their rescission was a valid one and damages for breach of contract. The defendants particularized their loss to be the costs of a survey plan, a valuation report⁷ and legal fees in the total sum of \$11,500.00.

Defence to counterclaim

15. The claimants aver that the parties were advised by Mr. Deena that the subject property would be exempt from stamp duty or the assessed value would be minimal and that it is in this context that the defendants agreed to pay stamp duty.
16. It is the claimants' case that they did not repudiate the contract thereby entitling the defendants to rescind and thereby terminate the agreement.

⁷ See exhibit "B" of the Defence namely a valuation invoice dated August 25, 2017 for Lots 2, 3 and 5 in the sum of \$7,500.00.

Issues to be determined

17. The issues are;
- i. Whether the claimants breached the agreement and whether they were entitled to repudiate the contract.
 - ii. If the claimants did breach the contract and the breach amounts to a repudiation, then whether the defendants were entitled to rescind the contract as a consequence and if they were what is the measure of damages to be awarded to the defendants.
 - iii. If the claimants did not breach the contract, then did the defendant breach the contract.
 - iv. If the defendants are the ones who breached the contract, then are the claimants entitled to specific performance.

Evidence of the claimants

18. The claimants testified and called one witness, Joel Moonilal.

Aldrick Moonilal

19. Aldrick Moonilal (“Aldrick”) is the second named claimant. He testified as to how the larger parcel of land was subdivided into Lots and the reason for the agreement for sale. He provided a contextual history of the larger parcel of land that was owned by his brother (Roderick Moonilal) and their mother as joint tenants. Their mother passed away, leaving Roderick as the owner of the entire parcel of land. According to Aldrick, his mother had intentions to sever the joint tenancy and subdivide the larger parcel of land for her children.
20. Aldrick referred to an unregistered Declaration of Trust that Roderick did not honour and Aldrick and his siblings initiated a High Court action against Roderick. It is undisputed that this matter was dismissed.

According to Aldrick, the second defendant approached him expressing his willingness to sell the subdivided Lots to him and Aldrick's surviving siblings.

21. Aldrick agreed to purchase Lot No. 5 as he had lived there for over twenty years. The second defendant agreed to pay all the surveying, valuation and legal fees.
22. On a date unknown, Aldrick along with his brothers, Eric Moonilal and Joel Moonilal visited the office of Attorney-at-Law Ramesh Deena where the parties negotiated the purchase price for Lot No. 1. At this point according to Aldrick, the second defendant informed the claimants that he would pay the legal fees and stamp duty fees.
23. On December 1, 2016 at the office of Mr. Deena, the second defendant allegedly informed the claimants that he no longer wished to sell Lot No. 1 and offered to sell Lot. No. 2 on the same terms and conditions. As such, Aldrick paid the deposit and part payment of \$50,000.00 towards Lot No. 2 as well as a down payment of \$40,000.00 for Lot No. 5 and the parties entered into the written agreement for sale.
24. Thereafter, Aldrick executed two Deeds for Lot No. 2 and 5. The Attorney informed him that the registered Deeds would be ready in approximately ninety days. However, Aldrick alleged that this time passed and he contacted Mr. Deena, who informed him that everything was in order.
25. Eventually the second defendant informed Aldrick that they had to meet at the Attorney's office. The witness testified that he formed the view that the registered Deeds were available and so they met at the Attorney's office for the purpose of collecting same in his view. Upon arrival, the second defendant informed the claimants that he was no

longer selling Lot No. 2 because the assessed stamp duty amounted to \$35,000.00 and this sum was too high. Aldrick, gave the clear impression in his witness statement that he then received the registered Deed for Lot No. 5 as there was no applicable stamp duty fee and the second defendant also paid the associated legal fees.

26. The second defendant also informed the claimants that he would refund the sum of \$30,000.00 only as he had subtracted \$20,000.00 being the amount owed on Lot No. 5 by Aldrick. Aldrick refused to accept the said refund⁸.

