THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 261 of 2011

BETWEEN

Deonarine Nerav Maloo
Dularchand Maloo
Sumatie Jhagroosingh

(Appellants/Defendants)

v.

Anthony Somar

(Respondent/Claimant)

Panel:
A. Mendonca J.A.
R. Narine J.A.
G. Smith J.A

Appearances:

Appellants in person.

Mr. K. Neebar on behalf of the respondent.

REASONS

1. On February 29, 2016 we dismissed this appeal and gave oral reasons for our decision. On April 25, 2016 the appellants were refused conditional leave to appeal to the Privy Council. However, they were subsequently granted special leave by the Board. We have recently received a request from the appellants' attorneys for written reasons which we now provide.

2. The first appellant orally agreed to sell to the respondent (Somar) eight lots of land which formed part of a larger parcel of land comprising two acres and three perches. The lands were registered under the provisions of the Real Property Act in the name of the first appellant (Deonarine). The second appellant (Dularchand) is the first appellant's father, and the third appellant (Sumatie) is his sister. Dularchand was authorized by Deonarine to act as his agent for the purposes of the sale, since Deonarine was resident in Canada.

3. In or around December 2008, Somar paid the full purchase price of $500,000.00 to Deonarine. On January 15, 2009 Deonarine and Somar signed a written agreement for sale.

4. At the end of February 2010, Somar observed that the land was being cleared. A search of the title revealed that Deonarine had transferred the entire parcel to Sumatie by memorandum of transferdated February 26, 2010 for the sum of $290,000.00.

5. On April 27, 2010 Somar filed an action against the appellants claiming inter alia, the purchase price of $500,000.00, damages for breach of contract, and

alternatively an order setting aside the transfer to Sumatie and specific performance of the agreement for sale.

6. A curious feature of the case was the appearance of two agreements for sale, both of which were signed by the parties and comprised two pages, typed only on one side. The second page of both agreements were identical and contained a provision that the land has a "good marketable title", was "free from encumbrances' and "discharge (sic) all outstanding rates taxes and assessments". It is not in dispute that the signatures of Deonarine and Somar appeared on the second page.

7. The first page of the agreement put forward by Somar contained the name and address of Somar, the purchase price and details of the cheques by which payment was made and a detailed description of the eight lots being purchased.

8. The first page of the agreement proffered by Deonarine contained the same information as Somar's, but included an additional paragraph, under which Somar agreed to be responsible for obtaining Town and Country Planning approval for "whatever development needs to be done", at his own expense and with the permission of the owner. A period of one year from August 1, 2008 to August 1, 2009 was provided for obtaining the approval, time being of the essence, failing which Deonarine would be entitled to forfeit 50% of the purchase price.

9. Clearly both versions of the agreement could not be authentic. The first issue that had to be determined was which version of the agreement was the one which was in fact agreed upon by the parties. Helpfully, the parties agreed before the trial judge to appoint a document examiner to conduct a forensic examination of both documents, and further agreed to be bound by his

findings. The cost of the forensic examination was equally borne by both parties.

10. The document examiner conducted a microscopic examination of both agreements. He found that Deonarine's agreement contained more variability in the sets of stapling holes of pages 1 and 2. This indicated that the pages were removed and reattached together more times and with less alignment than Somar's agreement. He further found that there were significant differences in the printed typeface characteristics between pages 1 and 2 of Deonarine's agreement. This indicated that page 1 and page 2 are not consistent in printing and could not have been produced simultaneously.

11. Having regard to the forensic report by which the parties agreed to be bound, the trial judge made a finding of fact that the written agreement put forward by Somar was the document which contained the agreement reached by the parties. She refused an application by the appellants' attorneys to cross-examine the document examiner. The appellants filed a procedural appeal against her ruling, which they subsequently withdrew.

12. Inevitably, certain findings of fact followed from the judge's rejection of Deonarine's written agreement. The judge went on to find that there was no express term of agreement for sale that Somar would be responsible for obtaining planning permission to excise the lots he was purchasing from the larger parcel, that there was no time limit to be imposed on Somar for this exercise, and there was no provision for the forfeiture of 50% of the purchase price.

13. The findings of the trial judge based on the forensic evidence must have had some impact on the credibility of Deonarine. It would have been artificial for the judge somehow to separate her findings on the agreements for sale, from

the overall credibility of Deonarine on other issues. However, the judge expressly stated that even without the benefit of the expert evidence, she would have come to the same conclusion. None of the appellants or their witness Matthew Ramcharan impressed her as credible witnesses. On the other hand, she found Somar to be a more credible witness.

14. A central issue in the trial, was the question of which party to the agreement was responsible for obtaining Town and Country approval for the excision of the eight lots from the larger parcel. Somar's version of the agreement was silent on this issue. However, in his witness statement and in cross-examination he asserted that it was orally agreed that Deonarine would obtain the requisite approval upon which the lots were to be transferred by Deonarine to him. It was Somar's evidence that Dularchand informed him that he was trying to get the approval but was unable to do so. When Somar requested a refund of the purchase price, Dularchand told him that they had no money. It was at this point that Somar made attempts of his own to obtain the approval (paragraph 17 witness statement of Somar filed on February 18, 2011). The record of appeal reveals that Somar made an application dated March 1, 2010, which was refused by the Town and Country Planning Division. A later application made by Somar on May 18, 2011 was approved by the Division on July 20, 2011 subject to certain conditions.

