



[2017] JMSC Civ 205

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013HCV00464**

<b>BETWEEN</b>	<b>Caribbean Real Estate Investment Fund</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>Valrine King</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Claimant appearing in person

Mr. Alexander Williams and Mrs. Sharon Usim for the defendant

November 8, 9,10 and December 12,2017

**CONTRACT – ENFORCEABILITY CHALLENGED ON THE GROUNDS OF ILLEGALITY – OF  
ENFORCEABILITY CHALLENGED ON THE GROUNDS OF UNCERTAINTY**

**Tie, J (Ag.)**

**The Claim**

- [1]** On November 13, 2006, a representative of the claimant entity and the defendant signed a document titled “Joint venture agreement.” The claimant alleges that the defendant has breached this agreement.
- [2]** As stated in the particulars of claim, the claimant is a registered limited liability company that specialises in real estate development and other real estate related products and services. It offers joint venture partnerships in real estate with property owners and other investors. By virtue of this arrangement the joint venture parties become owners of the real estate with absolute proprietary rights and control over their percentage share of the development.

- [3] The claimant contends that by virtue of this agreement, a large acreage of land owned by the defendant was to be developed by the claimant. On completion of the development, which would consist of commercial and residential housing units, the defendant would be paid the sum of US\$2,800,000 and would also earn a percentage of the profits.
- [4] The managing director for the claimant entity, Anthony Tharpe, as per the particulars of claim, professes to be the private financier of the joint venture of the parties and is aggrieved that the defendant has reneged on her responsibilities under the agreement in that she has failed to surrender the title for the property. As a result it is claimed that the claimant, as well as other joint venture partners who invested in the project, stand to lose millions of dollars as a result of her breach.
- [5] The claimant seeks orders for specific performance, to include the grant of a power of attorney over the property to facilitate the advancement of the development, as well as damages.

#### **The defence**

- [6] The essence of the defence is primarily three fold. Firstly, that the joint venture agreement is unenforceable as it contravenes sections 10 and 35 of the Real Estate (Dealers and Developers) Act and is therefore illegal; Secondly that the terms of the document are uncertain and hence unenforceable and in any event do not reflect the entirety of that which was agreed in discussions preceding the signing of same; Thirdly, that the agreement was terminated by the defendant some three months after the signing of same.

#### **The evidence**

- [7] The sole witness for the claimant was Mr Tharpe. His evidence was that the parties entered into a joint venture agreement on November 13, 2006. He maintained that there was no agreement outside of that document which is

accompanied by an addendum. The terms he asserts are clear and could not be misunderstood for an agreement for sale, as the defendant contends, particularly since she sought legal advice on the matter. Further, according to him, his discussions with her made it plain that the proposed arrangement was not a sale agreement, hence her earning a percentage of the profits in addition to being paid for the value of the property.

- [8]** According to Mr Tharpe, under the agreement the defendant's contribution would be the real estate. He explained that the claimant's contribution was to develop the concept and design of the development proposed as well as to address financing, technical services, marketing and sales. Under the joint venture agreement the claimant was to put together all the relevant partners and secure all the permits necessary to ensure the construction of the development.
- [9]** The claimant entity was also empowered to admit other partners to the joint venture wherein they would be given an actual percentage ownership in the property forming the basis of the development and would be entitled to units depending on their investment. The claimant contends that the defendant is responsible to the joint partners who have expended substantial amounts of money towards the development, as well as for all increases in the cost for the proposed development.
- [10]** He indicates that the agreement signed by the parties does not allow for the defendant to unilaterally end or withdraw from the joint venture and that such a breach attracts an automatic penalty of 10% forfeiture of the asset contributed to the joint venture by her which is to accrue solely to the claimant.
- [11]** He claims that the claimant prepared the preliminary design concept in the form of computer generated drawings that were presented to the defendant and also took steps to have the title for the property, which was not in the name of the defendant, retransferred to her.

[12] Not surprisingly, the defendant's evidence was in contrast with that of Mr. Tharpe. The defendant's evidence was that she was desirous of selling property and had discussions with Mr Gooden, a representative of the claimant in this regard. After a viewing of the property discussions were held as regards the price and a figure of US\$2.9 million settled on. She says that in October 2006 she was invited to a meeting at the office and was given forms to sign. On seeing the words 'joint venture' on the document she raised concerns with Mr. Gooden who assured her that she would be paid in full before anything is done. According to her she advised both Mr. Gooden and Mr. Tharpe that she would not be giving her title to anyone unless she was paid in full and her lawyer advised her to sell. She explained that she signed the agreement on the understanding that she would be paid fully for her land and that she would be paid a deposit of \$6million.

