BARBADOS

SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 1111 of 2000

BETWEEN:

SHAKA RODNEY **1st Plaintiff**

PORTFOLIO INVESTMENTS INC **2nd Plaintiff**

AND

VERNON O'CONNELL HOPE **Defendant**

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court.

2003: September 29, 30,

October 1, 2, 7, 8, 9,

2005: May 18,

2006: March 06.

Mr. Andrew V. Thornhill and Mr. Gregory P. B. Nicholls, of George Walton Payne & Co., attorneys-at-law, for the Plaintiffs.

Mr. Alair Shepherd, Q. C., Mr. Adrian King and Ms. Wendy Maraj, attorneys-at-law, for the Defendant.

DECISION

-

Introduction

[1] According to Shaka Rodney ("Rodney") it was the only remaining piece of vacant property ("the property") next to the sea on the West Coast of Barbados. It was situate at Prospect St. James. He had looked at it for many years and had come to believe it was meant for him. Eventually a sign went up on the property advertising it for sale. The property belonged to Vernon Hope ("Hope"). Rodney set out to purchase it. He retained an attorney-at law Mr. Leroy Inniss Q.C. to act on his behalf in the sale and purchase. In due course an agreement ("the written agreement") dated 6 December 1996 for the sale and purchase was concluded between Hope and Rodney. This agreement contained the usual clauses to be found in an agreement for the sale and purchase of land in Barbados. In that agreement Hope undertook to sell the property to Rodney for $395 000 and the usual 10% deposit was paid to Mr. Lionel Greenidge the attorney-at-law acting for Hope.

[2] In or about 1997, by an Assignment ("the Assignment") (then undated but dated 28 February 1997 during the trial and admitted into evidence) Rodney purported to assign the written agreement to Portfolio Investments Inc (" Portfolio").

[3] The transaction under the written agreement was scheduled for completion on 28 February 1997. It was not completed on that date because, on one hand, Rodney did not have the balance of the purchase price available, and on the other hand, Hope did not have all the requisite documents to facilitate completion. As it seemed that Rodney was having some difficulty in obtaining the required financing Hope was prepared to return the deposit to Rodney provided Hope found another buyer.

[4] Later, in or about December 1997, as a result of further negotiations between Rodney (now acting on behalf of Portfolio) and Hope, the latter orally agreed ("the oral agreement") to sell the property to Portfolio Investments Inc ("Portfolio") for the sum of $430 000.

[5] There was no written agreement between Hope and Portfolio in relation to the sale of the property. Indeed, other than the purchase price no other terms were discussed or agreed. Nonetheless, the attorneys-at-law, Mr. Inniss (now acting on behalf of Portfolio) and Mr. Greenidge still acting on behalf of Hope, proceeded to work towards completion of the transaction at the new price and Portfolio sought financing to enable it to do so although no date for completion was agreed.

[6] When Hope was in a position to complete, he gave a notice dated 4 May 1998 to Portfolio calling upon it to complete the transaction on or before 26 May 1998. Portfolio did not comply with the notice. The transaction was never completed. All efforts by Portfolio to have the transaction completed failed. In turn Portfolio, in August 1998, itself served on Hope a notice to complete. Hope failed or refused to comply with that notice and this action was filed some 2 years later by Rodney and Portfolio seeking, among other things, specific performance of the agreement for the sale and purchase.

The Parties.

[7] The first plaintiff is Rodney who was the purchaser under the written agreement. The second plaintiff is a company incorporated under the Companies Act of Barbados of which Rodney is a director and a shareholder, to which (a) Rodney purported to assign the written agreement; (b) Hope orally agreed to sell the property for $430 000 after the non-completion of the transaction under the written agreement at the price of $395 000 and (c) in whose favour a conveyance of the property was executed. The defendant is the owner of the property and the vendor under both the written agreement and the oral agreement.

The Issues

[8] The issues which arise for determination are:

1. Can Portfolio obtain any relief on its case as pleaded in the statement of claim?

2. Was there a valid notice assignment of the written agreement by Rodney to Portfolio?

3. If so, were the obligations of Hope under the Assignment validly terminated by the notice to complete dated 4 May 1998 given by Hope to Portfolio?

4. Was Portfolio entitled to give Hope the notice to complete dated 31 August 1998?

5. Is Portfolio barred by the doctrine of laches from obtaining the relief sought?

Relief on case as pleaded

[9] In order to determine whether Portfolio can obtain relief on the case as pleaded it is necessary to refer to the pleadings in some detail.