15. The trial judge noted that in order to comply with section 4 of the **Conveyancing and Law of Property Act Chapter 56:01**, the material terms of the prior oral agreement should be included in the written agreement. These included the parties, the property and interest to be disposed of, the consideration for the disposition and any other material terms except those that would be implied by law. The judge held the view that the term with respect to the obligation to obtain planning permission was a material term that should have been specifically included in the written agreement.

However, the judge went on to hold that there was an implied term that Deonarine would bear the responsibility of securing the approval for subdivision, since such an approval was required for him to sell lots of a specified size from the larger parcel.

16. It does not appear from the record that the trial judge was provided with any assistance on the issue of the implied term. Before this court the issue was not dealt with in written submissions, but was raised by the court during the course of oral submissions. Deonarine appeared in person before us. In response to the court's inquiries, Deonarine denied that a term should be implied that it was the responsibility of the vendor to obtain planning permission. For Somar, Mr. Neebar submitted that it was the vendor's responsibility to convey a good title to the purchaser and in the absence of permission to excise the lots to be conveyed, the vendor would be unable to do so. It followed that in accordance with his duty to pass a good title to the lots being sold, it must be the vendor's responsibility to obtain the requisite approval.

17. In his written submissions before us Deonarine focussed on the admission into evidence of the forensic report of the document examiner, and the findings of fact of the trial judge. Deonarine further submitted that the fact that Somar subsequently made an application for planning permission gave rise to an inference that under the agreement, Somar was the one who undertook the responsibility for obtaining the approval for subdivision.

18. With respect to the forensic report, the trial judge can hardly be faulted for admitting it into evidence. Faced with the issue as to which of the written agreements was the authentic document, the parties agreed to have the documents examined by a named expert, and agreed to be bound by his findings. In civil matters the parties are free to make such agreements. In practice, the cooperation of the parties in resolving issues of this kind saves

judicial time and court resources, and costs to the parties. The appellants' attorney's application to cross-examine the expert, which no doubt was an attempt to discredit the report, was quite rightly refused by the judge. A procedural appeal against her ruling was subsequently withdrawn. The evidence, in our view, was clearly relevant and admissible as an agreed document. The parties had agreed to be bound by the report. There was no valid reason for the judge to decline to admit it into evidence.

19. Deonarine also submitted that the judge's findings of fact ought to be set aside. It is well settled that appellate courts are slow to reverse findings of fact made by a trial judge. Appellate courts do not have the advantage of seeing and hearing the evidence, and observing the demeanour of the witnesses. In **Beacon Insurance Company Ltd v. Maharaj Bookstore Ltd** [2014] UKPC 21, the Board reviewed the leading cases on the role of an appellate court in reviewing findings of fact of a trial judge. Generally, an appellate court will interfere with a finding of fact only where it is satisfied that:

    (i) the trial judge has not taken proper advantage of having seen and heard the witnesses, or
    (ii) there was no evidence to support the finding, or
    (iii) the finding is based on a misunderstanding of the evidence, or
    (iv) the finding is one that no reasonable judge could have reached.

20. In this appeal, having considered the evidence before the judge, and her findings based on the evidence, we were unable to find any ground on which we could interfere with her findings. Specifically, we held the view that her findings of fact were supported by the evidence before her.

21. Deonarine further submitted that an inference could be drawn from Somar's application for planning permission, that it was Somar who had agreed to

obtain the approval for subdivision. In considering this submission, regard must be had to Somar's evidence. In his witness statement Somar stated that both Deonarine and Dularchand represented to him that the lots would be conveyed to him upon receipt of Town and Country approval (paragraph 7). He further stated that it was the responsibility of Deonarine, his servants or agents to obtain the approval but they were having difficulty with it, and he offered to assist (paragraph 14). In paragraph 17, he stated that the onus was on Deonarine to get the approval. Dularchand informed him that he was trying to get the approval but he could not. Somar requested a refund, and Dularchand told him that they had no money. It was then that Somar made attempts to obtain the approvals.

22. The first application for planning permission made by Somar was dated March 1, 2010. This was consistent with Somar's evidence that in February 2010, he observed that the land was being cleared and graded, and his discovery that the entire parcel had been transferred to Sumatie on February 26, 2010.

23. Somar's first application for planning permission was made long after the August 1, 2009 deadline purportedly agreed under Deonarine's written agreement, and after Deonarine had transferred the land to Sumatie. Having regard to Somar's evidence as to the circumstances under which he applied for the planning permission, and the date on which he applied, the inference for which Deonarine contends, appears to be less plausible than Somar's evidence, which the judge clearly preferred over that of the appellants and their witness.