[13] She therefore avers that although the document signed was headed 'joint venture agreement', the true nature of the agreement between the parties was that of a sale of the property.

[14] She explained that she had reason to have concerns about the bona fides of Mr. Tharpe and the claimant entity based on certain utterances of Mr. Gooden which concerns were later confirmed when she saw publications issued by the Financial Services Commission warning the public that the claimant was not licensed with them to do investments. Having received no payment from the claimant company, she terminated the said agreement by way of a letter dated January 28, 2007. Other than an abusive telephone call from Mr Tharpe the following day, she indicates that she heard nothing from him until some four years later.

#### **Submissions on the issue of illegality**

[15] The defendant asserts that the joint venture agreement is unenforceable as the claimant has contravened sections 10(1) and 35 of the Real Estate (Dealers and

Developers) Act. The defendant argues that the intended activities of the claimant under the agreement necessitated the obtaining of a real estate dealers licence as well as registration as a developer under the aforementioned legislation and that the contract is illegal in the absence of these.

- [16] In response thereto, the claimant concedes that it was not licenced under the Act but argues that there was no requirement for either at the time of the signing of the agreement.

### **Analysis**

- [17] By virtue of section 10(1) of the legislation, real estate dealers must hold a valid licence issued under section 20(1).

- [18] A real estate dealer is defined as one who engages in the practice of real estate business. The practice of real estate business is extensively defined in section 3 of the Act thus:-

3(1) "...a person engages in the practice of real estate business, for the purposes of this Act, if, on behalf of another person.....

(a) Appraises, auctions, sells, exchanges, buys, leases or rents or offers, attempts or agrees to appraise, auction or negotiate the sale, exchange, purchase, lease or rental of, any land or otherwise functions as a broker in relation to any land and includes activities such as the selling and buying of land;

(b) Advertises or holds out to the public by any oral or printed representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing or renting, land;

(c) Manages land or engages in any other business concerned with the management of land either in a consultative capacity or as an agent;

(d) Takes any part in the procuring of sellers, purchasers, lessors, lessees, landlords or tenants of land; or

(e) Directs or assists in the procuring of prospects, or the negotiation or closing of any transaction which results in a sale, exchange, lease or rental of land of another or is calculated to have that result.”

**[19]** Given the description by Mr Tharpe of the business of the claimant entity, it is evident that it was engaged in the practice of real estate business as a real estate dealer. He admitted under cross examination that the claimant was engaged in the practice of real estate business in that it acquired, developed and managed real estate. This description is subsumed in the definition of ‘real estate business’ under the Act, and hence places the claimant within the definition of a real estate dealer. Mr Tharpe also conceded that the agreement contemplates the claimant selling units from the development. Again, in so doing he has squarely placed the claimant within the definition of a real estate dealer under the Act

**[20]** It is also clear from a perusal of the agreement in its entirety that the intended activities of the claimant would amount to it acting as a real estate dealer. The general tenor of the joint venture agreement and the addendum is one in which the claimant would take control of the land, construct units thereon by obtaining financing from investors, who, as per the addendum, as a result of the capital contributed would obtain ownership of a unit in the development. It is apparent that the claimant’s intended actions were tantamount to that of a broker who sought to obtain money from individuals in exchange for an interest in the property. The claimant therefore intended to sell the units constructed, or, as the legislation states, the intended actions were ‘calculated to have that result.’

**[21]** A number of paragraphs in the agreement either explicitly or otherwise support the conclusion that the intended activities of the claimant amount to it acting as a real estate dealer.

**[22]** The agreement at paragraph 1 describes the claimant as being a 'Developer involved in the business of the acquisition, development and management of Real Estate.' This depiction is again duplicated in the paragraph which deals with the purpose of the parties entering into the agreement. As stated at paragraph 9(c), it is for the parties 'acquiring and developing and managing the property for long term income if not sold or it is determined by the developer that long term is the desired business sand profit taking strategy' (sic). This description is encompassed in the definition of real estate business under the legislation.

**[23]** Other provisions in the agreement also echo that the claimant was engaged in the business of real estate under the agreement, as defined in the legislation. For instance:-

- Paragraph 3 of the agreement indicates that the developer would promote the development which was to be called Phenion Preserves for the construction of commercial condominiums and / or townhouses for the 'lease or the transfer to individual joint venture or for sale on the open market' (sic).
- Paragraph 4 stipulates that the developer and the joint venturer (the defendant) desire that contributions shall be made in exchange for an interest in the property.
- As per paragraph 7, the developer would apply for the 'issuance of individual duplicate certificates of title for the lots or condominiums, town homes, homes or other applicable development under the Registration of Titles Act....'

