[2020] JMSC Civ 210

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2019 CV 02841

BETWEEN	**ALCOVIA DEVELOPMENT COMPANY LTD**	**APPLICANT**
AND	**KEMTEK DEVELOPMENT & CONSTRUCTION CO LTD**	**DEFENDANT**

IN CHAMBERS

Mr. Jerome Spencer instructed by Nigel Jones & Co for the Applicant

Akuna Noble and Sashree Smith instructed by Tulloch Smith & Company for the Defendant

Heard: July 29, 2020 and October 23, 2020

Application for Summary Judgment – Notice making time of the essence – When can a contract be repudiated – what constitutes reasonable notice

HUTCHINSON, J

INTRODUCTION

[1] The matter before me is an application for Court orders which was filed by the Applicant on the 20th of September 2019 in which they seek the following Orders:

1. Summary Judgment in favour of the Claimant;

2. Cost to the Claimant; and

3. Such further and/or other relief as this Honourable Court may deem fit.

[2] The grounds on which the Applicant is seeking the Orders are as follows:

a. Rule 15. 2 (b) of the Civil Procedure Rules allows for the Applicant to seek Summary Judgment if it is considered that the Defendant has no real prospect of successfully defending the claim or the issue.

b. The Defendant has no real prospect of successfully defending the claim against it;

c. The Defendant failed to fulfil its obligations under the agreement for sale, the letter of undertaking which was sent to them by Patterson Mair Hamilton on December 19, 2018 and the Notice to Complete Sale of Freehold Land and Making Time of the Essence ("the Notice");

d. By virtue of the failure to fulfil its obligations under the agreement for sale and to comply with the Notice, the Defendant repudiated the Agreement and the repudiation was accepted by the Claimant.

BACKGROUND

[3] In 2008, the Applicant entered into an agreement for sale to purchase property owned by the Defendant and registered at Volume 1447 Folio 894 in the Register Book of Titles being the land located at Lot Section 1, Part of Huddersfield in the parish of St. Mary. The parties agreed on a sale price of JMD$23,000,000 and the terms for payment of the amount were as follows;

a. The Applicant would pay an initial amount of JMD$6,900,000.00 upon the signing of the said Agreement;

b. The sum of JMD$4,600,000.00 was to be paid to the Defendant as a second deposit, on or before 60 days from the date of signing or the date of the Agreement, whichever is sooner;

c. The balance purchase price of JMD $11,500,000.00 was to be paid to the Defendant within sixty (60) days of the receipt of the certificate of compliance from the Chief Technical Officer together with the Claimant's share of the costs of Transfer.

d. Possession would be vacant upon completion.

[4] In compliance with the terms of the Agreement, the Applicant paid the Defendant the sum of JMD $11,500,000.00 towards the purchase price of the Property and engaged the services of Attorneys-at-Law and Commissioned Land Surveyor to represent its interests under the Agreement. After a prolonged delay, the Agreement was varied in early February 2017 to reduce the sale price to JMD $20,000,000.00 and a new completion date of May 1, 2017 was set.

[5] In April 2017, the Applicant discovered that a structure had been erected on the Property and was being occupied by a squatter. A request was then made of the Defendant to demolish the structure to ensure the Property was vacant. By letter dated June 14, 2017, the Applicant's Attorneys-at-Law at the time (Rattray Patterson Rattray) issued the required letter of undertaking to the Defendant's Attorneys-at-Law. In July of 2017, the Defendant requested further time to remove the squatter(s) off the Property and this request was acceded to by the Applicant.

[6] In February 2018, the Applicant was informed by the Defendant's Attorneys-at-Law that the Property was vacant and in March 2018 they commissioned the firm of Lofters & Associates, Commissioned Land Surveyors, to confirm this. A report was subsequently prepared which indicated that the surveyors had been barred by an individual asserting proprietary right over a section of the property. An encroachment on the subject property was also identified in the report. A copy of this report was provided to the Defendant's Attorneys-at-Law under cover of a letter

dated March 25, 2018 from the Applicant's then attorneys, Rattray Patterson Rattray.