Cross-examination by the defendants

27. Aldrick insisted that the initial discussions with Jeewan concerned Lot No. 1. Also, during that initial conversation Jeewan informed him that he would pay all the legal fees and he admitted that at that conversation Jeewan was speaking about legal fees for all of the lands to be transferred including those to him and the other siblings. He accepted that Jeewan only agreed to pay legal and other fees on that occasion, not stamp duty. That conversation was had at his front gate on a day when Jeewan came to him and said he was willing to sell to all the siblings.

28. Aldrick testified that at the second meeting which was held in the latter part of 2017, he did not pay the outstanding purchase price for Lot No. 2 and Lot No. 5. However, he denied that the defendants insisted upon payment. He also denied that the defendants told him that the stamp duty had to be paid so that he could get his Deed and he refused.

⁸ See exhibit "I" attached to the WS of Aldrick Moonilal, namely a Deed dated September 13, 2018 between Seeta Pityman and Jeewan Moonilal (the Vendors) and Aldrick Moonilal (the Purchaser) registered on November 23, 2019 as DE201802414395.

Aldrick also denied that he insisted that he would only pay off the balance upon receipt of the registered Deed.

29. Fundamentally, he admitted that there was a third meeting at Mr. Deena's office in February 2019 at which he was present with the defendants. He accepted that the registered Deed for Lot 5 was presented at this meeting but not the registered Deed for Lot 2. It was suggested to him that even then he refused to pay the balance owing on Lot 5 although he had seen the registered Deed and he denied this. It was suggested that he said that he would only pay off the balance on both lots if he also received the registered Deed for Lot 2 and he denied this also. Finally, he denied that he was asked for the payment for stamp duty for Lot 2 once again and that the Deed for Lot 2 was not registered by that date because stamp duty was not paid.

30. In essence, Aldrick denied the contention that he did not pay the stamp duty fee until he received the registered Deed for Lot No. 2 as well as the outstanding balances for Lot No. 2 and 5.

Eric Moonilal

31. Eric Moonilal ("Eric") is the first named claimant. He testified to a similar account of what took place in relation to the agreement for sale and the alleged rescission by the defendants.

32. In relation to the deposit, Eric agreed that Aldrick paid the said sum of \$50,000.00 on his behalf. Eric testified that he and Aldrick have been and are ready and willing to complete the transaction for the purchase of Lot No. 2.

Cross-examination by the defendants

33. Eric testified that Aldrick negotiated the purchase of the subject property on his behalf. As such, in relation to payment of stamp duty, he was unaware of the initial discussions that occurred between Aldrick and Jeewan as he was not present for those talks. However, Eric accepted that Jeewan paid the legal fees and other expenses for the subject property.
34. At the second meeting in which the parties executed the Deed, Eric accepted that he and Aldrick did not pay the remaining balance of \$50,000.00, as his understanding was that the said sum was to be paid upon receipt of the registered Deed.
35. Eric was referred to clause one of the agreement which obligate that the balance of the purchase price be paid within ninety days as part of the process of completion of the sale. He accepted that balance of \$50,000.00 ought to have been paid upon the execution of the Deed but they, the claimants insisted they receive the registered Deed before paying the outstanding balance.
36. Then there was the following evidence which speaks to the credibility of this witness. At paragraphs 12, 13, 14, 15 and 16 of his witness statement the witness testified that he was present at what has been come to be known as the third meeting. It is his testimony that he was present together with Aldrick and all parties and Mr Deena and that Jeewan made the statement that he was no longer willing to sell to them because of the high stamp duty. Most of his evidence on the issue of this meeting appeared to be confirmation of the evidence of Aldrick on the point. However, when confronted this witness admitted under oath that he was not present at that meeting so that the evidence he gave thereon would have been nothing but a tissue of untruths as

regards what he heard and saw. It means that this witness was willing to swear under oath that he did in fact attend the said meeting and give the impression that Jeewan said these things in his presence and in the presence of others when in fact this was not true. In the court's view, his admission has affected not only his credibility on the events of that day but also his credibility on the fundamental issue of whether Jeewan agreed to pay stamp duty. The court simply does not believe him and disregards his evidence entirely.

