

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 2020 of 2008

BETWEEN:

PETER VIVEK HARRIS

PLAINTIFF

AND

DAVID VERNON CLARKE

FIRST DEFENDANT

GLORIA CHRISTINE CLARKE

SECOND DEFENDANT

Before Dr. the Hon. Madam Justice Sonia Richards, Judge of the High Court.

2009: March 13

July 24, 30, 31

2010: March 24

Mr. Dale Marshall Q.C. for the Plaintiff

Mr. Clyde Turney Q.C. and Ms. L. Kadirullah for First and Second Defendants.

DECISION

Background To Application

- [1] By a Writ of Summons filed on December 12, 2008, Peter Vivek Harris (“the Plaintiff”) claimed from David Vernon Clarke (“the First

Defendant”) and Gloria Christine Clarke (“the Second Defendant”) the sum of \$750,000.00. (The First and Second Defendants are hereinafter collectively referred to as “the Defendants”). This figure represented the deposit paid by the Plaintiff to a stakeholder pursuant to two agreements for the sale of all the shares in PHW One Limited (“the Company”) to the Plaintiff by the Defendants. The Plaintiff alleges that the Defendants failed to complete the sale of the shares, and that the deposit is refundable consequent upon the termination of the contract by the Plaintiff.

- [2] The Defendants filed their Defence and Counterclaim on January 05, 2009, and asked the Court for a declaration that the two agreements are unenforceable. Shortly thereafter, on January 20, 2009, the Plaintiff filed a summons seeking final judgment against the Defendants under Order 14 of the Rules of the Supreme Court.

Procedure For Summary Judgment

- [3] Order 14 rule 1 (1) provides that:

“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.”

Rules 2(1) and 4(1) permit the filing of affidavits by the parties. The Plaintiff and the First Defendant filed affidavits on January 20, 2009, and March 04, 2009, respectively. And a joint affidavit was filed on March 13, 2009, by Michael Alleyne and Dawn Mayers on behalf of the Plaintiff.

- [4] Rule 3(1) of Order 14 permits the Court to give judgment for the Plaintiff unless the Court dismisses the application, or unless the Defendant satisfies the Court either that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial. The Court has determined the issues raised by this application, within the context of the Order 14 procedure, and the reasons for so doing will be enumerated later in this judgment.

The Documentation

- [5] The majority of the documents before the Court are contained in the affidavits of the Plaintiff and the First Defendant. These documents are as follows:-
- (1) in the Plaintiff's affidavit –
 - (i) the Agreement dated 04 June, 2007, between the Defendants as vendors and directors of the Company, the Company, and the Plaintiff as purchaser (the "Principal Agreement");

- (ii) the Agreement dated 07 April, 2008, between the Defendants as vendors and the Plaintiff as Purchaser (the “Supplemental Agreement”);
 - (iii) a letter dated November 28, 2008, from the Plaintiff’s counsel to the Defendants’ counsel;
 - (iv) a letter dated December 02, 2008, from the Plaintiff’s counsel to the Defendants’ counsel.
- (2) in the First Defendant’s affidavit –
- (i) a letter dated 16 June, 2008, from the Defendants’ counsel to the Plaintiff’s counsel with enclosures;
 - (ii) a letter dated 20 June, 2008, from the Defendants’ counsel to the Plaintiff’s counsel with enclosure;
 - (iii) two e-mails passing between the Plaintiff and the First Defendant on October 03 and 04, 2008;
 - (iv) a letter dated October 07, 2008, from counsel for the Plaintiff to counsel for the Defendants.
 - (v) a letter dated October 28, 2008, from counsel for the Plaintiff to counsel for the Defendants;
 - (vi) a letter dated 11 November, 2008, from counsel for the Defendants to counsel for the Plaintiff;

(vii) a letter dated November 17, 2008, from Plaintiff's counsel to counsel for the Defendants.

(viii) a letter dated 24 November, 2008, from counsel for the Defendants to Plaintiff's counsel.