[10] On their amended statement of claim the following material allegations were pleaded:

(a) the written agreement between Rodney and Hope for the sale and purchase of the property at $395 000;

(b) the payment of the deposit of $39 500 thereunder;

(c) the undated deed of Assignment made in or about 1997 under which Rodney purported to assign the written agreement to Portfolio;

(d) the date for completion of the transaction being 28 February 1997 on which date vacant possession

was to be given to Rodney;

(e) the obligation of Hope to give a good land marketable title of the property to Rodney;

(f) an oral agreement between Hope and Portfolio that the purchase price be increased to $430 000;

(g) the readiness, willingness and ability at all times of Portfolio to perform its obligations under the written agreement;

(h) a notice dated 31 August 1998 given by Portfolio to Hope whereby Hope was called upon to complete the transaction within 28 days; and

(i) the failure of Hope to comply with the notice;

On the basis of those allegations Portfolio claimed the following relief:

(1) Specific performance of the said agreement;

(2) All necessary accounts and enquires;

(3) Damages for breach of contact in lieu of or in addition to specific performance;

(4) Costs;

(5) Such further or other relief as this Honourable Court may deem fit;

[11] In the amended defence and counterclaim filed on behalf of Hope he:

(a) admitted the written agreement for the sale and purchase of the property to Rodney and the payment of the deposit, but pleaded that he never consented to the assignment of the written agreement to Portfolio and on that basis challenged its validity.

(b) admitted that the completion date under the written agreement was 28 February 1997 but denied that he warranted under clause 3 of the agreement that vacant possession would be given to Portfolio. He further alleged that Rodney had failed to complete the transaction on 28 February or at any other time with the result that the transaction was at end;

(c) denied that clause 4 of the agreement provided that a good and marketable title to the property would be given to Portfolio;

(d) denied, by para 8 of his amended defence and counterclaim, he denied that he had made any agreement with Portfolio that the purchase price of the property would be increased to $430 000 and deleted the earlier admission in his defence and counterclaim that in December 1997 he had entered into a contract for the sale of the said property to Portfolio for the price of $430 000 and that it had been agreed that Portfolio would be bound by all the terms and conditions of the written agreement made between Rodney and himself save and except that the purchase would be increased to $430,000;

(e) denied that Portfolio was ready willing or able to perform its outstanding obligations under the written agreement and alleged (a) that both Rodney and Portfolio had continually frustrated and extended the times for completion of the sale; (b) that Hope had served a notice to complete dated 4 May 1998 on Portfolio making time of the essence of the contract and requiring Portfolio to complete the said contract on or before 26 May 1998 and (c) that Portfolio having failed to so complete Hope exercised his rights under the written agreement to forfeit the deposit;

(f) denied the notice to complete dated 31 August 1998 allegedly given by Portfolio to him and his alleged failure to complete and alleged that any contractual relationship that previously existed between either Rodney or Portfolio and himself came to an end on the 26 May 1998;

(g) denied that either Rodney or Portfolio was entitled to any of the relief claimed and alleged that Portfolio is estopped from applying for specific performance of the written agreement on the basis of its protracted delay;

(h) alleged that if Rodney and Portfolio were in a position to complete, (which he denied), they lost that

right by their delay in not beginning the proceedings until 14 July 2000, notwithstanding the alleged rescission and forfeiture of the deposit;

[12] By his counterclaim Hope sought the following relief:

1. A declaration that the Agreement made between the Plaintiff and the Defendant dated the 6th day of December 1996 is null and void.

2. Alternatively a declaration that the Defendant was entitled to and did properly terminate all his future obligations under the said written Agreement dated the 6th day of December 1996;

3. Costs;

4. Further or other relief.

[13] By its reply and defence to counterclaim Portfolio denied that Hope is entitled to any relief in its amended defence and counterclaim.

[14] After suggestions by the court that the pleadings cried out for amendment Rodney and Portfolio on 7 October 2003, sought and obtained leave to amend the prayer in their statement of claim to seek relief on behalf of Portfolio only instead of on behalf of both Rodney and Portfolio.

[15] Hope also sought and obtained leave to amend para 5 of his defence and counterclaim to insert the following words at the beginning of that paragraph:

> "5. which is denied the first plaintiff duly and validly assigned the said agreement as is pleaded in para 6 of the statement of claim"…

and to delete that part of para 8 that reads as follows:

> "The defendant states however, that in or about the month of December 1997, he entered into a contract for the sale of the said property to the Second Plaintiff for the price of $430 000. It was agreed that the Second Plaintiff would be bound by all the terms and conditions of the first said contract made between the First Plaintiff and the Defendant save and except the purchase price which increased to $430 000."

[16] On 10 October Rodney and Portfolio again sought and obtained leave to amend paras 7 & 8 of their statement of claim by deleting the reference to the first plaintiff [Rodney] in both paras and substituting instead the second plaintiff [Portfolio].

[17] It is the submission of Mr. Shepherd, counsel for Hope, that Portfolio is not entitled to any relief on the pleadings. The starting point for a consideration of this issue is the law relating to the function of pleadings in civil proceedings. The law is well settled that the plaintiff is not entitled to relief except in regard to that which is alleged in the pleadings and proved at the trial. (See *Re Wrightson [1908]1 Ch at p.799 per Warrington J.; and Pelter v. The University of the West Indies Civil Appeal No. 3 of 1993 unreported* where Moe J.A cited a passage from Sir Jack Jacobs in an article on the importance of pleadings in **Current Legal Problems (1960) at pgs 176 to 177 and re-iterated in** *Bullen and Leake and Jacobs Precedents and Pleadings (12th edn at pgs 17 and 18)* that:

> "The very nature and character of pleadings demonstrate their significance and overwhelming importance; for the attention of the parties as well as the court is naturally focused on and riveted to the pleadings as being the nucleus around which the whole case revolves through all its stages. The respective cases of the parties can only be considered in the light of and on the basis of the pleadings which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may, thus be assumed to have put forward the best case he has in the best way he can in his pleadings and in this sense the pleadings manifest the true substantive merits of the case."