Joel Moonilal

37. Joel Moonilal ("Joel") is the brother of the claimants. Joel outlined a similar history of how negotiations began with the defendants. He attended a meeting with Eric and Aldrick for the purchase of Lot No. 3 and the second defendant informed them that he would pay the legal fees and the stamp duty fee. This was in the presence of Mr. Deena. Otherwise, Joel gave no relevant evidence in relation to agreement for sale.

Cross-examination by the defendants

38. Joel denied the assertion that Jeewan did not inform the claimants that he would pay stamp duty for Lot No. 2.

Evidence of the defendants

39. The defendants testified themselves.

Jeewan Moonilal

40. Jeewan Moonilal ("Jeewan") is the second named defendant. His father Roderick and grandmother were the registered owners of the larger parcel of land. This parcel of land is subdivided into seven Lots.

According to Jeewan, sometime in the 1980s his father and grandmother financed the construction of a concrete structure on Lot No. 5. Thereafter, with their permission, Aldrick moved into the concrete structure and has resided there ever since. In addition, there was an abandoned wooden and concrete structure standing on Lot No. 2.

41. Jeewan testified that after the death of his grandmother, his father transferred part of the larger parcel of land to Jeewan's mother, Seeta Pityman. Roderick passed away on April 28, 2017. Thereafter, the larger parcel of land (apart from Lot No. 4) was transferred by Seeta to herself and Jeewan as joint tenants.

42. After the dismissal of the previous action, Jeewan reached an agreement with the claimants to sell Lot No. 2 to both claimants and Lot No. 5 to Aldrick. The defendants decided to sell Lot No. 5 for \$60,000.00 based on certain discussions with their Attorney. In addition, the defendants sold Lot. No. 2 for \$100,000.00 as the claimants were their relatives. Jeewan paid the legal fees but neither he nor the first defendant specifically agreed to pay the related stamp duty fees.

43. There is no dispute that a deposit and down payment in the total sum of \$90,000.00 was paid to the defendants for the purchase of Lot No. 2 and Lot No. 5. Subsequently, Jeewan paid for the survey of Lot No. 2, 3 and 5.

44. Jeewan's evidence is that a dispute arose with the claimants when he Jeewan insisted that the balance of the purchase price for Lot No. 2 and 5 be paid in full. However, the claimants refused to pay same until they received the registered Deeds for the Lots. Jeewan states that Mr. Deena informed him he would file a caveats to protect the defendants'

interests. As such, Jeewan unwillingly executed an undated Deed of Conveyance for the subject property and for Lot No. 3 and 5 to avoid this possibility.

45. After the assessment of the stamp duty for Lot 2, he and the second claimant engaged in a discourse on the payment of the stamp duty and Jeewan instructed his Attorney to register the Deeds for the subject property and Lot No. 5.

46. On February 22, 2019 all the parties attended a meeting at Mr. Deena's office and second claimant was given the registered Deed for Lot No. 5 despite the unpaid balance of \$20,000.00. At the meeting Jeewan alleged that Mr. Deena inserted the purchase price of \$760,000.00 for the subject property instead of \$60,000.00 in error. Nonetheless, Jeewan insisted that the balance of the purchase price be paid for Lot No. 5 as well as the assessed stamp duty for Lot 2. Jeewan maintained that there was no written or oral agreement with the claimants that the defendants pay stamp duty for the subject property.

47. It was at this point, Jeewan expressed to the claimants that they, the defendants were no longer interested in selling Lot No. 2 and that the claimants would be refunded the deposit/down payment in the sum of \$30,000.00 being the amount paid (\$50,000.00) less the unpaid balance of \$20,000.00 for Lot No. 5.