24. Unfortunately we have not been provided with the grounds on which the Board has granted permission to appeal. We have, however, noted the case summary on the Board's website which has identified the issues for determination as:

(i) Whether an agreement for sale of land contains an implied term that the vendor is required to obtain planning permission for the excision of the land being sold from a larger parcel of land, and

(ii) If the purchaser applies for the relevant planning permission, whether such a term is still implied or, if it is implied, it is waived by the purchaser's actions.

25. As we noted earlier, we have not had the benefit of reasoned submissions and authorities with respect to the first issue. The issue of waiver was not raised before the trial judge or before us. Accordingly, we did not have the benefit of assistance on this issue. It is with some misgivings that we venture to give an opinion on these matters which were not canvassed before us.

26. In our brief researches, we have been unable to find any direct authority for the proposition that an agreement for sale contains an implied term that the vendor is required to obtain planning permission for the excision of lots to be sold from a larger parcel of land.

27. The general principles on which a term may be implied are conveniently summarised in **Chitty on Contracts** Volume 1 (33rd ed.) at paragraphs 14-006 and 14-007:

"14-006

Terms implied in fact: Traditional principles. *The requirements which must be satisfied before a term will be implied into a contract as a matter of fact have been stated in various ways over the years. At a high level of principle it may be said that the implication of a term as a matter of fact depends upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. The court will not make a*

contract for the parties but will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. Both are predicated to depend on the presumed common intention of the parties. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the time of contracting. As so formulated, these criteria were traditionally regarded as "tests" which had to be satisfied if a term was to be implied…

14-007

Efficacy to contract. *The source of the test that a term may be implied into a contract where it is necessary, in the business sense, to give efficacy to the contract is to be found in the judgment of Bowen L.J. in the Moorcock where he stated:*

> *"Now an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or*

covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." . . ."

28. In **Attorney General of Belize & Ors v. Belize Telecom Ltd** [2009] UKPC 10, Lord Hoffman adopted a broader approach. He stated at paragraph 21 that:

"…in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean".

29. The relevant background in this case must include the following:

- Deonarine was selling to Somar eight lots of land to be excised from a larger parcel.
- The lands were registered under the provisions of **the Real Property Act** which entails strict compliance with Town and Country requirements.
- Without permission from the Town and Country Division to subdivide the lands Deonarine would not be in a position to transfer the eight lots to Somar.
- There was an express provision in both written agreements that Deonarine was to provide a good marketable title to the lots to be conveyed.

30. Having regard to the principle espoused by Lord Hoffman in the **Belize** case (supra), the express words of the agreement that Deonarine was required to provide a good marketable title read against the background facts of this case, would reasonably be understood to mean, that Deonarine was under an obligation to obtain planning permission in order to transfer the lots to Somar.

31. The implication of the term may also be supported by the learning cited in paragraphs 14-006 and 14-007 of **Chitty on Contracts** Volume 1 (33rd ed.)**.** The term was clearly required to give business efficacy to the contract, and it represented the obvious but unexpressed intention of the parties.

32. Accordingly, without intending to lay down a general principle applicable to all contracts for the sale of land, we hold that in the circumstances of this case, the trial judge was correct to hold that there was an implied term that the vendor would bear the responsibility of obtaining planning permission to subdivide the larger parcel. Without it, the vendor would not have been able to fulfil his obligation to provide a good marketable title, or to effect a transfer of the eight lots to the purchaser.

33. With respect to the issue as to whether such a term is still implied if the purchaser applies for planning permission, we repeat our observations made in paragraphs 14, 21, 22 and 23. Clearly, Somar made the application only after Deonarine failed to fulfil his obligation to obtain the requisite approval, and in fact had already conveyed the entire parcel to his sister. Accordingly, in our view the term is still to be implied.

34. With respect to the issue of waiver, we note that it was not raised on the pleadings, in the evidence or on appeal. It appears to be an entirely new issue, which Somar was not afforded an opportunity to confront on the pleadings, in his evidence or on appeal.

35. The learning in **Chitty on Contracts** Volume 1 (33rd ed.) on the issue of waiver is to be found at paragraphs 22-040 and 22-041:

> *"22-040*
>
> ***Waiver or forbearance.*** *Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of 'waiver by etoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.*
>
> *22-041*
>
> ***Form of waiver.*** *A waiver may be oral or written or inferred from conduct …"*

36. It is to be noted that the conduct in this case, that is the application for planning permission, took place after Deonarine had repudiated the agreement for sale by transferring the entire parcel to his sister. Clearly, on the facts of this case, no issue of waiver of the implied term can arise, since by his own deliberate action, Deonarine evinced his intention not to complete the agreement for sale, before Somar made the application. In addition, there is no evidence that Deonarine acted in reliance on any representation which may be inferred from Somar's action. The issue of waiver simply does not get off the ground.

37. For these reasons, we dismissed the appeal and ordered that Deonarine should pay the costs of the appeal.

Dated March 1, 2019.

A. Mendonca,
Justice of Appeal

R. Narine,
Justice of Appeal

G. Smith,
Justice of Appeal