[18] The question then is what is the case made by Portfolio on its statement of claim? It is that the written

agreement admitted by Hope was assigned by Rodney to Portfolio under the Assignment at an unspecified date in 1997. Consequent upon that assignment Portfolio stood in the shoes of Rodney. It thereby became entitled to completion of the transaction represented by the written agreement. In December 1997, some time after the assignment Hope and Portfolio agreed to vary the written agreement by increasing the purchase price from $395 000 to $430 000. At all material times Portfolio was ready willing and able to perform its obligations under the written agreement as assigned and varied. By a notice dated 31 August 1998 it called upon Hope to complete the transaction within 28 days but Hope failed or refused to complete the transaction.

[19] In support of his submission Mr. Shepherd argues that Portfolio is relying on the Assignment of the written agreement under which the purchase price was $395 000. However, since Portfolio pleaded that there was an agreement between itself and Hope in December 1997, at a date after the assignment, that the purchase price under the agreement would be increased to $430 000 in order to succeed it must establish that the increase in the purchase price amounted to a variation of the written agreement. Mr. Shepherd contends that there was a new agreement between Hope and Portfolio for the sale of the property at $430 000. The new agreement he argues was not pleaded and Portfolio cannot obtain relief on the basis of the new agreement. So the question is was there a variation of the written agreement as assigned or was there a new agreement?

[20] Correspondence passing between the respective attorneys is instructive in resolving this issue. It appears from a letter dated 4 April 1997 from Mr. Lionel Greenidge to Inniss & Company (see Exhibit A- 10) that he first learnt that it was intended to convey the property to Portfolio from the real estate agent and by the amendment made by Inniss & Company to the draft conveyance, earlier sent to Inniss & Company for perusal. In that letter which is headed –*"Re Sale and Purchase of land at Prospect St. James- Vernon Hope to Shaka Rodney,"* Mr.Greenidge informed Inniss & Company that:

> "I have brought these developments to the attention of the vendor who because of your previous intimation that your client Mr. Rodney was having difficulty obtaining loan finance suggested he would be prepared to return the deposit as soon as another buyer was found. You had also indicated that that suggestion would be acceptable to your client and had called me to ascertain what progress had been made. My client is considering an offer of $450 000 for the two lots. Please let me know if Mr. Rodney is prepared to match this offer or the company is prepared to enter into a contract for the purchase of the land at the new price… I look forward to hear from you."

[21] It is clear that Mr. Greenidge and, by extension Hope, had not yet accepted that there existed any legal relationship between Hope and Portfolio.

[22] Inniss & Company replied to that letter on the same day. (See Exhibit A-11) to set the record straight. He pointed out that it was not correct that [Rodney] was having difficulty in obtaining finance, rather the lending agency was somewhat tardy in processing the application … that [Rodney] had obtained financing and wished to complete the purchase of the property in accordance with the agreement and requested the engrossed conveyance to be executed by [Rodney].

[23] It is noteworthy that the reply of Inniss & Company did not address the question whether Rodney was prepared to match the offer of $450 000 or Portfolio was prepared to enter into a new contract. Accordingly by letter of 6 April 1997 Mr. Greenidge again raised the issue with Inniss & Company in these terms:

> "Apart from being outside the date fixed for completion, Mr. Rodney does not have loan finance approved by lending institution before the 28 February 1997 or at all. As you know my client contracted to sell to Mr. Shaka Rodney alone. It is clear to me that Mr. Rodney is not himself proceeding with the contract and is now asking that the vendor agree to transfer the benefit of the contract to a company. That is a different matter.
>
> I therefore re-iterate the invitation to Mr. Rodney to match the offer of $450 000 *under an amended or new contract* for the purchase at this price. (*Emphasis added).*
>
> I look forward to hear from you further."

[24] There was no direct reply to this letter. However, by letter dated 7 October 1997 (See Exhibit A- 17) and headed-*"Re Conveyance Vernon O'Connell Hope to Portfolio Investments Inc"* Inniss & Company wrote to Mr. Greenidge as follows:

> "October 7, 1997

Mr. Lionel Greenidge

Attorney-at-Law

Pinfold Street

Bridgetown

Dear Sir,

Re: Conveyance Vernon O'Connell Hope to

Portfolio Investments Inc.

We refer to our previous correspondence and discussions on the above.

Our client does not accept that the vendor can change the purchase price. He entered into an agreement to purchase the land for $395,000.00 and this Agreement has never been rescinded. As you are aware it would have been necessary for your client to make time of the essence, which normally is by serving a formal Completion Notice on our client. Not only was this not done, but a Conveyance has never been presented to our client for signature although we requested by letter dated February 21, 1997 that the draft conveyance be perused and the engrossed copy returned, we again requested the engrossed conveyance on April 4, 1997. In addition there is no evidence that the vendor has obtained permission from the Exchange Control Authority as is required by law.