Cross examination by the claimants

48. Jeewan was referred to two registered Deeds namely the Deed for Lot No. 5 between he and Seeta as Vendors and Aldrick as Purchaser and Lot No. 3 between he and Seeta as Vendors and Joel as Purchaser⁹.

⁹ See exhibit "C" attached to the WS of Joel Moonilal namely a Deed for Lot No. 3 dated September 13, 2018 and registered as DE201802414274.

Jeewan testified that he paid the stamp duty for Lot No. 3 in the sum of \$6,000.00. He explained that he did this so that Joel could pay the remaining purchase price for Lot No. 3 as Joel demanded his registered Deed.

49. Jeewan was adamant that in relation to stamp duty he did not have a different agreement with Joel as he only had discussions with Aldrick. However, Joel allegedly did not want to pay the balance of the purchase price for Lot No. 3 and therefore, Jeewan decided to pay the stamp duty for that parcel of land at that point so as to be able to receive the purchase price on that piece. It was his answer to attorney for the claimants that if he did not give in and do so he would have been facing two law suits today.

50. Jeewan testified that prior to the third meeting he decided to return the deposit of \$30,000.00 (being \$50,000.00 minus the outstanding balance of \$20,000 for Lot No. 5). He accepted that the claimants eventually offered to pay the assessed stamp duty. Jeewan accepted that Joel paid the balance of the purchase price for Lot No. 3 after his Deed was registered. However, there remains an outstanding balance of \$20,000.00 for Lot No. 5.

51. In cross examination Jeewan admitted that he had walked with only \$30,000.00 to refund the parties that day. After much probing and hesitancy to answer a direct question on his part he admitted that he had made up his mind not to sell Lot 2 prior to attending the meeting on that day. It is also his evidence that he had asked Aldrick to pay the stamp duty on several occasions before that day.

Seeta Pityman

52. Seeta Pityman ("Seeta") is the first defendant. She was the common law wife of Roderick. She gave a similar account of the history of the larger parcel of land and agreements for sale. In addition, there was an abandoned wooden and concrete structure standing on Lot No. 2 that was built by her mother-in-law.
53. On her instructions, Aldrick negotiated with the defendants to the purchase of Lot No. 2 and Lot No. 5. Seeta testified that she paid the legal fees, valuation and surveying fees but later stated that Jeewan paid the fees to survey Lot No. 2, 3 and 5. However, she never agreed to pay stamp duty for the subject property. On December 1, 2016 Seeta executed the agreement for sale and did not converse with either of the claimants.
54. When the stamp duty was assessed for the subject property, Jeewan informed Seeta that Aldrick refused to pay the said sum. At the meeting of February 22, 2019 Seeta insisted that Aldrick settle the unpaid balance on Lot No. 5 and the stamp duty fee for Lot No. 2. However, Aldrick insisted that the claimants were responsible for the payment of the stamp duty.

Cross examination by the claimants

55. Seeta testified that the claimants told them they would pay the balance of the purchase price on the Lots when they received the registered Deeds.
56. According to Seeta, Aldrick voluntarily paid the stamp duty for Lot No. 3, but there was no agreement to pay stamp duty for Lot No. 2. Moreover, Aldrick received his registered Deed and still did not pay the balance of the purchase price.

The Court's Approach

57. In *Horace Reid v Dowling Charles and Percival Bain*¹⁰, Lord Ackner delivering the judgment of the Board stated that where there is an acute conflict of evidence, the trial judge must check the impression that the evidence of the witnesses makes upon him against:

- i. Contemporaneous documents;
- ii. The pleaded case; and
- iii. The inherent probability or improbability of the rival contentions.

First Issue: Whether the claimants breached the agreement and whether they were entitled to repudiate of the contract.

Submissions of the defendants

58. Attorney for the defendant submitted that generally, a purchaser, namely the claimants have an obligation to pay the stamp duty on a conveyancing transaction. Therefore, the claimants' insistence that the defendants pay the said sum was unreasonable especially since the defendants orally agreed to and did pay the associated legal fees.

