THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P016 of 2022

Claim No. CV 2018-01470

Between

CHAMPELLE VILLAS LIMITED

Appellant

And

CHAMPS ELYSEES LIMITED

Respondent

PANEL:

A. Mendonça, J.A.

J. Aboud, J.A.

Date of delivery: April 29, 2022

Appearances:

Mr. K. Scotland and Mr. K. Bengochea instructed by Ms. K. Kydd-Hannibal appeared on behalf of the Appellant

Mr. R. Otway instructed by Ms. S. Sandy appeared on behalf of the Respondent

JUDGMENT

Delivered by A. Mendonça, J.A. and J. Aboud, J.A.

1. The Appellant in this procedural appeal is Champelle Villas Limited (the Appellant). The Respondent is Champs Elysees Limited (the Respondent). The main issue in the appeal is whether there existed an enforceable contract for the sale of a parcel of land (the disputed parcel of land) in compromise and settlement of this claim.

2. The gist of the Respondent's case is that there was an agreement between the Appellant and the Respondent whereby they agreed to the joint appointment or retainer of Mr. Linden Scott to value the disputed parcel of land and that the Appellant would purchase the disputed parcel of land at the price as determined by the said valuator in settlement of the matter. The Respondent, by notice of application filed on September 7, 2021, applied for an order that the action had been compromised and settled by the said agreement and also sought consequential relief. The Judge found that there was such an agreement which compromised and settled the claim bringing an end to the matter.

3. The Judge in her written judgment framed three issues for her determination namely; 1. whether the Respondent and the Appellant entered into the agreement for the sale of the disputed parcel of land; 2. whether the engagement of Linden Scott and the payment of his fees was part performance of the agreement; and 3. whether the agreement compromised and settled the action between the Respondent and the Appellant.

4. The Judge held that the Appellant and the Respondent entered into such an agreement in respect of which there was a memorandum sufficient to satisfy section 4 (1) of the Conveyancing and Law of Property Act. She found that the memoranda for the agreement was contained in emails passing between the parties over the period May 28, 2021 to July 7, 2021 and that there was an

intention to create legal relations. The Judge further found that the parties to the agreement were identified in the documents, so too was the disputed parcel of land and the parties had agreed a mechanism for arriving at the price for the disputed parcel of land. In the alternative, the Judge found that even if there was no memorandum of the agreement, there was an oral agreement between the parties and there was evidence of part performance of that agreement by the Respondent.

5. The Judge accordingly ordered that the action had been compromised and settled by the agreement. The terms of the agreement were that the Appellant agreed to purchase from the Respondent the disputed parcel of land at the price of $700,000.00 being the value of the land as determined by Linden Scott.

6. The core issue in this appeal is whether the Judge was correct to hold that there was an agreement for the sale of the disputed parcel of land in respect of which an action may be brought to enforce it.

7. Generally speaking, a contract for the sale of land cannot be enforced by action unless it is in writing or there is a sufficient note or memorandum thereof in writing signed by the person to be charged or his authorised agent or there is evidence of part performance of the agreement by the person seeking to enforce the agreement. I will first consider whether the Judge was correct to find that there was an agreement in respect of which there was a sufficient note or memorandum thereof signed by the Appellant or its duly authorised agent.

8. Section 4(1) of the Conveyancing and Law of Property Act provides that no action may be brought upon any contract for the sale or other disposition of and or any interest in land, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing and signed by

the party to be charged or by some other person thereunto by him lawfully authorised.

9. To satisfy the section, the contract may be in writing. But, it need not be so long as there is written evidence of it, i.e. a note or memorandum, signed by the party to be charged or his duly appointed agent. The section therefore does not invalidate an oral contract for the sale of land. It deals only with the evidence to prove the agreement, if it is to be enforced by action. Where the claimant seeks to enforce by action an agreement that is not itself in writing for the sale of land, he must establish that it is evidenced by a written note or memorandum sufficient for the purposes of the section.