According to the learned author of Emmett on Title "before serving a Notice to Complete on behalf of a vendor care must be taken to ensure that the vendor has deduced a good title and has carried out all its obligations" In Re Stone and Saville's Contract 1 WLR 163 it was held that the notice amounts to an assertion by the vendor that he has performed the duties required of him before completion.

We should be grateful if you would do all that remains to be done and present the Conveyance as a matter of urgency so that the matter can be completed.

Our client served you notice that he had assigned his rights in the Agreement to Portfolio Investments Limited. It is settled law that a purchaser has the right to assign any benefit or liability which he may have to another person there is normally no need for the consent of a third liability which he may have to another person there is normally no need for the consent of a third party, including the vendor.

We enclose herewith a Further Requisition on Title and look forward to the completion of this matter without further delay.

Yours faithfully

____

INNISS & C0.

WLI/hd

Enc.

The requisition enclosed with the letter was as follows:

"FURTHER REQUISITION on the title to ALL THAT certain property situate at Prospect in the parish of Saint James in this Island which Vernon Hope is selling to Portfolio Investments Inc.

---

6. Please furnish me with the permission from the Exchange Control Authority.

Dated this day of 1997.

____

Attorney-at-Law for the Purchaser

To: Mr. Lionel Greenidge

Attorney-at-Law for the Vendor

Pinfold Street

Bridgetown.

[25] There was no reply to this letter and on 31 October 1997 Inniss & Company wrote to Mr. Greenidge with the same heading as above referring to its letter of 7 October, requesting that the conveyance be sent for execution by [Portfolio] without delay and Exchange Control Approval. (*See Exhibit A- 19*).

[26] So it is clear that Inniss & Company is maintaining its position that Portfolio is entitled to the benefit of the assignment. By letter of 24 November 1997 headed - *Re land at Prospect, St. James Vernon Hope/Shaka Rodney* Mr. Greenidge informed Mr. Inniss of his instructions that Rodney had made a revised offer of $420 000, that his client was prepared to accept $430 000 and he inquired whether Rodney was prepared to proceed at that price. (*See Exhibit A-19*).

[27] By letter dated 15 December 1997 Inniss & Company wrote to Mr. Greenidge informing of his instructions that Rodney had reached agreement on the sale of the property at $420 000 and requested the return of the draft conveyance so that the matter could be closed without further delay. (see Exhibit A- 22). On 22 December 1997 Mr. Greenidge for the first time wrote to Inniss & Company under a letter headed – ***Re: Conveyance Vernon O' Connell Hope to Portfolio Investments Inc. $430*** **000 (emphasis added)** in these terms:

> "The draft conveyance has been engrossed at the new price of $430 000. I enclose my reply to your requisition.
>
> I have applied to the Exchange Control Authority for permission … to transfer the land at the price of $430 000.
>
> Please indicate your client's acceptance by having him sign the copy letter or **alternatively confirm by your letter that the sale and purchase is proceeding at this price** - which letter will in any event form part the contract documents". *(Emphasis added). (See Exhibit A-23).*

[28] Inniss & Company did not comply with request of Mr. Greenidge. Instead by letter dated 10 February 1998 to Mr. Greenidge it requested that he send it the engrossed conveyance at his earliest convenience. (See Exhibit A-25) and under cover of letter dated 16 February 1998 Mr. Greenidge sent to Inniss & Company the engrossed conveyance – Vernon Hope to Portfolio Investments Inc. for execution together with the section 12A form in duplicate. (See Exhibit A-26). Subsequently the conveyance executed by Portfolio was returned to Mr. Greenidge by Inniss & Company for execution by Hope. In turn that conveyance was executed by Hope and delivered by him to Mr. Greenidge awaiting completion of the transaction.

[29] What emerges from this correspondence is that as at February 1978 the respective attorneys-at-law had now accepted that there was a contract between Hope and Portfolio for the sale and purchase of the property at $430 000. By that date Mr. Greenidge had certainly abandoned his position that the written agreement could not be assigned to Portfolio; he had not insisted on, or prepared a new agreement reflecting the new purchase price and other terms and conditions making provision e.g. for a date for completion or the payment of the usual deposit. Instead, he had engrossed and sent to Inniss & Company a conveyance in favour of Portfolio for execution and had replied to requistions on the title by Inniss & Company sent on behalf of Portfolio.

[30] In addition, it is the evidence of Hope himself that in December 1997 in the negotiations between himself and Rodney he knew that Rodney was acting on behalf of Portfolio; that Portfolio was the purchaser and not Rodney; that he was expecting an agreement similar to the written agreement and that he knew that no such agreement

was drawn up.

[31] Taking into consideration the correspondence referred to, the conduct of the attorneys-at-law acting on behalf of Hope and Portfolio and the testimony of Hope, I am of the opinion that there was a variation of the written agreement as assigned so as to increase the purchase price to $430 000 and that if Hope, as vendor, intended that a new agreement should have been drawn up that intention was not carried into effect.

[32] I therefore find that Portfolio has not only alleged a variation of the written agreement but has also proved, at trial, that variation. Accordingly, I hold that Portfolio can obtain relief on its statement of claim as pleaded.