[6] The joint affidavit filed on March 13, 2009, annexed the following documents:

- (i) an e-mail dated December 02, 2008, to the First Defendant;
- (ii) a scanned letter to the Defendants and the Company dated December 02, 2008;
- (iii) a verification receipt dated December 02, 2008.

The Two Agreements

[7] The Principal Agreement provided for the sale of the shares in the Company by the Defendants to the Plaintiff at a price of 10 million Barbados dollars. The Defendants received a deposit of 750 thousand dollars and the date for completion of the transaction was 25 January, 2008. The Principal Agreement also contained a number of conditions that had to be satisfied or complied with before the date of completion. The Plaintiff's obligation to complete the transaction was subject to the performance of these conditions by the Defendants, unless they were wholly or partly waived by the Plaintiff. The Principal Agreement also

addressed what was expected of the Plaintiff and the Defendants on the completion date.

[8] The parties did not complete the transaction on 25 January, 2008, and a Supplemental Agreement was drawn up which contained the following variations:

- (1) there was a new date of completion, 28 November, 2008, and time was of the essence;
- (2) the Plaintiff undertook to pay the Defendants a monthly rental of \$16,500 from 01 February, 2008 to the closing date in four tranches in advance;
- (3) the deposit and interest would be forfeited to the Defendants if the Plaintiff failed to complete by 28 November, 2008; and
- (4) the Defendants withdrew the one million dollar financing to the Plaintiff that was contemplated by the Principal Agreement.

The Principal Agreement was confirmed in all other respects.

[9] With respect to the new closing date, the parties agreed to make time of the essence, and having done so -

“... the rule is strict. Failure to complete on the due date constitutes fundamental breach of contract both at law and in equity. The party at fault cannot enforce the contract specifically, whereas the other party is free to pursue his remedies for the breach. Thus he may elect to rescind the contract on the very next day, if he so

chooses.”. (See Barnsley’s Conveyancing Law and Practice, 4th ed. at page 423).

[10] The Court is of the view that clause 5 of the Supplemental Agreement must be understood in this light. Clause 5, which in effect replaced clause 11 of the Principal Agreement, states that:

“If the [Plaintiff] fails to complete the sale and purchase by [28 November, 2008] then the deposit paid under the principal agreement shall be forfeited to the [Defendants] together with all interest accumulated on such deposit to the date of forfeiture and the principal agreement and this agreement shall become null and void.”.

Clause 5 could be invoked by the Defendants if the failure to complete on 28 November, 2008, was the fault of the Plaintiff. And the Plaintiff’s failure to complete must have been such that the Defendants were in a position to elect to rescind the contract, immediately thereafter, and pursue the remedy under clause 5.

Events Prior To The Completion Date

[11] Between 03 October, 2008, and 24 November, 2008, attempts were made by the Plaintiff and his counsel to negotiate with the Defendants for an extended time for completion. The reasons given were the economic downturn in the United States of America and the United Kingdom; the lack of credit in the banking industry; and a depressed rental market in Barbados. The Plaintiff was optimistic, however, that the stringent

requests of his financiers could be met, but he required more time to put the financing in place.

- [12] The documents referred to at paragraphs [5] (2) (iii), (iv), (v) and (vii) of this judgment contain the Plaintiff's proposals to counsel for the Defendants. Seventeen days before the date of completion, that is, on 11 November, 2008, counsel for the Defendants reminded counsel for the Plaintiff, by letter, that no agreement for an extension had been concluded. And, four days before completion, counsel for the Defendants effectively scuttled any negotiations in a letter dated 24 November, 2008, to counsel for the Plaintiff. That correspondence informed the Plaintiff that the Defendants "[did] not wish to entertain any further proposals for any extension beyond 28 November, 2008."
- [13] The implications of the correspondence of 24 November, 2008, are obvious. The completion date remained 28 November, 2008, and time continued to be of the essence. The Defendants were either expecting the transaction to be completed on 28 November, 2008, or the Plaintiff to default on his payment obligations on 28 November, 2008. It is more than likely that a default was anticipated given the tenor of the correspondence from the Plaintiff and his counsel during the days prior to completion.