10. In order to satisfy the section, one of the requirements is that the note or memorandum must evidence all the material terms of the parol contract between the parties. So for example in **Hawkins v Price [1947] Ch. 645** where the memorandum did not evidence the oral and material term of vacant possession that the parties had agreed, it was held that the memorandum did not satisfy the section (see also **Burgess v Cox [1951] Ch. 383**). The cases demonstrate that the claim to enforce the agreement can be successfully resisted where the memorandum does not evidence the material terms of the parol agreement between the parties. It would therefore follow that where the parties have not reached agreement for the sale of the land then there cannot be a note or memorandum that can satisfy section 4(1) of the Conveyancing and Law of Property Act. In such a case, the claimant cannot succeed in the claim. It stands to reason also that in a case where the fact of an agreement for the sale of land has not been established that the claimant there too should not succeed.

11. Evidence before the Judge was provided by affidavits of the parties' attorneys-at-law on which there was no cross examination.

12. From the affidavits, there was agreement between the parties that the Judge, in April 2021, gave certain directions with a view to promoting the possible amicable resolution of the matter. Among them was that the Appellant retain a valuator to value the lands and provide a valuation report. This led to the email of April 21, 2021 from the Appellant's attorney-at-law, Ms. Dookie (Dookie), to Ms. Da Silva (Da Silva), attorney-at-law for the Respondent. In that email, it was proposed by Dookie that the parties agree to a joint valuator. This proposal, according to the email, was made in the interest of "continuing constructive settlement discussions" and with a view to the prevention of the wastage of time and money should the parties subsequently have reservations with respect to a named valuator. According to Dookie, this proposal represented an effort to compromise as to quantum so that if the Appellant decided to make an offer for the purchase of the disputed parcel of land, the Appellant would accept the valued price as the purchase price. Da Silva responded to this email by email dated April 22, 2021 rejecting the proposal. In the email, Da Silva roundly criticised the Appellant for ignoring "innumerable opportunities" to make an offer in settlement of the claim.

13. Shortly thereafter, in May 2021 there was a telephone conversation between Dookie and Da Silva (I will refer to this conversation as the May conversation). Their recollection as to the contents of the May conversation differ considerably. According to Da Silva, based on instructions she received, presumably from her client, she proposed to Dookie that the parties agree to the appointment of a joint valuator whose charges would be shared equally between them, on the condition that whatever value or price the valuator sets would be accepted by the parties as the figure which the Appellant would buy the disputed strip of land from the Respondent in full and final settlement of the proceedings. According to Da Silva, a few days later Dookie called her indicating her client's agreement to that proposal in order to finally determine the action. The tenor of Da Silva's evidence was therefore that the Appellant

was obligated to purchase the disputed parcel of land at the price as determined by the valuator.

14. Dookie, on the other hand, stated that Da Silva in the May conversation told her that her client was now amenable to appointing a joint valuator. According to Dookie, she reminded Da Silva of the contents of her email of April 22, 2021 which contained diametrically opposed instructions. Da Silva simply responded that she was aware of what was stated in her email but these were her present instructions. She stated that she told Da Silva that she would need to speak to her client and counsel and also requested that Da Silva send an email confirming the verbal exchange. No such email was received by Dookie. Dookie specifically denied that Da Silva indicated that her client's willingness to retain a joint valuator was strictly on the basis that Dookie's clients were obligated to purchase the parcel of land. Further, Dookie denied that she agreed to any such term during the May conversation.

15. It was clear that the recall of Dookie and Da Silva as to the contents of the May conversation was very different. According to Da Silva, the Appellant had proposed the appointment of a joint valuator on the condition that the Appellant was obligated to purchase the land at the price determined by the valuator, which Dookie subsequently agreed to. Dookie, on the other hand, denied this. The Judge was cognizant of this dispute on the evidence but made no order for the cross-examination of the deponents and it appears no application for cross-examination was made to the Judge by any of the parties.