Was there a Valid Assignment of the Written Agreement?

[33] Mr. Shepherd submits that the Deed of Assignment did not pass the benefit of the written agreement to Portfolio. First, he contends that given the nature of the interest, Rodney required the consent of Hope to the Assignment to bind him.

[34] S 214 of the Property Act CAP 236 of the Laws of Barbados sets out the law relating to the assignment of things in action. In so far as material, it provides that an absolute assignment in writing signed by the assignor …of any debt or other thing in action, *of which express notice in writing has been given to the debtor, trustee, or other person* from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law … to pass and transfer from the date of such notice (a) the legal right to such debt or thing; and (b) all legal and other remedies for the same. (*Emphasis added).*

[35] The language of s 214 does not require the consent of the person against whom the claim is made. Indeed, the word "consent" is not even mentioned in s 214. It would be wrong, in my view, to import such a requirement in the section. Mr. Shepherd relied on *Venetian Glass Gallery Ltd v Next Properties Ltd [1989] 2 EGLR* 42. At issue in that case was the question whether consent was given to the assignment of a lease. The principles relating to that issue are not the same as those relating to an assignment under s 214. *Venetian Glass* is therefore not applicable and I consider the argument misconceived. I therefore reject the submission of Mr. Shepherd that the consent of Hope was required for the assignment.

[36] Now, the written agreement, the subject matter of this case, is a legal thing in action capable of being assigned under this section, the assignor being Rodney and the assignee being Portfolio. To constitute a valid assignment the section requires express notice in writing to be given to the person from whom the assignor would have been able to claim such thing in action. In this case that person is Hope as he is the person against whom Rodney had a legal right or claim under the written agreement. And the question therefore is, was express notice in writing given to Hope of the Assignment?

[37] Mr. Thornhill, counsel for Rodney and Portfolio, relies on *Van Lynn Developments Ltd v Pelias Construction Co Ltd [1968] 3 ALL ER 824* where the Court of Appeal with Lord Denning MR as President had to consider whether there was a valid notice of the assignment of a debt. In that case the defendants had a bank overdraft which was paid off by the plaintiffs in consideration for an assignment of the debt to themselves. The assignment was dated 26 June and on 27 June the plaintiffs called on the defendants for payment. In the letter of 27 June it was stated (incorrectly) that notice of the assignment had been previously given to the defendants. On the question whether the letter of 27 June constituted a valid notice of assignment, it was held that on the true construction of s 136 of the Law of Property Act, 1925 (identical in its terms to s 214) notice of assignment of a chose in action was good even though it contained no date and the incorrect statement could be ignored as an inaccurate surplusage; and (per Widgery LJ) it was immaterial that the letter was not written with the intention that it should perform the function of giving notice under s 136 (1).

[38] In giving his decision Lord Denning MR expressed his opinion that the correct interpretation of the statute was given by Atkin J. in *Denney, Gasquet, and Metcalfe v Conklin [1913] 3 KB 177 at p 180* that no formal requirements were required for a notice of assignment and observed that:

> "It seems to me to be unnecessary that it should give the date of the assignment so long as it makes it plain that there has in fact been an assignment so that the debtor knows to whom he has to pay the debt in future. After receiving the notice, the debtor will be entitled, of course, to require a sight of the assignment so as to be satisfied that it is valid, and that the assignee can give him a good discharge. But the notice itself is valid."

[39] In concurring with Lord Denning MR. Widgery LJ. stated :

> "The section does not speak of "a notice:" it speaks of "notice". Accordingly, it is wrong to suppose that a separate document purposely prepared as a notice, and *described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and that it shall be conveyed in writing".* (Emphasis added.)

[40] Mr. Thornhill contends that notice was given to Hope's attorney-at-law in the letter of 4 April (Exhibit A-10)earlier referred to at [20]. That is a letter from Mr. Greenidge to Inniss & Company. That very fact destroys the argument of Counsel that it could in any sense constitute notice either to Mr. Greenidge or to his client, Hope. It would appear, however, that Counsel is relying on that portion of the letter which reads thus:

> "I have also been informed by the real estate agent that Caribbean Commercial Bank has approved facilities to a company called Portfolio Investments Inc now shown by your amendment as the intended purchaser".

[41] I consider that those words might raise a query as to exactly how Portfolio was entering the transaction, but to my mind they do not constitute, in the words of Widgery LJ.," information relative to the assignment" conveyed to Hope in writing.

[42] In *Van Lynn* the letter that was held to constitute a valid notice under

s. 136 (1) of the Law of Property Act 1925 read as follows:

> "Dear Sirs,
>
> We have been instructed by our above named Clients [the plaintiffs] to apply to you for the payment of a sum of £5296 19.5. outstanding to them following the assignment of the debt to them by National Provincial Bank. Notice of this Assignment has already been given to you.
>
> Unless we receive payment for the full amount of this debt at this office by the first post on Monday 1st July, we have instructions that proceedings will be taken against you without further notice."