59. It is the case for the defendants that due to the claimants' repudiatory breach of failing to pay the assessed stamp duty, the defendants rightfully terminated and/or rescinded the said agreement.

60. It was also submitted that the claimants committed a repudiatory breach when they failed to pay the outstanding purchase price of \$50,000.00 for Lot No.2 after the execution of the Deed. In further breach of the agreement for sale, the outstanding balance for Lot No. 5 remains unpaid.

¹⁰ Privy Council Appeal No. 36 of 1987 at page 6.

61. Attorney for the defendants pointed out that nowhere in the pleadings have the claimants attempted to explain their failure to pay the balance of the purchase price.

62. As a result of these breaches, Attorney argued that damages would be an inadequate remedy.

Submissions of the claimants

63. According to the claimants, although it is customary that the purchasers pay stamp duty on conveyancing transactions, the agreement between the parties were not standard in that the agreement for sale stated more than ten percent deposit was paid.

64. Attorney for the claimants argued that it was likely that the same terms would apply to Joel and the claimants. Importantly, the Deeds for Lots 2, 3 and 5 were submitted for stamp duty and registered on the same date. However, due to the high cost of the stamp duty payable for Lot No. 2, the defendants refused to honour the agreement for sale.

65. Attorney for the claimants made the point that during cross examination, Jeewan testified that Joel demanded his Deed but also testified that he, Jeewan only had discussions with Aldrick.

66. It was argued that the defendants did not make 'time of the essence' clause or pleaded that Aldrick pay the assessed stamp duty.

67. Notwithstanding the above submissions, Attorney submitted that failure to pay stamp duty is not a justification to rescind the agreement for sale as this is a non-essential term. Therefore, without the Notice of purported breach and no time of the essence, the defendants cannot treat the agreement for sale at an end.

68. However, the claimants say that if they breached the agreement for sale, this court should order the conveyance of Lot No. 2 to the claimants upon payment of the assessed stamp duty and the unpaid balance of \$20,000.00.

Submissions in response

69. The defendants submitted that there was no agreement between Joel and the defendants to pay the stamp duty. Further, the claimants cannot rely on the transactions that occurred with Lot No. 3 and Lot No. 5 as they were separate agreements.

70. The claimants admitted that they breached the agreement for sale in that they did not pay the balance of the purchase price for lot No. 2.

71. The claimants refuted the defendants' submissions that time of the essence was not made. The agreement for sale stated that the balance of the purchase price to be paid at the execution of the Deed of conveyance. Further, they were not required to give Notice of their rescission because of the claimants' fundamental breach and repeated failure to pay the outstanding purchase price up to the third meeting.

Law and Analysis

Which of the parties were obligated to pay stamp duty

72. The first factual issue is what were the obligations of the claimants under the agreement. This necessarily involves and determination as to whether the claimants or the defendants were responsible for the payment of stamp duty.

73. For a contract for the sale of land to be enforceable it must be in writing. Section 4 of the Conveyancing and Law Property Act, Chap. 56:01 (“the Act”) reads as follows:

No action may be brought upon any contract for sale or other disposition of and/or any interest in land, unless the Agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some person thereunto by him lawfully authorised.

74. In cases where there is a written agreement and the parties understand the terms of said agreement, an oral agreement otherwise does not form part of the agreement. In the present case there was no written agreement to pay legal fees and stamp duty or no addendum, therefore the terms of the agreement as evidenced in writing must apply. The parties are expected to follow the practice that the purchaser pays stamp duty, not the vendor.

75. The court finds that the defendants did not contract to pay the stamp duty. This is so for the following reasons:

- a. It is implausible that the vendor in this case would have committed himself to paying the stamp duty regardless of the amount especially where the purchase price was on the lower end of the scale in the sum of \$100,000.00. To so contract would be to assume an enormous risk that the sum collected on the purchase may be whittled down considerably.
- b. If it is that Jeewan was of the view that the property would not have attracted any stamp duty, there would have been no reason to agree to pay something that would not have existed.
- c. The agreement contains nothing about the vendor paying stamp duty.