The Date Of Completion

[14] After the correspondence of 24 November, 2008, there was a total communications blackout between the parties until 28 November, 2008, which was the date of completion. There is nothing in the affidavits that refers to any conversations or letters passing between the parties during this period. Counsel for the Plaintiff issued the following letter to counsel for the Defendants on November 28, 2008:

“Dear Sir

Re Westridge Villas

We understand from a Notice appearing in the daily paper during this week that your offices will be closed at 2.00 p.m. today and await your indication as to what time you would be able to close.

In preparation for closing today, we require evidence of the following:

- (1) Fully adjudicated Conveyance to [the Company].
- (2) Proof of payment of Stamp Duty and Property Transfer Tax in respect of the Conveyance.
- (3) The corporate documents of the company.
- (4) The books of Accounts of the company.
- (5) The assignment of the debts of the company.
- (6) The Directors' resignations and releases.

We note that time is of the essence and we are available up to close of business today.”.

- [15] Paragraph 2 (c) (i) of the First Defendant’s affidavit alleges that the abovementioned correspondence was received by counsel for the Defendants at 1 p.m. on the date of completion, and that it imposed “a time constraint for closing which in the circumstances could not be met.”. Based on the affidavit evidence, this was the first contact between the parties after counsel for the Plaintiff received the letter of 24 November, 2008. There is no denial that counsel for the Defendants had advertised the early closure of their offices, and that this early closure was to be on the same day scheduled for the closing of the transaction.
- [16] The early closure of the office of counsel for the Defendants had no relevance to the completion of the sale of the shares. The contract did not stipulate the time of day for closing. Therefore, it was incumbent upon both parties to be available for completion up to the close of business on 28 November, 2008. The fact that the office of counsel for the Defendants was scheduled to close at 2 p.m. on the agreed date of completion did not absolve the Defendants and their counsel from their responsibilities for completion under the two agreements. This was especially so in light of the fact that time was made of the essence in the

Supplemental Agreement, and the refusal by the Defendants to agree to another extension of the completion date. The letter of 28 November, 2008, put counsel for the Defendants on notice that counsel for the Plaintiff was available for completion in accordance with the contract.

- [17] The Defendants did not have to produce the evidence requested at clauses (3), (4) and (5) of the letter of 28 November, 2008, namely the Company's corporate documents, books of accounts, and the assignment of its debts. According to clauses 5(c) (iii) and (iv), and clause 5(d) of the Principal Agreement, these were to be delivered to the Plaintiff after the Defendants received the balance of the purchase price at completion. It was only after his tender to the Defendants that the Plaintiff could expect to receive these documents. However, the request for evidence of the matters mentioned in clauses (1), (2) and (6) of the correspondence, is consistent with the requirements of clause 4 (a) of the Principal Agreement.

The Principal Agreement – Clause 4

- [18] In clause 4(a), the Plaintiff's obligation to complete is subject to certain conditions. It would be convenient to quote this clause in full.

“4. (a) The obligation of the [Plaintiff] to complete the transaction contemplated herein is subject to the satisfaction of or compliance with before the completion date of each of the following conditions (each of which is

acknowledged to be for the exclusive benefit of the [Plaintiff] and may be waived by him in whole or in part):

- (i) The representations and warranties of the [Defendants] made in or pursuant to this agreement shall be true and correct and with the same force and effect as if these had been made at the completion date.
- (ii) The [Defendants] shall have performed all of their obligations under this agreement to be performed by them on or prior to the completion date and the vendors shall not be in breach of any agreement or undertaking on their part contained in these presents.
- (iii) All documents relating to the due authorisation and completion of the transaction contemplated hereby and all actions and proceedings taken on or prior to completion in connection with the performance by the [Defendants] of their obligations under this agreement shall be satisfactory to the [Plaintiff] and his attorney-at-law and the [Plaintiff] shall have copies of all such documents or other evidence as the [Plaintiff] may reasonably request in form and substance satisfactory to the [Plaintiff] and his attorney-at-law;
- (iv) No legislation (whether by statute regulation by-law or otherwise) shall have been enacted or introduced which in the reasonable opinion of the [Plaintiff] adversely affects or may adversely effect the company or its property and assets;
- (v) No action or proceeding shall be pending or threatened by any person to restrain or prohibit;