- Paragraph 9(k) of the agreement also speaks to the “cost of agreement” and stipulates that the ‘Cost of Title transfer inclusive of Attorney’s fees shall be bore (sic) by developer and buyer in accordance with local Real Estate Laws at the relevant time of transfer if any transfer.’
- Under Paragraph 9(M) the developer/claimant is responsible for the allocation of funds obtained under individual joint venture agreement for various purposes which includes the ‘subdivision and transfer of individual Titles’.
- As per 9(M) ‘...in the event that the other remaining individual condominiums or buildings for sale under the development are not sold, allocated or the contributions not collected, the Developer may obtain long term refinancing and transfer the individual Titles to the names of its nominee(s) at it own expense.’
- According to 9(N), ‘...the Developer shall be obliged to execute all Agreements and Transfers necessary to transfer the Titles to the individual Joint Venture or buyer if such transactions are a part of the agreement.’

**[24]** The aforementioned activities of the claimant under the agreement are subsumed within the definition of real estate business under the Act.

**[25]** Mr Tharpe, also accepted under cross examination that the claimant advertises real estate as part of his primary product. He conceded that the investors would sign an equity agreement that would give them an interest in the property and that this would come about through the advertisements. In so doing, the claimant was clearly acting within the dictates of section 3(1)(b) of the Act. The claimant having advertised this arrangement and made representations that he was engaged in activities which in essence amounted to the sale of property, would have breached the legislation.

[26] This assessment of the activities undertaken by the claimant is also evident from a review of the 'equity agreement.'

[27] The Real Estate (Dealers and Developers) Act, prohibits persons who are not licenced as dealers from engaging in certain activities. The legislation when read in its entirety is designed to protect the public. The Real Estate Board which is established under the Act, is empowered 'to regulate and control the practice of real estate business" and to do all necessary "in protecting the mutual interests of persons entering into land transactions." Under the Act, performing acts as a dealer without a licence is a criminal offence.

[28] According to Chitty on contracts, 27<sup>th</sup> Edition, 16-08

*"Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, or alternatively it may be a statutory requirement that the parties to the transaction possess a licence and where they do not the contract will be illegal as formed."*

[29] Given the nature of the business of the claimant entity and the responsibilities of the claimant under the agreement there was a requirement for licencing as a real estate dealer at the time of the signing of the agreement. This is compounded by the fact that money was collected from persons under the equity agreement as a means of financing same. The fact that the representatives of the claimant may have honestly believed that there was no requirement for same does not assist the claimant's cause.

[30] I am fortified in this position by various authorities that have delved into the issue of the implications of a breach of this nature on a contract. By way of illustration, the case of **Re an arbitration between Mahmoud and Ispahani** [1921] KB, 716, involved a contract to sell linseed oil at a time when it was required that purchasers and vendors be licenced. One of the parties to the contract was not licenced and despite having misled the other in believing that he was in fact

licenced, was nonetheless able to rely on this fact and the contract being illegal as a consequence. Scrutton LJ stated therein, 'the contract was absolutely prohibited; and in my view if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality.'

**[31]** The joint venture agreement in issue is unenforceable as it is illegal. The claimant was prohibited from acting in the manner set out in the agreement since he was not licenced under the Real Estate (Dealers and Developers) Act.

**[32]** The defendant further argued that the agreement is also unenforceable as the claimant was not registered as a dealer at the time as required by section 35(1) of the aforementioned Act. Having already determined that the agreement is unenforceable, I find it unnecessary to delve into the issue illegality of the agreement on this ground.

#### **Submissions on the issue of uncertainty**

**[33]** The defendant asserts that the agreement is unenforceable as the terms are unclear and nonsensical when read in its entirety. By way of illustration the defendant points to the lack of clarity as regards the entitlement and obligations of each party under the agreement, the vagueness as to the development itself, and inconsistencies within the agreement itself. The defendant argues further that this is compounded by the nature of the discussions which transpired prior to signing which related solely to the sale of the property.

**[34]** In contrast the claimant maintains that the terms of the agreement are clear and that the defendant sought legal advice prior to signing of same. Further he insists that all discussions related to a joint venture agreement in which the claimant entity would develop the defendant's property and not the sale of property.