- d. That although the agreement does not contain a clause for the payment of stamp duty, the fact that Jeewan paid the stamp duty for Joel's property does not lead to an inescapable inference that there was an agreement to pay the stamp duty for Aldrick and Eric.
- e. That there was in fact no agreement to pay the stamp duty for Joel. In that regard the court accepts the evidence of Jeewan that he paid the stamp duty for Joel as he essentially ended up between a rock and a hard place to put it in local language. In other words, he considered that it would be in his interest to pay the stamp duty which was \$6,000.00 so that he could collect the balance of the purchase price. This is not the same as saying that he agreed to pay \$6,000.00 and not \$35,000.00 because one was lower than the other. In the court's view there no agreement to pay either and Jeewan took the decision to pay the one having found himself in the circumstances he narrated. That is quite a different matter from an agreement to pay.
- f. The evidence on the promise to pay by Eric is not credible for the reasons set out above.
- g. The evidence of the discussion between Aldrick and Jeewan on the issue of the payment of stamp duty is unsatisfactory for two reasons. Firstly, the first one is alleged to have occurred at a gateway at a time before proper consideration had been given to the circumstances surrounding the agreement to sell by Jeewan. Nothing said that that conversation can truly have been a term of any contract because of the nature, circumstances and stage of the conversation in the context of the entire transaction. At that stage Jeewan has simply approached Aldrick with a view to having discussions on the sale to all of the siblings so that there would have been no intention to create legal relations at that stage.

- h. The second occasion upon which the issue of stamp duty allegedly arose was at the office of Mr Deena. The points here are straightforward. If it was agreed that the defendants would pay the stamp duty, there is no reason in principle as to why that would not have been made a term of the written agreement but it was not. Further no explanation is provided for its alleged exclusion.
- i. Additionally, the onus lay with the party who asserted that there was such a term of the agreement to prove same. In that regard the evidence demonstrates that it is alleged that Mr. Deena was present at least two conversations on same and certainly at the time it was allegedly agreed that the defendants would pay the stamp duty. So that it was incumbent on the claimants to call Mr Deena as a witness as it is highly probable and a reasonable assertion that he would have been able to provide important evidence as to whether there was an agreement to pay the stamp duty by the defendants. As a consequence of the failure of the claimant to call Mr. Deena the court draws in adverse inference against the claimant on the issue.

76. Even if the court is wrong and Jeewan did promise to pay the stamp duty, such a statement would have amounted to a bare promise at the highest and nothing more. It certainly would not have ascended to become a term of contract so that it would have been an unenforceable promise based on Jeewan's mistaken belief that the Deed may not have attracted stamp duty. To say that it was a term of the contract would be an entirely different matter in the context of the clear contractual terms set out in the written agreement and the court so finds.

Time of the essence of the contract

77. It is settled law that for time to be of the essence it must be so stated in the contract. In **Chaital & Ors v. Ramlal**¹¹ the Board held that the party serving the notice making time of the essence must himself be ready, able and willing to complete at the date when the notice is served. So that where time is not of the essence in the contract either party must make time of the essence before that party can complain of breach.

78. In the present case the claimant alleges that the defendants breached the contract by refusing to pay the stamp duty by the time set for completion. The written agreement does not make time of the essence. Therefore, it would have been the obligation of the claimant to set a date for compliance and make time of the essence before being able to rely on an alleged breach by the defendant. In this case however this would have made no difference having regard to the court's ruling that the defendants were not responsible for payment of stamp duty. It follows that the claimants were responsible for paying stamp duty on their Deed and they would have breached the contract by refusing to pay same and by refusing to pay the balance on the purchase price which is a term of the contract set out in the written agreement.

Specific performance

79. Section 7 of the Act enables both vendors and purchasers to apply to the Court in respect of questions arising out of or connected with a contract for the sale of land. Section 7(2) and (3) reads:

(2) Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit.