[7] In December 19, 2018, the Applicant changed representation and their new Attorneys-at-Law, Patterson Mair Hamilton, issued another letter of undertaking to the Defendant's Attorneys-at-Law. On the 19th of April 2019, a notice making time of the essence was prepared by Patterson Mair Hamilton on behalf of the Applicant and it was served on the Defendant's Attorneys-at-Law on the 23rd of April 2019.

[8] The contents of the letters of undertaking provided that the Attorneys for the Applicant gave their professional undertaking to pay over to Counsel for the Defendant the sum of Eight Million Nine Hundred and Eighty Thousand Two Hundred and Ninety Dollars ($8,980,290.00) being the balance purchase price and Purchaser's costs on transfer per statement of account dated June 13, 2016 upon receipt of the following documents, to wit:

i. Duplicate Certificate of Title registered at Volume 1447 Folio 894 duly endorsed in the name of Alcovia Development Company Limited;

ii. Property tax certificate evidencing payment of taxes up to date;

iii. Letter of Possession;

iv. Letter to Jamaica Public Service Company Limited;

v. Letter to the National Water Commission, and

vi. Completed TR 1 Form

The letter dated June 2017 also contained the term, and upon our receipt of confirmation from our client that the property is vacant.

[9] The contents of the notice in addition to making time of the essence required that the Defendant complete the following tasks;

i. Complete the sale of the land.

ii. Provide proof of beneficial ownership and

iii. vacant possession of the said land;

Failing their ability to complete same by the 3rd of May 2019, the Applicant outlined that they would terminate the agreement and pursue recovery of the sums paid and damages for breach of contract.

[10] On the 6th of May 2019, the Applicant issued correspondence in which they indicated that as a result of the Defendants failure to comply with the notice the agreement was cancelled. They demanded a refund of the monies paid and subsequently brought an action on the 9th of July 2019 in which they sought the following orders;

1. A declaration that it lawfully rescinded the agreement for sale of the property on May 6, 2019.

2. The sums of
   i. JMD $11,500,000.00 and
   ii. JMD $1, 150,973.31 for the total failure of consideration.

3. Damages for breach of contract

4. Costs.

5. A declaration that the Claimant is entitled to a lien over the Property to secure the sums herein and costs awarded

6. Interest at the commercial rate pursuant to the Law Reform (Miscellaneous Provision) Act

7. Such further and other relief as this Honourable Court may deem fit.

APPLICANT'S SUBMISSIONS

[11] It was the Applicants' position that their action in rescinding the agreement for sale was entirely justified as it had been occasioned by a number of failures on the part of the Defendant, most notably their failure to comply with the notice making time of the essence. In support of this position they made reference to the age of the transaction and highlighted the fact that the agreement dates back to 2008 but up to April 2019, ownership had not yet been passed to them.

[12] They argued that they were in no way responsible for the delays which were solely the responsibility of the Defendant. They submitted that they had always been ready to complete and in this regard reference was made to two letters of undertaking dated June 2017 and December 2019 in which they had made this position clear to the Defendants. They accepted that for at least a part of the period which elapsed, the delay was occasioned by litigation which impacted the Defendant's ability to pass vacant possession to them.

[13] In relation to the post litigation period, the Applicants argued that the presence of the squatters on the property was brought to the Defendants attention by them in May 2017. They outlined that although they were informed by the Defendant's Attorney in May 2017 that this situation would be addressed it was not until February 2018 that they were informed that the problem no longer existed. The Applicants argued that in spite of this indication an additional period of delay was created by the Defendants as their surveyors' ID report conducted in March 2018 revealed that the squatters were still on the property and the presence of an encroachment.

[14] They submitted that in spite of several request for follow up on this situation no response was provided. Additionally, their request for a Surveyors Report prepared by the Defendant was rejected.

