

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV1633 of 2014

BETWEEN

MONTROSE HOLDINGS LIMITED

CLAIMANT

AND

OM PRAKASH

DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

Date of Decision: 2020: June 16

Appearances:

Mr. Michael Koeiman, Attorney-at-law on behalf of the Clarke Gittens Farmer for the Claimant

Ms. Joia W.S. Reece, Attorney-at-law for the Defendant

DECISION

INTRODUCTION

[1] This matter concerns the application by the Claimant for summary judgment against the Defendant.

FACTS AND PROCEDURAL BACKGROUND

[2] The parties entered into an agreement dated the 8th April, 2008 where the Claimant agreed to sell and the Defendant agreed to purchase

- 100 common shares in P.D.F. Incorporated ('the company'), a company owned by the Claimant. The company is the beneficial owner of a property named Staple Grove ('the property') situate in the parishes of St. Michael, Christ Church and St. George.
- [3] In consideration for the shares in the company, the Defendant agreed to pay \$40,000.00 per acre for the property. Based on the second schedule in the agreement, the property contained approximately 493.47 acres – therefore the agreed amount to be paid was \$19,738,800.00. On the date of the agreement, the Defendant paid a deposit of \$1,820,000.00 in part payment of the purchase price. The balance of the purchase price, \$17,918,800.00, was to be paid on the completion date as set out in the agreement to the vendor's attorney subject to the provisions of clause 3.3.
- [4] Clause 3.3 of the agreement made provision for adjustment of the balance of the purchase price if the land/property contained more or less than the area of 493.47 acres.
- [5] Clause 3.3.1 of the agreement limited the actual area to be sold to the Defendant subject to a sale agreement between the company and Barbados Cricket Legends ('the sale agreement'). The said agreement was also subject to obtaining permission from the Chief Town Planner for the subdivision of the land contained therein, therefore the purchase price did not include the area of land contained in the agreement and the Defendant was now required to pay \$16,318,800.00.

- [6] The parties also agreed that if the planning permission was not obtained by a certain date, the Defendant would pay the Claimant the sum of \$1,160,000.00 for the area of land contained in the agreement between the company and Barbados Cricket Legends. Planning permission was not obtained by the date in question and the Defendant was therefore required to pay the Claimant the \$1,160,000.00.
- [7] The Defendant made an initial payment and owed \$836,000.00. By a requisition on the title dated 2nd February, 2009, the Defendant requisitioned the Claimant. Among other things, the Defendant queried whether there were any judgments or other encroachments affecting the land to be purchased. They further requested the Claimant to discharge or otherwise remove same, if any, prior to completion.
- [8] The Claimant had informed the Defendant that there were no judgments or encroachments affecting the land but a subsequent survey of the land revealed that there were indeed encroachments.
- [9] Based on a surveyor's report regarding the outstanding encroachments, the Claimant informed the Defendant's attorney that the encroachments only affected 742.70 sq. ft. of the land which amounted to a value of \$683.28. They noted that the amount would be taken from the outstanding purchase price and requested the Defendant to submit \$135,316.72 as final payment.
- [10] The Defendant not in agreement with the Claimant surveyor's report hired an independent surveyor to survey the property which revealed

that the encroachments were more significant than that reported by the Claimant. The Claimant again offered that the value of the encroachments be taken from the final payment.

- [11] Over a period of time the parties exchanged correspondence with a view of rectifying the matter. The Defendant subsequently paid \$700,000.00 towards the balance of the purchase price but retained \$136,000.00 pending the satisfactory resolution of the encroachments.
- [12] The Defendant filed a defence and counterclaim on the 22nd December, 2014, counterclaiming for damages for breach of contract and/or warranties, namely clauses 3.6, 4.3, 5.1, 7.1.1, 8.2 and warranties 1.1, 18.3, 20.1, 20.2, interests and costs and any other relief deemed fit by the court.
- [13] As to date, the Defendant has not accepted the Claimant's proposal of paying a reduced price for the disputed land fearing that the encroachers could have acquired rights to the property and that he would not be acquiring what he had contracted for.

THE APPLICATION

- [14] As a result by an application dated 26th February, 2016, the Claimant applied to the court pursuant to Rule 15.2 of the Supreme Court (Civil Practice) Rules 2008 for summary judgment against the Defendant. The application was accompanied by an affidavit.
- [15] The grounds of the application are repeated here:

“1. This is a claim for monies due under a contract for the sale of shares by the Claimant to the Defendant. The shares were in a limited liability company, which owned a plantation, and the purchase price of the shares was determined by

reference to the square footage of the plantation using a formula of \$40,000.00 per acre.

2. The majority of the purchase price was paid. The outstanding purchase monies relate to a piece of the plantation whose size needed to be determined so that the proportionate part of the purchase monies are the subject of the claim.
3. Under the contract for the sale of the shares the Claimant warranted that the company whose shares were being sold had good title to the plantation free from encumbrances, and was in a position to give vacant possession.
4. The Defendant in his Defence has not disputed the Claimant's calculation of the outstanding purchase monies, but contends that the encroachments which reduced the area of the disputed portion are a breach of the Claimant's above-mentioned warranties. The encroachments reduced the area of the disputed portion by 1.06%.
5. The Defendant's Defence is wholly based on that said contention. Similarly the Defendant has counterclaimed damages for breach of the above-mentioned warranties.
6. As a matter of law, minor encroachments do not prevent a vendor giving vacant possession or good title free from encumbrances.
7. Accordingly the Defendant has no real prospect of successfully defending the Claimant's claim and the Claimant knows of no other reason why the disposal of the claim should await trial."