¹¹ [2003] UKPC 12

(3) This section applies to a contract for the sale or exchange of any interest in land.

80. To enforce specific performance the learned authors in Halsbury's¹² stated the following:

Where it is sought to enforce specific performance of a contract, the court must be satisfied:

- (1) that there is a concluded contract which is binding at law, and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract; and*
- (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract.*

81. Further, the authors¹³ stated the grounds for refusing specific performance.

...specific performance will not be granted if the contract is illegal or oppressive, if the claimant has failed to perform conditions of the contract or done acts amounting to a repudiation of the contract or been guilty of undue delay in performing his part of the contract, if it has become impossible for the defendant to perform the contract, if the contract has been rescinded or varied...

¹² Halsbury's Laws of England, Vol 95 (2017) para 540

¹³ Halsbury's Laws of England, Vol 95 (2017) para 541

Issue 2: If the claimants did breach the contract and the breach amounts to a repudiation then whether the defendants were entitled to rescind the contract as a consequence and if they were what is the measure of damages to be awarded to the defendants.

82. The defendants must demonstrate that the claimants either directly or by their conduct refused to render due performance thereby entitling the defendants to rescind.

83. It is not in dispute that there is an outstanding balance of \$50,000.00 owing on the purchase price for Lot No. 2. The evidence demonstrates that despite the defendants having executed the Deed thereby fulfilling their obligations under the contract the claimants refused to pay the balance of the purchase price. The court has found that there was no breach of contract by the defendants so that the claimants would have failed to fulfil their obligations without any legal justification for so doing.

84. Instead of merely failing to provide due performance at the stipulated time, one party (A) may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect. It has been said that repudiation is a serious matter, not to be lightly found or inferred. Such repudiation may occur at the time fixed for performance or before that time; in the latter case it is known as 'anticipatory breach'. Repudiation will give the innocent party (B) the right to treat the contract as discharged and claim damages. It may be express or implied¹⁴.

¹⁴ **Halsbury's Laws of England, Contract** (Volume 22, 2019), Chapter 8 - Discharge of Contractual Promises, Topic 4-Discharge by Termination for Breach of Contract, Sub Topic 4 – Effect of 2021-04-19 14:36:25 5 / 18 6 Failure to Perform Obligation which Amounts to Breach, Paragraph 351 – Repudiation and anticipatory breach.

85. Not every refusal by A to perform a part of the contract amounts to a repudiation which entitles the other party (B) to treat the contract as at an end; there must be a refusal to perform something which goes to the root or essence of the contract. Thus it is not just any delay in breach of contract which amounts to a repudiation, but only such delay as would frustrate the adventure. The question whether the refusal to perform part of the contract amounts to a repudiation of the whole contract depends on the construction of the contract and the circumstances of the case. The test is the same for both repudiation and anticipatory breach. If the agreement is an entire contract, the test is applied to repudiation of any part of it. If the agreement is construed as a series of separate contracts, prima facie no breach of one contract can be a repudiation of the others; whereas, if the contract is divisible, the question is whether repudiation of a divisible part shows an intention to repudiate the contract as a whole¹⁵.

86. The learned authors of Halsbury's¹⁶ explained rescission in relation to specific performance:

The word 'rescission' is used in two different senses. In the strict sense, it means the exercise by a party to a contract of a right to have the contract avoided ab initio. Such a right may arise by virtue of a term in the contract itself or for some reason such as fraud, misrepresentation or mistake. A person who has a right to rescind the contract in the strict sense will lose that right if, at a time when he knows that he has the right of rescission, he affirms the contract by taking some step which indicates an intention to proceed with it. The commencement of a claim for specific performance of a contract clearly affirms the contract, so that rescission in the strict

¹⁵ **Halsbury's Laws of England**, Contract (Volume 22, 2019), Chapter 8 - Discharge of Contractual Promises, Topic 4-Discharge by Termination for Breach of Contract, Sub Topic 4 – Effect of Failure to Perform Obligation which Amounts to Breach, Paragraph 352 – Repudiation must go to the root of the contract.