[43] Counsel then argues that the defendant received written notice of the assignment by the letter of 7 October 1997 (Exhibit A-17 set out at [24] and that this letter is sufficient to satisfy the requirements of s. 214. This letter from *Inniss & Company to* Mr. Greenidge deals primarily with the validity of a notice to complete. But the penultimate paragraph reads as follows:

> "Our client served you notice that he had assigned his rights in the Agreement to Portfolio Investments Limited. It is settled law that a purchaser has the right to assign any benefit or liability which he may have to another person there is normally no need for the consent of a third party, including the vendor".

[44] Properly construed that paragraph amounts to no more than a contention on the part of Counsel for Portfolio that notice had been given to Mr. Greenidge. But the question is was it is sufficient to satisfy s. 214?

[45] Applying the principle enunciated by Widgery LJ. to the letter of 7 October I find that as in *Van Lynn* the statement "our client served you notice that he had assigned his rights in the agreement to Portfolio Investments Limited" is incorrect since it is Counsel's argument that the letter itself constitutes the notice. Unlike the letter in *Van Lynn*, however, when that statement is disregarded, the letter of 7 October does not contain any information sufficient to bring to the notice of Hope the fact that the written agreement had been assigned to Portfolio so as to prevent him from completing the sale and purchase with Rodney.

[46] As regards the letter of 7 October it is noteworthy that Justice W. Leroy Inniss, retired Judge of the High Court and formerly the managing partner of Inniss & Company, which at all material times acted for both Rodney and Portfolio in relation to the transaction the subject matter of this case, was called to give evidence on behalf of Portfolio.

[47] Under cross-examination in relation to the letter of 7 October written by him he testified that he could not recall when the letter was sent to Mr. Greenidge but it was sent to the best of his knowledge. He further testified that the

notice referred to in that letter was written but he did not see such in the Agreed Bundle. Now the issue of disclosure was quite contentious between the parties and was the subject of much correspondence and also interlocutory applications. No such notice was disclosed in the discovery process and I therefore hold that the existence of this notice has not been established.

[48] I therefore reject the submission of Mr. Thornhill and hold that there was no notice of the Assignment sufficient to satisfy s. 214.

[49] Mr. Shepherd further contends that the Assignment could not have passed the benefit of the written agreement to Portfolio since at the date of the Assignment 28 February 1997 Portfolio was not yet incorporated and it was not incorporated until 31 March 1997. As a result the Assignment purported to transfer an interest to a company which did not exist.

[50] In this regard, under cross-examination, Justice Inniss testified that it was not true to say that the Assignment was made prior to the incorporation of the company and that the incorporation came first. The undeniable fact on perusal of both the Assignment and the certificate of incorporation of Portfolio produced into evidence is that the Assignment pre-dated the incorporation.

[51] S. 16 of the Companies Act CAP 308 allows a company within a reasonable time after incorporation to adopt a written contract made in its name or on its behalf, before it came into existence, by any action or conduct signifying its intention to be bound thereby. The question is whether Portfolio by its actions or conduct in a reasonable time after its incorporation ratified or adopted the Assignment?

[52] Under cross-examination, Rodney testified that it was not correct that there was no meeting of the Board of Directors of Portfolio; that he did not at any stage meet with the Board of Directors of Portfolio; that Portfolio does not have in its possession a minute book nor does it have a register of shareholders; and that the company does not have a record of any shareholder meetings.

[53] Relying on that testimony Counsel submits that there is no evidence before the court to establish that the Assignment was adopted in accordance with s. 16. However s. 16 is not so restrictive that evidence of adoption must be found in the corporate records of the company. The section is widely framed. It speaks of *any action or conduct* of the company signifying its intention to be bound. (*Emphasis added*).

[54] Exhibit A-13 is a letter of 15 April 1997 from Mr. Leslie Haynes to Mr. LeRoy Inniss written with reference to a loan of $275 000 by Caribbean Commercial Bank Ltd (on whose behalf Mr. Haynes was acting) to Portfolio Investments Inc. to assist with the purchase of 1011.7 square metres of land at Prospect, St. James for $275 000 and secured by first legal mortgage over the same. In that letter Mr. Haynes requested from Mr. Inniss the title deeds to the property to commence investigation. It seems to me that this letter satisfies s. 16 as it shows that within 15 days of its incorporation Portfolio had signified a clear intention to be bound by a contract for the purchase of the property and had sought financing to enable it to do so.

[55] I therefore find that Portfolio had after its incorporation adopted the Assignment.

[56] Notwithstanding the adoption however, I hold that the Assignment was ineffectual in law to transfer the benefit of the written agreement to Portfolio and its claim for relief based on that Assignment therefore fails.

[57] My finding that the Assignment was invalid sufficiently disposes of this action. Nonetheless, in the event that I am wrong and for the sake of completeness, I shall now deal with the effect of the notice to complete of 4 May 1998 given by Hope to Portfolio.