- (a) the completion of the transactions contemplated herein; or
 - (b) the company from owing [sic] its property and assets;
- (vi) The property shall have been vested in the company for an estate in fee simple and the title thereto shall be good and marketable and free from encumbrances (save as set out in the second part of the third schedule hereto) and no sums of money shall be due and owing by the company to any person other than the [Defendants] in respect of the acquisition thereof.
- (vii) All stamp duty property transfer tax property taxes and any other taxes duties or imposts whatsoever in respect of the property shall have been paid or otherwise discharged.
- (viii) The directors and officers (if any) of the company shall have resigned and released the company in writing from all or any claims against the company by such directors and officers.
- (ix) There shall have been no material change in the financial position or prospects of the company which has not been disclosed to the [Plaintiff].”.

[19] In Aberfoyle Plantations Ltd. v. Cheng ([1960] A.C. 128), parties agreed to the sale and purchase of a plantation, part of which consisted of 182 acres comprised in seven leases that had previously expired. In the intervening years the vendor was unable to obtain a renewal of the leases.

Clause 4 of the agreement in the Aberfoyle case provided for the purchase to be conditional on the vendor obtaining a renewal of the leases. If the vendor was unable to fulfil the condition, the agreement would become null and void.

- [20] The vendor was unable to get the leases renewed, and the Judicial Committee allowed the purchaser to recover the deposit. Lord Jenkins opined that:

“At the very outset of the agreement, the vendor’s obligation to sell, and the purchaser’s obligation to buy were by clause 1 expressed to be subject to the condition contained in clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.”. (page 128)

- [21] In keeping with the Aberfoyle decision, the Plaintiff in this case was not obliged to complete the transaction unless the ten conditions in clause 4(a) of the Principal Agreement were either satisfied or complied with. Clause 4(a) clearly states that the conditions are to be satisfied or complied with before the completion date, that is, before 28 November, 2008. And, clause 4(b) of the Principal Agreement contains the Plaintiff’s remedies for any breach of clause 4(a).

[22] Clause 4 (b) provides that:-

“If any of the conditions contained in this clause 4 shall not be fulfilled or performed at or before the completion date to the reasonable satisfaction of the [Plaintiff] the [Plaintiff] may by written notice served on the [Defendants] in accordance with clause 12 hereof terminate [his] obligations hereunder and thereupon the deposit paid by the [Plaintiff] pursuant to clause 2 hereof shall be refunded to the [Plaintiff] by the [Defendants] without deduction Provided that where the performance or non-fulfilment of a condition is as a result of a breach of a covenant representation or warranty on the part of the [Defendants] herein contained the [Plaintiff] may bring an action against the [Defendants] for damages suffered by the [Plaintiff] Provided also that any of the said conditions may be waived in whole or in part by the [Plaintiff] without prejudice to any claims he may have for breach of any other covenant representation or warranty.”.

[23] Clause 4 (b) permits the conditions in clause 4(a) to be fulfilled or performed “at or before completion date.” Thus, it extends the time frame in clause 4(a) by including the date of completion. The conditions must also be performed or fulfilled to the reasonable satisfaction of the Plaintiff. More importantly, clause 4(b) allows the Plaintiff to terminate his obligations under the contract where any of the conditions are not fulfilled or completed within the stipulated time. Termination of the contract must be by written notice to the Defendants in accordance with clause 12 of the Principal Agreement.