¹⁶ **Halsbury's Laws of England, Vol 95 (2017) para 598**

sense cannot in practice be claimed as alternative relief in a claim for specific performance.

'Rescission' is, however, frequently and confusingly used in a broader sense to describe a different act, namely, the acceptance by one party to a contract of a repudiatory breach of contract by the other party. Acceptance of repudiation discharges both parties from further performance of their executory obligations under the contract, but the contract is not avoided ab initio and the innocent party may claim damages for breach of contract. A claimant may claim both specific performance and rescission (in the sense of acceptance of repudiation) in the alternative, but as these claims are inconsistent with each other he must elect between them at the trial if he has not done so previously. Rescission ab initio is very different from a failure of performance which entitles the innocent party to treat the contract as discharged.

A person pursuing a claim for specific performance is treating the contract as still in existence, and therefore cannot elect to rescind after the defendant has remedied his breach and is able and willing to perform his part of the contract. If the repudiatory breach is not of a continuing nature, the innocent party will be treated as having affirmed the contract and lost the right to rescind if, after acquiring full knowledge of the breach, he takes steps which indicate an intention to proceed with the contract or delays in exercising the right to terminate it.

87. It has been held that, where a claimant commenced a claim for specific performance claiming damages as alternative relief but not rescission, he could not terminate the contract by accepting the repudiation without first discontinuing the claim.

88. The evidence demonstrates that the claimants sought to repudiate by refusing outright on several occasions to pay both the stamp duty and fundamentally the balance of the purchase price. In that regard the court does not believe the evidence of the claimants that the balance was payable after the Deeds were registered as same is not set out in the agreement. To the contrary the agreement specifies that the balance is payable on completion at which time the conveyance will be executed¹⁷. This is a clear condition in the contract so it is a material term that goes to the root and essence of the contract.

89. Further, the claim for specific performance is not one made by the defendants so they have not affirmed the contract. On the other hand, it is the claimants who have repudiated the contract thus entitling the defendants to rescind and the court so finds.

90. Issues three and four therefore do not arise for consideration.

Damages

91. The defendants have claimed the sum of \$11,500.00 for special damages. They pleaded in their Counterclaim that they expended the following sums in relation to Lot No. 2:

- i. \$8,000.00 for legal fees paid to Mr. Deena¹⁸;
- ii. \$2,500.00 for a valuation¹⁹; and
- iii. \$1,000.00 for the agreement for sale.

92. Aldrick testified that he did not have a copy of the receipt for the legal fees. Further, the information provided for the cost of the valuation is

¹⁷ See clause 1 of the agreement for sale.

¹⁸ See exhibit "J.M.8" and "J.M.14" attached to the WS of Jeewan Moonilal namely receipts from Mr. Deena.

¹⁹ See exhibit "J.M.12" namely fee advice for Lot No. 2 in the sum of \$2,500.00.

that of a quotation. The claimants led no evidence to the contrary of that set out by the defendants nor have they challenged it. The court finds that a cost would have been attached to the preparation and execution of the agreement for sale and the sum of \$1,000.00 is more than a reasonable sum for same. Further, the cost of the valuation would have to be borne by the defendants they having agreed to bear same. That cost is reflected in the quotation. The sums will therefore be allowed.

Disposition

93. The order of the court is therefore as follows:

- i. The claim is dismissed.
- ii. Judgment for the defendants against the claimants on the counterclaim as follows;
 - a. It is declared that the defendants have validly rescinded the agreement for sale entered into in writing between the claimants and the defendants on December 1, 2016.
 - b. The claimants shall pay to the defendants the sum of \$11,500.00 as damages for breach of contract together with interest at the rate of 2.5% per annum from October 11, 2019 to the date of judgment.
 - c. The claimants shall pay to the defendants the prescribed costs of the claim and counterclaim on the basis of the value of each being \$50,000.00 in the sum of \$14,000.00 each.

Ricky N. Rahim
Judge.