"BARBADOS:

<u>NOTICE TO COMPLETE</u>

-

TAKE NOTICE that as Attorney-at-Law and Agent for the Vendor, I hereby give you notice that the vendor is ready and willing and hereby offers to execute all such assurances and to do or procure to be done all such acts deeds and things as may be reasonably required to complete the said of FIRSTLY ALL THAT certain piece or parcel of land situate at Prospect in the parish of Saint James in this Island containing by estimation 505.85 square metres which represents a metric conversation from 20 perches or thereabouts abutting and bounding to the North on the Seashore to the East on lands now or late of the estate of one Gibson deceased, to the South on the public road and to the

West on other lands of Alfred O. Husbands or however else the same may and bound AND SECONDLY ALL THAT certain piece or parcel of land situate at Prospect in the parish of Saint James in this Island containing 505.85 square metres which represents a metric conversion from 20 perches or thereabouts abutting and bounding to the North on other lands of the Vendor to the East on a road leading to Bridgetown to the South on lands of A. Carrington and on the West on the Seashore or however else the same may abut and bound.

As Attorney-at-Law and Agent as aforesaid, I hereby give you further notice that if this matter is not completed by the Purchaser on or before the 26th day of May, 1998 (as to which time is hereby made of the essence) the Vendor will forfeit the deposit paid by the Purchaser to the Vendor and will proceed to another sale or otherwise enforce his rights against the Purchaser as the Vendor may be advised.

Dated 4th day of May 1998.

To: Inniss and Company

Attorney-at-Law

Chancellor House

Pinfold Street

Bridgetown.

Attorney-at-Law for the Purchaser

And: Portfolio Investments Inc.

Registered Office

Humphrey's Complex

Dayrells Road

Christ Church.

____

Attorney-at-law for the

Vendor

The Effect of the Notice to Complete

[58] The transaction for the sale and purchase of the property under the written agreement of 6 December 1996 had not been completed some one and a half years later.

[59] On 4 May 1998 it appears that Hope for the first time had all the necessary documents that would enable him to complete the transaction. Accordingly, on that day his attorney-at-law Mr. Greenidge served on Portfolio's attorney-at-law and on Portfolio a notice to complete (exhibit B-1) calling upon Portfolio to complete the transaction by 26 May 1998; making time of the essence of the contract and giving Portfolio notice of Hope's intention to forfeit the deposit in the event of its failure to comply with the notice.

[60] It is not in dispute that the first day on which Hope was in a position to complete was indeed 4 May 1998. The

question is, whether in those circumstances Hope was entitled to serve the notice to complete making time of the essence of the contract and requiring completion on 26 May.

[61] On the facts of this case the written agreement as assigned and varied in December 1997 did not stipulate a date for completion. It is well settled that in such a contract (an open contract), the law implies a term that the contract will be completed within a reasonable time from the date of the contract. (See *Behzadi v Shaftesbury Hotels Ltd. [1991] 2 ALL ER 477 at p. 487*).

[62] What then is the time for service of a notice to complete making time of the essence under such a contract?

[63] In **Barnsley's Conveyancing Law & Practice 4th Edn. P. 426** the principle is stated that under an open contract, it is clear that the innocent party must wait until there has been an unreasonable delay before serving a notice to complete, the reason for this being that until such a period has elapsed the date for completion has not passed and the guilty party is not in breach of his obligation under the contract.

[64] In *British and Commonwealth Holdings plc v Quadrex Holding Inc [1989] 3 All ER 492* Sir Nicolas Browne – Wilkinson V-C at p. 504 enunciated the three requirements to be satisfied if the time for completion is to be made of the essence by service of a notice to complete. They are: (1) the giver of the notice (the innocent party) has to be ready, willing and able to complete; (2) the other party (the guilty party) has to have been guilty of unreasonable delay before a notice to complete can be served and (3) the notice when served must limit a reasonable period within which completion is to take place.

[65] In this case it has not been contended that Hope was not ready, willing and able to complete on 4 May 1998. I am therefore finding that he was, and that the first requirement is satisfied.

[66] Was Portfolio guilty of an unreasonable delay to justify the service of the notice to complete by Hope under the second requirement? Given the fact that Hope had only on the day of the notice put himself in a position to complete, up to that day, no breach had yet been committed by Portfolio. Indeed, on that day, neither party could establish unreasonable delay by the other.

[67] Accordingly, the second requirement was not satisfied. If I were required to make a determination on the validity of the notice to complete of 4 May, I would hold that in all the circumstances the service of the notice was premature and therefore did not constitute a valid notice to complete.

[68] There need be no consideration of the letter of 29 May under which the time for completion was allegedly extended to 5 June 1998 as that letter could have no effect arising, as it did, out of the notice to complete on 4 May 1998.