## **Analysis**

- [35] The agreement when read in its entirety is generally unclear. Whilst entitled 'joint venture agreement' and whilst committing the defendant to provide property towards the development project as equity, other provisions of the agreement suggest that there would be a transfer in ownership. As an example, the stated purpose of the parties entering the agreement as set out in 9(C) is to acquire, develop and manage the property. Also Mr. Tharpe in his witness statement at paragraph 24 speaks to Mrs. King being 'paid for the value of the property.'
- [36] Uncertainty also surrounds specific provisions under the agreement. It is, for instance, ambiguous on the crucial matter of the entitlement of each party under the agreement and when these entitlements would be received.
- [37] On the part of Mrs. King, paragraph 9(A) of the agreement indicates that "the investment shall entitle the joint venturer to a certain percentage of the profits. The said returns or interest in the investment shall be payable as follows:100% the agreed value of the property as the cost for the exclusive development rights to the property and the development has been the amount of US\$2,800,000 (two million eight hundred thousand US dollars) plus 5% of the net profits from the sale of development, all payable once profits are declared (sic)" The paragraph however further states that "The developer will pay directly to joint venturer US\$2,800,000 (two million eight hundred thousand US dollars) for exclusive right to develop the property. This amount is to be equal to the value of the property or the agreed and accepted negotiated price of the property and payable 120 days or sooner of the receipt of final approvals from all government agencies including local government."
- [38] On the one hand it appears that the sum of US\$2,800,000 has been settled however on the other it seems that it is to be determined by the 'value of the property or the agreed and accepted negotiated price of the property'. It also is unclear whether this figure is for the right to develop the property on the one

hand or if it is the 'negotiated price for the property', given that other parts of the agreement suggests that there would be a transfer of ownership. This gives credence to Mrs. King's assertion that the discussions prior to the signing of the document pertained to the sale of the property. Additionally, it is unclear when payment would be made. On the one hand the agreement states that Mrs King would receive this figure 'once profits are declared' but the agreement also states that payment would take place '120 days or sooner of the receipt of final approvals from all government agencies including local government.'

- [39] On the part of the claimant, the agreement also does not clearly indicate what is to be received given that the claimant's interest is dependent on other investors who are unknown.
- [40] The agreement also fails to elaborate on the development itself. It does not for instance indicate the intended composition in relation to the number of units, the proportion of commercial units vis a vis residential units, and the intended outlay of these units. It is also silent on the process of getting the units sold. These are crucial issues given the implications if units are sold or not sold. Under the agreement the defendant is to receive a percentage of the net profits from sales of units sold whilst as regards units not sold, "the developer may obtain long term refinancing and transfer the individual titles to the names of its nominee(s) at its own expense."
- [41] Paragraph 9(T) of the agreement deals with the assignment of interests and covers issues such as withdrawing from the agreement. The paragraph however is unclear as to whether it applies to the defendant. Under the agreement Mrs King is described as the 'joint venture.' The uncertainty in relation to paragraph 9(T) relates to the fact that the provision generally makes reference to 'venturers' in subsections 1 and 2. The term 'joint venturer' however is used in subsection 3 but does so in the context of plurality of persons as it refers to 'the selling of their interest.' It is therefore uncertain whether these provisions relate to the defendant, the joint venture or to the other investors.

[42] The agreement is therefore unclear as to its general objective and also as regards specifics. The implications of this lack of clarity and certainty were addressed in the Privy Council judgment of **Western Broadcasting Services v Edward Seaga** (2007) 70 WIR 2013 wherein the issue of the comprehensiveness of a settlement agreement was considered. Their lordships indicated therein that, "It is trite law that although parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete: *Chitty on Contracts*, 29<sup>th</sup> ed (2004) para 2-110. In some cases it can properly be said that the parties have reached an enforceable agreement on part of the matters in issue, leaving the rest to be determined by further agreement or the process of litigation: see such cases as *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378..... In others the remaining details can be supplied by the operation of law or by invoking the standard of reasonableness." It was determined that the omissions in the settlement agreement were 'a lacuna which was impossible to fill.'

[43] I am of the view that the gaps in the agreement herein are as such that they cannot be rectified by any of the avenues set out by their lordships, and similarly, there is a lacuna which is impossible to fill. Therefore, even if the agreement were not unenforceable on the basis of illegality, it is unenforceable for uncertainty.

#### **Submissions on the issue of termination of the agreement by the defendant**

[44] The defendant submits that the agreement was terminated some three months after its signing by way of a letter written by the defendant and delivered to the claimant's office. The defendant indicates that she withdrew from the agreement based on information she received from Mr. Gooden that other persons were aggrieved that they had not received their monies from the claimant. She indicates that she was fortified in her decision when the Financial Services Commission advised the public that the claimant entity was not licenced by the Commission.