16. It is clear that from the evidence of Dookie and Da Silva as to the May conversation that the Court cannot conclude that there was a proposal by the Respondent for the Appellant to purchase the disputed parcel of land at the price to be determined by the valuator, which, if accepted, would form a contract for the purchase of the disputed parcel of land. The Judge, however, found that there was an agreement by the Appellant for the purchase of the

land. She further found that there were memoranda for the agreement, sufficient to satisfy section 4 (1) of the Conveyancing and Law of Property Act, in emails between the attorneys-at-law for the Appellant and for the Respondent over the period May 28, 2021 to July 7, 2021. In so finding, the Judge paid no regard to the dispute on the evidence as to the conversation between Dookie and Da Silva.

17. The emails to which the Judge referred are annexed to the affidavit of Da Silva. There are four emails of the May 28, 2021. It seems clear that those emails are after the May conversation with Dookie and Da Silva. The emails focus on the appointment of a suitable valuator. The parties eventually agree on June 2, 2021 to the appointment of Linden Scott. The emails of May 28, 2021 make no reference to any agreement for the purchase of the parcel pf land.

18. The Judge further stated that she noted in particular the email dated June 2, 2021 in which the Respondent's attorneys-at-law sought confirmation that the figure in the valuation report would be the "buy out figure" for the Appellant to become the legal owners of the parcel of land. Dookie, the Judge said, confirmed this to be the position by email of June 4, 2021. The Judge also placed emphasis on the fact that there was no email from Dookie in response to the email of June 8, 2021 from the Respondent's attorneys confirming their understanding that the agreement between the parties was for the Appellant to purchase the lands at the price as determined by the valuator.

19. The email of June 2, 2021 to which the Judge makes particular reference is from the Respondent's attorneys-at-law to the Appellant's attorneys-at-law. In it the attorneys thank Dookie for agreeing to the appointment of the valuator and then state "And this would be on the basis that the figure Mr. Scott sets as the value of the disputed strip would be the buy out figure for your clients to become the legal owners of it, right? I would be grateful for

your confirmation of this please." Dookie in an email of June 4, 2021 replies "With respect to your query, yes, those are my instructions".

20. The emails of June 2, 2021 and June 4, 2021 of course post-date the May conversations where the parties differed on what was then discussed and what was subsequently agreed. Further, the emails do not expressly set out in clear language that there was an agreement that the Appellant shall purchase the disputed lands at the price as determined by the valuator in compromise and settlement of the claim. The Judge appeared to think that by Dookie stating that the email of June 2, 2021 accorded with her client's instructions meant the Appellant had agreed to purchase the disputed parcel of land at the price as determined by the valuator. That, however, is not at all clear. The statement that the valuator was retained on the basis that the figure set by him would be the buy out figure for the Appellant to become the legal owners of the disputed parcel of land is ambiguous and may convey the meaning that if the Appellant agreed to purchase the disputed parcel of land the price would be as determined by the valuator. This is particularly so when viewed in the light of Dookie's evidence of the May conversation. If Dookie's recollection of the May conversation is correct, then it is reasonable to construe the June 2, 2021 email as not placing any obligation on the Appellant to purchase the disputed parcel of land but as conveying the agreement of the parties that the value arrived at by the valuator would be the price or the buy out figure for the Appellant to become the legal owners of the disputed parcel of land if the Appellant were to agree to buy it. As Dookie said in her affidavit, what she meant by her email of June 4, 2021 is that "if her clients were so minded to subsequently purchase they would honour the market value of the disputed strip of land and make an offer in the sum as stipulated by the valuation report". That is not an unreasonable interpretation of the email of June 4, 2021 if Dookie's evidence of the May conversation were to be preferred. A different result might be obtained if Da Silva's evidence were to be preferred.

21. The other email that the Judge placed particular emphasis on was the email of June 8, 2021. This email was sent by the Respondent's attorneys-at-law and states, inter alia, "And for the sake of good order I confirm my client's instructions that the defendant (the Respondent) agrees to both Mr. Scott being appointed as joint valuator and to share his fee on the basis of the agreement made on behalf of our clients to resolve this matter by the payment by your clients to mine of the value set by Mr. Scott for your clients to acquire full legal title to the entirety of that strip, which of course leads to the Champs Elysees Road". The Judge noted that there was no objection to the Respondent's attorneys' understanding of the terms of the agreement as expressed in the email.