[15] The Applicants argued that in light of what they described as protracted delays and failures by the Defendant it became necessary for them to serve a notice making time of the essence as more than 10 years had passed since the agreement had been entered into. They submitted that the 10 days or 8 working days between the date on which the Defendant was served to the date the time expired was a reasonable period within which the requisite steps for completion could have been taken and on this basis summary judgment should be entered in their favour.

[16] They relied on the Court of Appeal authority of ***Marvalyn Taylor Wright v Sagicor Bank*** as providing guidance on summary judgment applications. They also commended to the court the decisions of ***Robinson (Executor of the estate of Herman L Denton, dec'd) v Chen et al [2014] JMSC Civ 146*** and ***Stickney v Keeble [1914-15] All ER Rep 73*** on the area of notice making time of the essence.

DEFENDANT'S SUBMISSIONS

[17] The Defendants in their response, argued that the application should be refused as the Applicant's notice to complete was invalid due to its ambiguous nature and the inadequacy of the period to complete the sale. They submitted that contrary to the assertions of the Applicant, the delays in the transaction were not solely attributable to them. In this regard they made reference to an affidavit provided by Sylvester Tulloch where he outlined that as a result of litigation brought by a third party they were prevented from completing the sale and passing title to the Applicant.

[18] They submitted that the Applicants had always been aware of this situation and they had been advised when the litigation came to its conclusion and offered the opportunity to continue at a discounted price of JMS $20 million which they accepted. They argued that on two occasions extensions were granted to the

Applicant to make payments on the purchase price and letters bearing dates in June and December 2016 were provided in support of this position. It was also pointed out that the Applicants had been granted access to the property pending the transfer.

[19] The Defendants submitted that because of the ambiguous nature of the notice to complete clarification was sought from Patterson, Mair and Hamilton, the Attorneys on record for the Applicant on the 24th and 26th of April 2019 but no information was forthcoming. They said that they were informed that Mr. Spencer who had conduct of the matter was no longer with this firm but a follow up call would be provided to them which they never received.

[20] They argued that the situation was compounded by the lack of clarification as had this been provided, the sale could have been completed within 14 days as they had been in possession of all registrable documents to effect the transfer of the land. They pointed out that the working days allotted to complete the sale, provide proof of beneficial interest and provide vacant possession was wholly sufficient and on this basis the Applicant should not succeed.

[21] They argued that they had a real prospect of successfully defending the claim and relied on the local Court of Appeal decision of ***Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the province of the West Indies 2005 JMCA 21*** which affirmed the test outlined in ***Swain v Hillman,*** that is, that they should have a realistic as opposed to a fanciful prospect of success.

[22] The Defendants also made reference to the guidance provided in ***Bennett v Pearson*** *JMSC 2004 Civ 102* and ***Eureka Medical Ltd v Life of Jamaica Limited*** and ***Stewart v Samuels*** *JMCA Civ App No. 2 of 2005*. In respect of the validity of the notice to complete, they also made reference to ***JTM Construction and Equipment Ltd v Circle B Farms*** *2007HCV05110* and the guidance provided therein.

RELEVANT LAW

Summary Judgment

[23] The Court's power to dispose of an action by way of entering summary judgment in favour of a Claimant or Defendant is found at Rule 15.2 of the CPR which provides as follows;

> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue.*

[24] The 14th edition of the text ***A Practical Approach to Civil Procedure by Stuart Sime***, also provides useful guidance on this area. Paragraph 21.18 page 306 outlines the following discussion;

> *'In **Swain v Hillman** [2001] 1 All ER 91, Lord Woolf MR said that the words, 'no real prospect of success' did not need any amplification as they spoke for themselves. The word 'real' directed the Court to the need to see whether there was a realistic as opposed to a fanciful, prospect of success. The need does not mean, real and substantial' prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence 'is bound to be dismissed at trial'. If the defendant's evidence taken at its highest, shows a distinctly improbable defence, it is right to enter summary judgment (**Akinyele v East Sussex Hospital NHS Trust** [2008] LS Law med 216). Lord Woolf MR went on to say in Swain v Hillman that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Nor is summary judgment suitable for cases that depend on second or third hand evidence (**Radiocomms Systems Ltd v Radio Communications Systems Ltd** [2010] ECHC 149 (Ch)). If the Respondents case has some prospects of success, summary judgment should be refused (Cotton v Rickard Metals Inc [2008] EWHC 824 (QB)) '(emphasis supplied)*