- [24] Counsel for the Plaintiff was entitled, on the date of completion, to ascertain whether the conditions in clause 4(a) were fulfilled or satisfied prior to tendering the remainder of the purchase price. The Court has to determine whether any of these conditions remained unfulfilled or unsatisfied, so as to trigger the Plaintiff's right to terminate under clause 4(b). The Court will limit this determination to clauses 4(a) (vi), (vii) and (viii) of the Principal Agreement, as these were the only conditions mentioned by counsel for the Plaintiff in the letter of 28 November, 2008.
- [25] Neither clause 4 of the Principal Agreement, nor any other clause in the two agreements state specifically who is responsible for ensuring that the conditions in clause 4(a) are satisfied or fulfilled. In comparison, clause 3(a) of the Principal Agreement makes the contract subject to and conditional upon the Plaintiff obtaining planning permission. It is clear from clause 3 that the Plaintiff is responsible for the town planning application and the costs attendant thereto. Although the conditions in clause 4(a) are said to be for the exclusive benefit of the Plaintiff, it cannot be assumed, without more, that the Defendants are solely responsible for ensuring that these conditions are satisfied or fulfilled. The requirements of each condition should be evaluated to determine where the responsibility lay. The responsibility could be that of the

Plaintiff (as seen in clause 3 of the Principal Agreement), or the Defendants, or a combination of the parties to the contract, or even third parties.

- [26] Clause 4(a) (viii) required the Plaintiff to be satisfied that the resignations of the directors and officers of the Company had occurred, prior to paying the remainder of the purchase price. The Plaintiff only became entitled to the original documents, containing the written resignations and releases, after he had tendered the monies due. (See clause 5(c)(v) of the Principal Agreement). But clause 4(a)(viii) allowed the Plaintiff to satisfy himself that the condition had been fulfilled before the remainder of the purchase price was paid. The requirements of this clause had to be satisfied by the Defendants because they were the only directors of the Company. As the directors, the Defendants were the individuals in a position to ensure their own resignations and the resignations of any officers of the Company. Also, it could only reasonably have been the responsibility of the Defendants, and not the Plaintiff, to obtain the releases required by clause 4(a) (viii).
- [27] There is nothing in the affidavit evidence to indicate that, by the close of business on 28 November, 2008, either the Plaintiff or his counsel received any verbal or written response to the letter of even date. There

is no evidence that the Defendants satisfied or fulfilled the requirements of clause 4(a) (viii) prior to or on the date of completion. And there is no allegation by the Defendants, that the Plaintiff or his counsel prevented them from satisfying this condition. The parties, in an apparent arms length transaction, expressly indicated their intention that if this or any other condition in clause 4(a) was not fulfilled or performed, the Plaintiff could not be forced to complete the transaction. The parties agreed that this was a necessary provision in the contract.

- [28] The condition in clause 4(a) (viii) was for the exclusive benefit of the Plaintiff. Where a condition in a contract is for the benefit of one party, that party can waive the condition. (See Wood Preservation v. Prior [1969] 1 All E.R. 346). And clauses 3(e), 4(a) and 4(b) of the Principal Agreement permit the Plaintiff to waive any of the conditions in clause 4(a). However, there is no allegation by the Defendants, and no evidence that the Plaintiff waived the condition in clause 4(a) (viii).
- [29] The Court finds that the Defendants were in breach of clause 4(a) (viii) of the Principal Agreement. In Photo Production Ltd v. Securicor Transport Ltd. ([1980] A.C. 827 at p. 849E), Lord Diplock described a breach of condition as a situation where:

“the contracting parties have agreed, whether by express words or by implication of law, that *any* failure

by one party to perform a primary obligation, irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.”.

This is precisely what has occurred on the facts of this case. And as a result of the breach of a condition, the Plaintiff was entitled to terminate his obligations under the contract.