THE CLAIMANT'S SUBMISSIONS

[16] Counsel for the Claimant submitted that the dispute between the parties turns on the construction of the warranties given by the Claimant under the agreement, specifically, the company's good title to the property free from encumbrance and its vacant possession.

[17] In support of his argument, he relied on Jowitt's Dictionary of English Law definition of what is a good title and submitted that the Defendant has not raised any equity affecting the property and therefore can only successfully challenge the company's good title to the property if he can show that the encroachments are in fact an encumbrance. Jowitt's Dictionary provides:

“[a] good title to a freehold or leasehold estate is made wherever it appears that the legal estate in the property contracted for will become vested in the purchaser free from any equity which would be capable of being overreached by a disposition on trust for sale...and free from all encumbrances not specially provided for in the contract.”

[18] Counsel submitted that an encumbrance as used in the agreement refers to charges on the land and is reinforced by the context in which it appears. In particular, he referred to warranty 18.3 which provides that “... the company is the owner of, and has good and marketable title to property and its assets free from all charges, liens and encumbrances of any kind, and warranty 20.1 which states “...the company is the legal and beneficial owner of the property with full right to sell the same free from all mortgages, charges, liens and encumbrances of any kind”.

[19] It was Counsel's considered view that the word “encumbrance” as stated in both warranties is a general term defined by the examples, which precedes it. Further, Counsel posited that the ‘ejusdem generis’ principle is applicable in that all words of the contract are to be considered, so that in listing the preceding words, the Agreement

must have intended to limit the general word ‘encumbrance’ to objects of the listed type.

[20] Counsel further submitted that whether the ordinary meaning principle or the ejusdem generis rule is applied, ‘encumbrance’ as is used in the agreement means a charge on the property and maintains the view that an encroachment is not an encumbrance as it does not constitute a charge on the property. It was his position therefore that the Defendant failed to establish as a triable issue, the question of the Claimant’s good title to the property free of encumbrances.

[21] Counsel noted that an encroachment is a misdescription and a misdescription means that the vendor is unable to convey to the purchaser property corresponding exactly with that described in the contract for sale. Moreover, if the Claimant’s failure to deliver to the Defendant the full portion as described in the agreement amounts to a breach of contract, it merely amounts to a misdescription. He further submitted that a material misdescription entitles a purchaser to rescission but not one inconsequential in nature. Such a misdescription entitles a purchaser to the difference between the land as contained in the agreement and the land actually conveyed. Counsel pointed out that the Defendant did not seek to rescind the contract but sought damages, which would be the difference between the property agreed to be sold and the actual property sold.

[22] Counsel relied on the case of Re Contract between Fawcett and Holmes (1889) 42 Ch.D.150 in support of his argument that where the

- substance of what was bargained for was not substantially affected, the Defendant can be compensated.
- [23] He submitted that the parties never contracted on the basis that the exact extent of the property was certain as the property was described in the agreement by estimation. Further, Counsel contended that clause 3.3 of the agreement provided that the balance of the purchase price would be adjusted if the land was more or less than 493.47 acres, therefore, the encroachments affecting the land do not amount to a breach of contract by the Claimant.
- [24] Counsel argued that the Defendant could only establish a breach of warranty as to vacant possession if he can show that someone is in possession of the disputed portion. Additionally, the Claimant contends that the Defendant failed to show that the company is not in possession of the disputed portion as reduced by the encroachment, nor has the Defendant pleaded any facts to the effect that the encroachments are such as to amount to possession by the encroachers of the entire disputed portion and so has failed to raise as a triable issue the question of vacant possession.
- [25] It is on the strength of these arguments that Counsel submitted that the Defendant's Defence and counterclaim fails since the Claimant did not breach the warranties as to vacant possession and good title free from encumbrances.

THE DEFENDANT'S SUBMISSIONS

- [26] Counsel for the Defendant submitted that the Claimant failed to mention their counterclaim and the merits of its success, therefore

summary judgment on a Defence where there is a live and valid counterclaim is a waste of the court's resources unless there is a specific application seeking to deal with the counterclaim.

[27] She submitted that the Claimant had prior knowledge of how the Defendant intended to use the land since he had indicated that he was interested in developing the property into lower income residential property.

[28] Further, Counsel submitted that the Defendant was induced into the agreement by its director who warranted that the property would be unencumbered and the shares would be transferred subject to there being vacant possession of the property since the intended purpose of use of the land was known to the director. It was therefore on this basis that the Defendant entered into the agreement.

[29] Additionally she submitted that despite numerous lawful demands, the Claimant remained unable and unwilling to render good and marketable title to the property with vacant possession. He noted that the Claimant is in breach of the agreement and the warranties contained therein.