[25] Further consideration of the relevant legal principles was conducted in the decision of Mangatal J in ***Eureka Medical Limited v Life of Jamaica Ltd*** *2003HCV1268* where in handing down her ruling on an application for summary judgment she

confirmed the applicability of the legal principles enunciated in ***Swain v Hillman*** when she stated as follows;

> *"Summary judgment is really designed to deal with cases that do not merit trial at all and as such a minitrial should not be conducted"*

[26] In the local Court of Appeal case of ***Taylor- Wright (Marvalyn) v Sagicor Bank Jamaica Ltd.*** *[2016] JMCA Civ. 38*, after an examination of relevant case law to include the locus classicus ***Swain v Hillman*** Phillips J.A. came to the following conclusion:

> *'From a reading of these cases, it is evident that to succeed on an application for summary judgment, the prospects of success must be "realistic" as opposed to 'fanciful" and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice. <u>However, if there are serious issues which require investigation, these ought to be detemined in a trial and not on a summary judgment application.' (emphasis supplied)</u>*

[27] It is clear from the legal principles extrapolated from these authorities that it is not the remit of the Court on a summary judgment application to conduct a mini-trial to determine where the truth/fault lies as where a matter requires investigation those are issues which are properly for the relevant tribunal. Additionally, the authorities make it clear that if the Defendant/Respondent's case has some prospect of success the matter would not be appropriate for summary judgment.

[28] The issue for determination clearly revolves around whether the defendant has a real prospect of defending this claim. It is the applicant's contention that they do not as they failed to comply with the terms of the notice making time of the essence and have failed to proffer an explanation for that failure even in the defence which has been raised. They argue that on this basis the Court should bring the matter to an end by granting their application. In treating with this argument it is noted that apart from the legal principles in respect of summary judgment, it is also essential to consider the law in relation to notices making time of the essence.

Notice making time of the essence

[29] Useful guidance on this area is provided by the dicta of McDonald-Bishop J (as she then was) in ***JTM Construction and Equipment Ltd v Circle B Farm*** *2007HCV05110* where she stated as follows;

> *45. Where time is not originally of the essence, failure to complete on the agreed date does not entitle the aggrieved party to decline to proceed with the contract. One exception to this principle, however, is where the delay is so protracted as to justify the aggrieved party treating the default as a repudiation of the contract. A protracted delay means delay for an unreasonably long time. This is a question of fact to be decided in all the circumstances:* ***Cole v Rose*** *[1978] 3 ALL ER 1121.*
>
> *47. The question now arises: did the defendant act properly in sending a notice to complete? It is the legal position that once the contract has been signed, it is clearly not open to one party to vary its terms by making the date specified in it of the essence of the contract, but it is settled that he may, after unreasonable delay by the other party, give reasonable notice to him to complete within a definite time provided the party serving the notice had carried out his own obligations: See:* ***Smith v Hamilton*** *[195.1] Ch. 174 and* ***Ajit v Sammy*** *[1967] 1 A.C. 255.*

[30] Having examined these legal principles, the learned judge then went on to say;

> *50. It is thus well accepted in conveyancing law that where the completion is delayed, the innocent party will normally be anxious to take action long before delay becomes protracted. If he wishes to be rid of the contract, he must first serve a notice requiring completion by a specified date, failing which he will treat the non-performance as a repudiation of the contract. The new date so fixed is then of the essence and the court will not assist the party served with the notice or the party serving it if he fails to complete by the new date: (See:* ***Stickney v Keeble*** *11917] A.C. 386 and* ***Brickles v Snell*** *[19 16] 2 A.C.599) (emphasis supplied)*

[31] In the course of her judgment, McDonald-Bishop J made it clear that for the notice to be valid, there are three common law requirements that must be satisfied:

i. The server must himself be ready and willing to complete at the time of service: ***Quandrangle Development and Construction Co. Ltd. v Jenner*** *[1974] 1 All ER 729 at 731.*

ii. The notice can only be served after unreasonable delay.

iii. The notice must allow a reasonable time for completion.