- [30] It was argued on behalf of the Defendants that the notice of termination is dated December 2, 2008, some four days after the contract became null and void under clause 5 of the Supplemental Agreement. Therefore, the argument continued, the purported termination by the Plaintiff was ineffective. The Court noted earlier that clause 5 could only be invoked by the Defendants if the failure to complete on 28 November, 2008, was the fault of the Plaintiff. The Court also found that the failure to complete was not due to the Plaintiff's default, but was caused by the inability of the Defendants to confirm that they had satisfied one of the conditions in the contract. Therefore, there was no default by the Plaintiff that would have triggered clause 5.
- [31] The extract from Barnsley's Conveyancing Law, that was quoted at paragraph [9] of this judgment, confirmed that when time is of essence in a contract, the party who is not at fault can rescind the contract on the

very next day. The contract here was subsisting until terminated at the earliest opportunity by the Plaintiff under clause 4 (b) of the Principal Agreement. The Court takes judicial notice of the fact that the notice is dated December 02, 2008, which represents the earliest working day after 28 November, 2008, on which written notice could have been given. 28 November, 2008, was the Friday of the independence weekend. Independence Day occurred on 30 November, 2008, a Sunday, and was followed by a national holiday on Monday 01 December, 2008. Therefore, the Plaintiff gave notice to the Defendants at the earliest time possible, that is, Tuesday 02 December, 2008. And it was effective notice.

- [32] In addition to the challenge to the effectiveness of the notice, the validity of the notice was also questioned. The Court however finds that the documents referred to at paragraph [6] of this judgment, satisfy the requirements of clause 4(b) with respect to the notice of termination. There is, therefore, no substance to the allegation contained in paragraph 2(iii) of the First Defendant's affidavit, that a valid notice of termination was not served in accordance with the terms of the contract. The letter of 02 December, 2008, from counsel for the Plaintiff to counsel for the Defendants was a valid notice of termination of the contract.

[33] Having found that the Defendants were in breach of one of the conditions precedent in the contract, there is no need for the Court to consider further whether the Defendants were in breach of clauses 4(a) (vi) of (vii) of the Principal Agreement. These clauses related to the vesting of property in the Company, and the payment of stamp duty and other taxes. And in any event, clause 4(b) of the Principal Agreement allowed the Plaintiff to terminate the contract by notice, if any of the conditions were not performed or fulfilled.

Tender Of Purchase Price

[34] The First Defendant in his Affidavit relied on the fact that on the date of completion “there was no tender by cheque of the balance of the purchase money or any confirmation from an acceptable bank or other financial institution in Barbados that the monies for closing were available.”. (paragraph 2(c) (ii)). The First Defendant also believed that the letter of 28 November, 2008, was a ruse by the Plaintiff to avoid the effect of the “time of the essence” clause in the Supplemental Agreement. (paragraph 2(d)).

[35] The Court noted earlier that the Plaintiff did not have to commit his money towards completion if any of the conditions in clause 4(a) of the Principal Agreement were not satisfied. The Defendants believed that

the Purchaser was in no position to complete because of a lack of financing. Therefore, it was open to them to request evidence of the availability of the balance of the purchase price as soon as they broke off negotiations for the extension of the completion date. The Defendants through their counsel chose to wait it out, and the letter from the Plaintiff's counsel on 28 November, 2008, must have taken them by surprise.

[36] Nowhere in the Plaintiff's affidavit does he allege or produce documentation to show that on the date of completion the balance of the purchase price was available. But there was no need for the Plaintiff to do this until the Defendants satisfied him that condition 4(a) (viii) of the Principal Agreement had been performed. No such confirmation was received from the Defendants or their counsel up to the close of business on 28 November, 2008.

Entitlement To Deposit

[37] There can be no forfeiture by the Defendants of the deposit, or the interest accumulated on the deposit, under clause 5 of the Supplemental Agreement. There are, however, five clauses in the Principal Agreement that refer to the deposit. These are clauses 2(b), 3(e) 4(b), 6 and 11. Clause 11 will not be considered, because it was replaced by clause 5 of

the Supplemental Agreement. Clause 6 can likewise be disregarded because it gives the Plaintiff the right to rescind the contract and call for the deposit if the Defendants cannot show a good and marketable title to the property. Similarly, clause 3(e) deals with a specific situation where planning permission is not obtained. In those circumstances the Plaintiff is entitled to the deposit and interest, minus 50 thousand dollars paid to the Defendants.