22. It is correct that the Appellant did not respond to the email. But, this must be viewed against the Appellant's untested evidence that the email was not an accurate representation of what was discussed between the parties and agreed. In our view, in the circumstances where the existence of an agreement as alleged in the email is denied, the failure to respond to the email and object to its contents should not be treated as an acknowledgment that the email correctly set out the terms of an agreement between the parties. Further, we do not believe that there was any obligation on the part of the Appellant to respond to the email and although it might have been desirable for the Appellant to do so, without more no adverse inferences should be drawn against the Appellant because it did not do so.

23. After the June 8, 2021 email the parties signed the valuator's letter of engagement and paid his fees. We do not see this as taking the matter any further. Indeed, the engagement letter contains a provision that the parties agreed to be bound by the opinion of the valuator. That is entirely consistent with the Appellant's evidence as to the effect and purpose of the valuation. There is nothing in the engagement letter that binds the Appellant to purchase the disputed parcel of land at all or at the price as determined by the valuator.

24. In view of the above, in our judgment, it was necessary in order for the Judge to have fairly and properly determined the issue before her to resolve the dispute on the evidence as to the contents of the May conversation. That was important since it appears that the Respondent's contention is that it was during that conversation that the offer or proposal that led to the parol agreement was made. It is relevant to notice in that regard that both the June 2, 2021 and June 8, 2021 emails from the Respondent appear to be premised on the basis that the agreement, as contended for by the Respondent, materialised because of an offer or proposal previously made. That, on the evidence of the Respondent, could only have been the offer or proposal which the Respondent contends was made during the May conversation. That underlines the importance and significance of the May conversation and the necessity to have had the dispute on the evidence resolved. Simply put, there cannot be a sufficient note or memorandum of an agreement that was not made. It was of the utmost importance to have determined the dispute surrounding that.

25. In our view, the dispute on the evidence should have been resolved by the cross-examination of the deponents, Dookie and Da Silva. However, as we noted earlier, it does not appear that there was any application made for the cross-examination of the deponents and none was ordered. It is of course possible for a Court not to accept a deponent's evidence in his or her affidavit without the need for cross-examination. That usually occurs where there is some inherent improbability in the evidence or the evidence conflicts with undisputed contemporaneous documentary evidence. That, however, is not this case and the Court could not properly accept one deponent's evidence in preference to the other without a forensic examination of it by cross-examination.

26. The alternative ground on which the Judge decided the matter, that is to say, there was an oral agreement and evidence of part performance, suffers from

the same defect. It cannot properly be determined on the evidence as it stands that there was an oral agreement between the parties for the purchase of the disputed parcel of land in settlement of the matter.

27. In the circumstances, we are unable to support the judgment of the Judge. The appeal is therefore allowed. The order of the Judge made on January 18, 2022 is set aside. The notice of application of the Respondent dated and filed on September 7, 2021 is dismissed. The matter is remitted to the Judge to continue with it.

28. We may mention that the Appellant raised other issues, which in view of our conclusion above it is not necessary that we treat with and we do not propose to do so.

29. The Respondent by its said notice of application in effect sought the determination of a preliminary issue as to whether the parties had arrived at a compromise agreement in settlement of the claim. This is not the first time we have seen an appeal where the parties attempted to have the Court determine a preliminary issue that was dependent on facts that were not agreed or determined but were disputed. Needless to say, those matters simply amounted to added expense, delay and anxiety. The fact of the matter is whether the Court should embark on the determination of a preliminary issue requires careful consideration. In that regard, we would like to draw to the parties' attention the case of **Steele v Steele [2001] C.P. Rep 106** which contains useful guidance on the matters to be considered on whether to embark on a preliminary issue.

30. We will now hear the parties on costs.

A. Mendonça, J.A.

J. Aboud, J.A.