[32] On the question as to what constitutes a reasonable time for completion/performance, the Learned Judge stated;

> *63. Also, to be effective, the notice must limit a reasonable time for performance. In an open contract, the period for completion should be what would be reasonable to allow completion to be effected when all the outstanding steps are taken into consideration. In determining this issue of reasonableness the court should consider all the circumstances of the case which would include what at the date of notice remains to be done to complete, the reasons for the delay and the attitude of the innocent party to it:* ***Stickney v Keeble*** *[1915] AC 386.*
>
> *64. In the U.K., the general practice in this regard as gleaned from the Standard Conditions of Sale, (SC 6. 8.3. to be exact) is that in an open contract after notice to complete had been served, the parties are to complete within 10 working days of giving the notice excluding the day on which the notice is given. Again, this proves rather instructive to the extent that it offers an insight into the practice in another jurisdiction as to the time frame allowed for completion following on service of a notice to complete. (emphasis supplied)*

ANALYSIS AND DISCUSSION

[33] In keeping with established legal principles, it is acknowledged that the burden of satisfying the Court that the Defendants have no real prospect of successfully defending this claim rests on the Applicant. On examining the evidence on which they rely, I have reminded myself that this application is not meant to dispense with a trial but merely to determine if there is evidence on which if the matter were to proceed the defendants may have a reasonable prospect of success.

[34] In the instant matter the Applicants rely on a number of documents in support of their position. They have highlighted the date on which the agreement was entered into as well as the correspondence sent to the Defendant by their Attorneys between 2017 and December 2018 which they say make it clear that they were

ready and willing to complete the transaction. They argued that had the Defendant truly been in a state of readiness they would have been able to complete the transaction within the 8 business days as express services were available at the relevant agencies.

[35] The Defendants however have insisted that responsibility for the delay lay on both sides and the period allotted for completion was always an impossibility given the established period of time required to register a transfer and receive title. In coming to my decision on these competing positions, I elected to proceed on the basis of whether the three factors required for the notice to be valid have been met.

Was the Applicant ready and willing to complete at the time of service

[36] On a careful review of the documents provided by both parties, it is evident that although the transaction was originally entered into over 12 years ago, the process was unable to move forward for some time. It is not in dispute that litigation brought by a third party against the defendant impacted the sale and/or transfer of the land in question. It appears that this state of affairs remained until sometime in 2016/2017 when correspondence which was sent by the Defendant to the Applicant advising that they were now in a state of readiness to proceed.

[37] The parties having decided to continue with the transaction, it is noted that on at least two occasions extensions were granted to the Applicant to make payments which were due and owing. The Applicants situation seems to have been regularised sometime in or about February 2017 when an agreement was arrived at in respect of the new purchase price and date for completion which was scheduled for 90 days from the 1st February 2017 which would be May 1st 2017.

[38] The evidence shows that in June 2017, the Applicant Attorneys provided a letter of undertaking to the Defendant signalling their readiness to complete by paying over the balance of the purchase price upon receipt of a number of documents requested. They also indicated that this was subject to confirmation from their

client that the property was vacant as an occupant had been observed on the 29th of April 2017, a day before the transaction had been scheduled to be completed.

[39] The unchallenged evidence revealed that the concern in respect of the third party continued to be an issue up to March 2018, when a Commissioned Surveyor who could properly be described as an independent party was denied entry to survey the property by an individual who described himself as having a proprietary interest. In December of 2018, the Applicant's again indicated their readiness to proceed by providing an updated letter of undertaking to the Defendants having changed their representation.