- [38] The relevant part of clause 2(b) of the Principal Agreement that provides for the allocation of the deposit and the accumulated interest states as follows:

“... in the event that the sale and purchase shall be completed in accordance with the terms of this agreement then the interest on such deposit shall belong to the [Defendants] but if the agreement shall be terminated as herein provided then the interest thereon shall belong to the [Plaintiff] Provided that in the event the sale and purchase shall not be completed for the reasons aforesaid then the [Defendants] shall be entitled to payment of the sum of Bds \$50,000.00 to be deducted from such deposit and the accumulated interest thereon.”.

- [39] Where the transaction is completed in accordance with the contract, the interest belongs to the Defendants. That did not occur on the facts of this case. If the agreement is terminated “as herein provided” the interest belongs to the Plaintiff. The reference here is made only to the interest and not to the deposit. The circumstance of termination are provided for

in clause 4(b). And clause 4(b), which is quoted in full at paragraph [22] of this judgment, states clearly that if the contract is terminated under clause 4(a), the deposit is refundable without deductions. This is the scenario that unfolded in this case, and the Court rules that the Plaintiff is entitled to the deposit of 750 thousand dollars and the accumulated interest, without deduction, because the contract was terminated as provided in clause 4(b) of the Principal Agreement.

[40] There is one further reference to the deposit in clause 2(b). It is where the transaction is not completed “for reasons aforesaid”. In this situation the Defendants are entitled to 50 thousand dollars from the deposit and the accumulated interest. What is the meaning of the phrase “for reasons aforesaid”? It can only logically relate to a previous reference in the Principal Agreement to a state of affairs where the transaction is not completed. That previous reference is to the termination of the contract. As pointed out in the foregoing paragraph, termination is covered by clause 4, and clause 4 (b) prohibits deductions from the deposit. If termination also includes the discharge of the parties because planning permission was not obtained, clause 3(e) gives the Defendants 50 thousand dollars out of the deposit and interest, with the remainder to the Plaintiff. But that did not happen on the facts of this case. And, as noted

before, clause 5 of the Supplemental Agreement contains an event of termination that does not apply here.

- [41] It must be emphasized that clause 2(b) does not permit deductions from the interest when the contract is terminated by the Plaintiff as provided by clause 4(b) of the Principal Agreement. The interest belongs to the Plaintiff. The Court is driven to the conclusion that the proviso to clause 2(b) is either superfluous, or that whatever its meaning, it does not apply to the circumstances of this case. The Plaintiff is entitled, therefore, to the deposit and the accumulated interest without any deductions.

Reasons For Adopting Order 14

- [42] Order 14 rule 3(1) directs the Court to dismiss an application if the Court is satisfied either that there is a triable issue, or that there should be a trial for some other reason. The onus is on the Defendants to so satisfy the Court. The Supreme Court Practice, 1999, Vol. I, further states that:

“O.14 proceedings should not be allowed to become a means for obtaining in effect, an immediate trial of the action, which will be the case if the court lends itself to determining points of law or construction that may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision. It is only if an arguable question of law or construction is short and depends on few documents that O.14 procedure is apposite.”. (paragraph 14/1/2).

(See also Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (in liq.) [1989] 3 All E.R. 74 at p. 77)).