Notice to complete given by Portfolio

[69] I now turn to deal with the notice to complete given by Portfolio on 31 August 1998. If it were necessary to make a determination on this notice I would hold that Portfolio at the date of the service of that notice could not have satisfied the three requirements earlier referred in order to make time of the essence of the contract. In particular, I consider Portfolio would not have established on the evidence on a balance of probability that it had the requisite funds to pay the balance of the purchase price for the following reasons:

(i) the history of both Rodney and Portfolio on the evidence is that the availability of the financing was always problematic. As to Rodney, he had no financing in place as at 28 February 1997 to complete under the written agreement. He said in cross-examination he was financially able to close the written agreement at $395,000 in June 1997 and then said he would have been able to close as at 21 March 1997. When further pressed in cross-examination, he said that at 21 March 1997 he had not paid any monies other than the deposit to Mr. Inniss, he had personal savings of $60,000 and savings at Credit Union in sum of approximately $100,000;

(ii) As to Portfolio, in the course of the cross-examination of Rodney much of which was contradictory, it is clear that Portfolio did not have the requisite financing available on 26 May 1998;

(iii) as at 5 June 1998 Portfolio did not have the requisite funds to complete and indeed it was its then attorney-at-law who had agreed to lend Portfolio on a short-term basis the funds required to complete;

(iv) one of the terms of that short-term loan as shown in a letter dated 5 June 1998 (Exhibit B–20) from W. LeRoy Inniss to Mr. Theodore Walcott was that the money had been repaid before 31 July 1998 exactly one month before the notice to complete was given;

(v) Despite the facts set out at (iv) above it was the testimony of Rodney under cross-examination that Portfolio was in a position to complete on or about 30 September 1998. The funding, he testified, would have come from LeRoy Inniss Q.C., who said that he would advance whatever funds was required to complete the sale;

(vi) on the issue of the availability of funds to Portfolio Rodney stood totally discredited under cross-examination. He testified thus:

> "Correct to say that at no stage did Inniss & Co. have sufficient funds from me to close this sale. It was not true that at all times the only way the sale could have been closed was if Mr. Inniss was prepared to advance the funds.
>
> It could have been closed because I had other arrangements to source funds from overseas investors; those funds did come into Barbados, they were paid into the account of Portfolio with C.C.B. It was approximately $80000. The funds arrived in April 1999. That was at a time when the purchase price was $430000. I did not have funds from C.C.B. as at 3 June 1998. Inniss and Company had at most $40000 in its account and there was $80000 from overseas inventors; the difference was to come from C.C.B.
>
> Correct that only way the transaction could be closed on 3 June 1998 is if Inniss & Co. lent me the balance of the monies. I agree that this contradicts my earlier statement.
>
> As of 3 June 1998 Inniss & Co. returned the $62000 to me. This was put on account of Portfolio at C.C.B. As at 3 June 1998 I cannot recall that Portfolio had in its account at C.C.B. the said sum of $62000 plus the $80000 from the overseas investors. I had put monies into separate accounts so that it would be clear where they come from.
>
> As at 3 June 1998 Portfolio had $62000 plus $80000 totalling $142000 available for closing and Mr. Inniss was aware of this. In addition Portfolio had available the deposit of $39500, plus the $10000 paid under the Assignment making a total of $191500".

When shown the letter of 5 June 1998 (Exhibit A-20), he agreed that paragraph (f) of that letter was correct i.e. that the only monies paid by Portfolio and/or Rodney was $100000.

[70] Accordingly, I would hold that Portfolio was not in a position to give Hope the notice to complete dated 31 August 1998. That notice did not therefore constitute a valid notice to complete.

<u>Doctrine of Laches</u>

[71] The doctrine of laches is raised as a bar to Portfolio obtaining any relief by Hope in his amended defence and counterclaim

[72] In his text *The Principles of Equitable Remedies* 5th Edn. I.C.F. Spry discusses the meaning of the term "laches" at p. 225. He states that the term 'laches' is commonly used in two senses; the first sense referring simply to delay on the part of the plaintiff in pursuing relief and in the second sense it refers to the position that the delay of the plaintiff in pursuing relief has brought about, and in the latter case (the only case now relevant in the courts of equity), it is the position caused by the delay, especially its effect on the defendant himself, rather than the delay itself which causes the court to grant relief. At pages 230 and 231, he further states that:

> "It is established … that proceedings for specific performance will not fail merely because the plaintiff has been guilty of unreasonable delay. In order for that relief to be refused it is necessary that it should further appear that as a consequence of that delay, it would be unjust that the plaintiff should obtain an order of specific performance … a defendant must establish in order to make out laches, that the delay of which he complains has caused him to be prejudiced and that for that or some other reason it would be unjust that specific performance should be granted."

[73] It is not in dispute that these proceedings were not commenced until some two years after the cause of action accrued. That period I find to be unreasonable when no reasonable excuse has been proffered. However while Hope has pleaded laches, he has done so in the first sense described by Spry – the mere delay in pursuing relief by Portfolio.

[74] In order to succeed under the doctrine it would have been necessary for Hope to allege in his amended defence and counterclaim prejudice by the delay rendering it unjust for Portfolio to obtain an order for specific performance.

[75] No such prejudice has been pleaded. Applying the principles enunciated by Spry and that relating to the necessity for pleadings laid down by Warrington J., and referred to by Moe J.A. in *Pelter v The University of the West Indies* both earlier referred to at [17], Portfolio would not be barred by the doctrine from obtaining the relief sought in its amened statement of claim.

Disposal of action

[76] (1) The claim of Portfolio for specific performance of the written agreement as assigned is dismissed with costs certified fit for two Counsel to be agreed or taxed.

(2) It is further ordered that there be a stay of execution for six weeks.

Elneth O. Kentish

Judge of the High Court.

-

-

-

-

-

-

-

-

-

-

-