[40] While the affidavit of the Defendants representative (which was produced in response to this application) asserts that the property was vacant and no lawsuit had been brought by anyone seeking to assert ownership, it is still unknown whether the encroachment identified has been removed. In these circumstances, it is evident that although the Applicants had sought to put themselves in a state of readiness, they could take no further steps to complete the transaction in the absence of the Defendant compliance with the terms of the letter of undertaking and sale agreement. Accordingly, they were on good ground in electing to proceed in this manner at the point at which the notice was served.

The notice can only be served after unreasonable delay

[41] It is an undisputed fact that after the Parties agreed to move forward with the sale a new date for completion was identified. On the 29th of April 2017, the presence of a third party on the property having come to the attention of the Applicants representative, on the 1st of May 2017 a letter was sent bringing this to the Defendant's attention. It is noted that a number of letters were subsequently exchanged with the Attorneys for the Defendant several of which touched and concerned this issue. As previously stated, this situation was addressed several months later in February 2018.

[42] Further delay was occasioned however when the Applicants Surveyors ID report revealed an encroachment as well as the continued presence of third parties on the property. Although requests were made for updates on this situation, no information had been provided by the Defendants in this regard neither did they provided any of the documents requested in the letter of undertaking. This was still the position up to April 2019 when the notice making time of the essence was served.

[43] On an examination of the evidence provided by the Defendants no explanation has been offered for this delay. They contend however that the Applicant could have obtained another Surveyors ID Report to satisfy themselves that possession was vacant. This assertion was made in spite of the fact that it had been an agreed term of the contract that the Defendant would provide vacant possession. Although both parties had a change of Attorney, this did not account for the delay in completing each stage of the transaction from February 2017 until April 2019 which I found were all one sided. The end result of this was although the agreement had been scheduled for completion by the 1st of May 2017, at the time the notice was served in April 2019 almost another two years had passed with the Defendant being no closer to completing the sale. In these circumstances, I find that there had been unreasonable delay on the part of the defendant and the Applicant had been justified in serving the notice making time of the essence.

The notice must allow a reasonable time for completion

[44] In relation to this requirement, it is the contention of the Applicants that the period was more than sufficient as the Defendants could have utilised the express service at Titles Office for the transfer and the letters requested could have been prepared and provided in 3 days. The Defendants on the other hand insisted that the period was not feasible particularly where clarification had been needed on the contents of the notice and Counsel with conduct had left the firm on record.

[45] At the point when the notice was prepared on Good Friday to when it was served on the Tuesday following Easter Monday, there were only eight working days available for the Defendants to complete all the remaining tasks. It would be an understatement to say that this was not a very long time.

[46] On examination of the period allotted and what remained to be done, it is noted that although the Defendants asserted that the period was brief and no less than two weeks would have been required to effect the transfer of the property, they took no steps to complete any of the requirements outlined in the letter of undertaking. It is observed that a number of them such as proof of vacant possession, letters of possession, letters to the utility companies, property tax certificate and the completed TR1 form required no clarification from Counsel and could have been prepared and available within a few days.

[47] In those circumstances although the period was short, the completion of the tasks required was not impossible and the explanation that clarification was being sought in no way precluded the Defendant from completing the majority of the requirements outlined and depositing the title and instrument of transfer for the relevant processing to be done. On the issue of what constituted beneficial interest, if the Defendants were in possession of the title it was open to them to have a copy of same provided to the Applicants and to have a search certificate provided to support their contention that no claim of ownership had been registered against the title. Instead they elected to sit back and wait for a return call which they contend never came. It is my finding that the circumstances were such that it required an expeditious approach on the part of the Defendants and had they acted with the urgency required they could have completed the process within the relevant period. As such, while the notice period provided was short I am not of the view that it was unreasonable.

[48] In ***Swain v Hillman*** the learned judge made it clear that where a case is based on a point of law which is bound to fail then summary judgment may be granted. My review of the evidence provided to include the pleadings and affidavits reveal that

this matter falls to be determined on whether the notice provided was in fact valid. In light of the foregoing discussion it is my finding that it was. The end result of this is that the defendants would have no real prospect of successfully defending this claim and as such, summary judgment is entered in favour of the Applicant. Costs are also awarded to them to be taxed if not agreed.