- [43] The parties in this case relied on the affidavit evidence alone, and did not seek additional evidence by way of cross examination of the deponents. There was no indication by either side that any other evidence would be required in order for a court to properly assess the merits of the case at a trial. There is no significant difference between the content of the affidavits and the content of the Statement of Claim, Defence and Counterclaim. Therefore, the evidence at a trial and the evidence on the Order 14 application would be essentially the same. Or put another way, the Defendants did not suggest that any additional evidence would be required if the matter went to trial.
- [44] The documentation in this matter may appear to be copious, but the Court has not found it to be complex or overwhelming. The Plaintiff's affidavit was two pages in length with four documents attached. Two of these documents were the agreements that are central to the dispute. The Principal Agreement contains fifteen clauses of varying lengths, and the Supplemental Agreement is much shorter with seven clauses. The other two documents are brief letters. The joint affidavit is another two page document with three attachments; the first a two line e-mail, the second a

letter already annexed to the Plaintiff's affidavit, and the third a four line response e-mail.

- [45] The First Defendant's affidavit covered four pages with eight attachments. Six of these documents pertain to the negotiations to extend the date of completion beyond 28 November, 2008. Of the other two documents, one deals with matters of title, the draft conveyance and a request for requisitions, and the other concerns a National Insurance clearance certificate. The evidence and exhibits in this matter amounted to approximately 43 pages, and they pale in comparison to the over 2000 pages before the court in **British and Commonwealth Holdings plc v. Quadrex Holdings Inc.** ([1989] 3 All E.R. 492).
- [46] The oral submissions by counsel for the parties were delivered in the afternoon of 13 March, 2009, for a period of approximately two hours, with minimum references to either case law or other legal sources. The written submissions, received on 24, 30 and 31 July, 2009, were more detailed, but again there was no abundance of case law or other legal authorities. In comparison, the Court of Appeal in the **Quadrex** case commented on the fact that the skeleton arguments at first instance were 63 pages, and the arguments before the appeal court took many days. This was not a complicated case that required many days to unravel.

- [47] The issues of fact in this case were not so complex as to require days for hearing and the reading of a huge weight of evidence in order to understand the issues. The facts generally were not in dispute. The single area of disputed fact related to the validity of the written notice sent to the Defendants on 02 December, 2008. That dispute was clarified and resolved by the joint affidavit of 13 March, 2009. The Defendants did not challenge the content of this affidavit. In addition, counsel for the Defendants placed greater weight on the ineffectiveness of the notice than on its invalidity.
- [48] Counsel for the Defendants submitted that there were triable issues that included the following:-
- (i) the failure of the Plaintiff to perform his obligations as purchaser under the principal and supplemental agreements.

The Court found that there was no failure by the Plaintiff to perform his obligations. The Plaintiff was not obliged to complete if there was a breach of a condition precedent, and such a breach had occurred.
 - (ii) the lack of tender of a certified cheque for the balance of purchase money or other satisfactory means of payment when the demand for completion was made on 28 November, 2008.

Again, the Purchaser was not required to tender the balance of the purchase price because the Defendants were in breach of a condition precedent that had not been waived by the Purchaser.

- (iii) The ineffectiveness of the notice to terminate on 02 December 2008 taking into account the provisions of clause 5 of the supplemental agreement under which the principal and supplemental agreements became null and void on 28 November, 2008.

The Court determined that clause 5 of the Supplemental Agreement was not triggered because the Plaintiff was not in default.

- [49] The Defendants have not satisfied the Court that there are any triable issues of substance in this case. Such issues would have arisen if the Court had considered clauses 4(a) (vi) and (vii) of the Principal Agreement. However, the Court is of the view that even if this matter went to trial, the success of the Plaintiff's case would not depend upon the resolution of the issues pertaining to these clauses. This is because the affidavit and documentary evidence, presented to this Court, has shown the breach of one of the conditions precedent to the Plaintiff's obligation to pay the remainder of the purchase price.

Disposal

[50] The Court finds that the Order 14 application is appropriate in this matter, for the reasons given above, and because of the particular circumstances of this case. The Plaintiff is entitled to summary judgment, and to the return of the deposit and accumulated interest. The Defendant's counterclaim is dismissed. Interest is awarded on the deposit at the rate of 8 per cent from the date of judgment, with costs to the Plaintiff to be agreed or taxed.



SONIA RICHARDS
High Court Judge