- [45] Other than receiving an abusive telephone call the following day, the defendant heard nothing from the claimant until some four years later when she received a letter from Mr. Tharpe and thereafter when the claim herein was filed some 7 years after. According to the defendant, the claimant's inertia amounts to acquiesce to the termination.
- [46] The claimant in response argues that there are no provisions in the agreement to facilitate the defendant withdrawing from the agreement.
- [47] The claimant maintains that he never had sight of the letter written by the defendant until the case management conference but admitted that he was aware of same. He states in his witness statement that there is no provision in the joint venture agreement which allows Mrs. King to unilaterally end or withdraw from the agreement. He however also says in the said witness statement that she 'voluntarily ended her right as a joint venture partner as afforded under the joint venture agreement.'

### **Analysis**

- [48] The agreement indicates consequences if any 'venturer' withdraws as a 'venturer' in contravention of the agreement. The agreement therefore contemplates same, however given the lack of clarity of the document, it is difficult to appreciate what these provisions are and also whether the provisions relate to the defendant or to the other investors. It is certainly a compelling argument that the claimant's dormancy for years after receipt of the defendant's letter terminating the agreement, which I accept as the truth, was acquiescence to same. It is therefore unfathomable that the claimant would have continued collecting money from investors as regards this project as evident from the exhibits. In any event, given the court's findings as regards the unenforceability of the agreement on the grounds of illegality and uncertainty, the issue of termination of the agreement by the defendant does not advance the resolution of this matter. The agreement cannot stand.

[49] Finally, even if the agreement was enforceable, the court would have been unable to grant the relief sought. The claimant primarily seeks specific performance even though damages have been claimed. As regards specific performance, such an order is not appropriate in contracts that relate to the construction of buildings. Counsel for the defendant made reference to Keaton Building Contracts (5<sup>th</sup> edition) at page 269 which states,

*“Specific performance is a decree issued by the court ordering the defendant to perform his promise. It is an equitable remedy granted by the court in its discretion, such discretion being exercised according to well established principles. Thus the court will not grant a decree where the common law remedy of damages will adequately compensate the plaintiff, nor where the court cannot properly supervise performance. For these reasons ‘it is settled that, as a general rule, the court will not compel the building of houses.’ Thus the court does not often order specific performance of a contract to build or do repairs but it has jurisdiction to do so and sometimes does.”*

[50] It states further that

*“...the court will order specific performance of the agreement to build if the following conditions are satisfied:*

*(1) That the building work,, is defined by contract; that is to say that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance.”*

[51] This position was also stated by Sir G. Nelles LJ in **Wilkinson v. Clements** (1892) LR 8Ch96 at 112 wherein he stated,

*“I confess I do not see how, if he did give that undertaking, he could even then be entitled to the specific performance of part, because the rule, when an agreement is really entire, is, that the Court will not perform a part, unless it can compel the actual performance of the whole. Now it is settled that, as a general rule, the Court will not compel the building of houses. Therefore, if this were to be treated as being an entire agreement, it seems to me that no specific performance could be granted at all until the whole of the houses had been built.”*

- [52] The court will therefore only make an order for specific performance in relation to building contracts where the work to be done is exactly defined. This principle was applied in the case of **Morris v Redland Bricks Ltd** [1970] AC 652 where in at first instance an injunction was ordered requiring the defendant, whose actions had caused land slippage to neighbouring land, to take all necessary steps to restore support to claimant's land. On appeal it was held that this injunction was invalid as an order requiring the defendant to do something must set out exactly that which is to be done. It was insufficient to provide general instructions.
- [53] Given the nature of the agreement in issue, such an order could not be considered. The granting of Power of Attorney to the claimant, given the nature of same, is one which cannot be entertained by the court.
- [54] On the issue of damages, the claimant has presented no evidence as regards its loss. The claimant seeks an award of damages 'equal to 100% of the actual investment already made towards the Project as well as 100% of the projected profits lost if the development is not completed as per the joint venture agreement (the development's subsequent expected/anticipated projected profits).' The sole witness for the claimant was unable to speak to any expenses that have been incurred or the extent of investments by other individuals. It is trite that special damages must be specifically proved. The claimant would have failed in this regard if it had satisfied the court on the issue of liability, which it did not.
- [55] In the circumstances judgment is entered for the defendant with costs to be taxed if not agreed.