[30] Counsel is also of the view that since there are encroachments on the property in question, the Defendant should not be made to pay the Claimant until the encroachment issues are dealt with.

[31] She argues that since there are varying views with respect to the encroachments, expert evidence from at least two experts in the area is needed to first determine the size of the encroached area and such evidence will have to be cross-examined. It is Counsel's position that

- there are issues of facts to be dealt with at trial, in particular, the Defendant wants the area constituting the encroachments determined and to know how they are to be dealt with. Furthermore they want the encroachments removed as entitled to under the contract.
- [32] In relation to summary judgment, Counsel submitted that the court in determining whether the Claimant has a real prospect of success should consider the evidence which should reasonably be expected to be available at trial. Counsel referred the court to Swain v. Hillman [2001] 1 All ER 91 at 92, Three Rivers District Council v. Bank of England (No. 3) [2001] UK HL 16 and ED&F Man Liquid Products Ltd. v. Patel [2003] EWCA Civ 472 stating what needs to be applied in summary judgment applications.
- [33] In referring to ED&F Man Liquid Products, supra, Counsel noted that this case explained how the prospect of success should be investigated. She furthermore submitted that if the court were to get into such an investigation, it would be forced to embark on a mini-trial which as gleaned from the case law is to be avoided in summary judgment applications.
- [34] She also submitted that there is extrinsic evidence as to what was in the Defendant's mind and the Claimant's when they entered into the contract for sale. She noted that circumstances surrounding the entering into an agreement for sale are capable of being tendered into evidence to address the basis of the parties entering into the agreements.

- [35] Counsel further argued that extrinsic evidence does not enlarge the terms of the agreement but instead, assist in interpreting the terms relied on by the parties and the matters highlighting the inducement to enter the agreement. In support of this contention, she relied on the case of *Bank of New Zealand v. Simpson [1900] AC 182* at 187.
- [36] She posits that an encroachment is an encumbrance of some kind, and as such an encroachment is included in the warranty given by the Claimant.
- [37] Counsel further submitted that if there is a misdescription in land and it is substantial the vendor would be unable to enforce the contract, even with an abatement of the price – see Emmet and Ferrand on Title. Counsel noted that whether a misdescription is substantial is a matter for the court to decide.
- [38] In conclusion she submitted that since there will be competing evidence and no real prospect of the Claimant succeeding on their claim, a full trial of the facts and issues is necessary to properly adjudicate on the matters raised. It is her position that since there are conflicting views on the extent of the encroachments, the issue of vacant possession and unsettled evidence as to whether the parties themselves had agreed that elements of the contract required the vendor to ensure compliance with the terms despite completion, the Claimant’s application should be dismissed.

THE CLAIMANT’S REBUTTAL ARGUMENTS

- [39] In reply to the Defendant’s contention that the Claimant failed to claim summary judgment on the counterclaim, Counsel for the

- Claimant submitted that the Defendant did not confine the application to the Defence and that the counterclaim is based on the same facts and legal arguments in the Defence and therefore such a contention is unjustified and spurious.
- [40] Counsel also noted that even though the Defendant resisted the Claimant's contention that no facts were pleaded as to vacant possession, the Defendant failed to identify such pleadings. Counsel further contended that the Defendant indicated that evidence in relation to same will be elected through witness statements. However, he noted that evidence cannot be called in of something that was not pleaded.
- [41] Counsel also pointed out that new arguments were made by the Defendant which were not supported by the pleadings.
- [42] Counsel further contended that the Defendant introduced fresh points of law and new authorities. He noted that the case of *Bank of New Zealand v. Simpson* cited by the Defendant in support of her contention that oral evidence is admissible to address the basis of the parties entering into the agreement merely establishes that oral evidence is admissible to resolve ambiguity in a written contract.
- [43] Additionally, Counsel noted that the Defendant relied on the case of *Alex Imports Limited v. Tennant* in support of her contention that an encroachment is not an encumbrance, but noted that none of the dictionaries support that contention but instead distinguishes encroachment, which, as he states, are intrusions into another's

property from encroachment, which are claim or liabilities attached to the property.

[44] Counsel submitted that Tennant can be distinguished as the encroachment in that case was a restrictive covenant and did not merely reduce the square footage of the property as an encroachment would and furthermore that it gave rights to a third party and was therefore a claim, lien or liability attached to the property.

[45] Finally Counsel submitted that the encroachment in Tennant was a breach of contract because the property in question was registered land which had precisely determined boundaries but not in this case as the exact extent of the property was never certain and compensation would be paid based on a formula according to what the amount turned out to be.

ISSUES

[46] In determining whether the court should give summary judgment against the Defendant on the Claimant's application two main issues have to be addressed:

1. Whether this is an appropriate case for the exercise of the court's power to grant summary judgment; and
2. Whether the Claimant is in breach of the conditions/warranties of the contract, namely, vacant possession and a good and marketable title to the property.

THE LAW AND DISCUSSION

[47] Rule 15.2 of the Supreme Court of Judicature Civil Procedure Rules CPR (2008) gives the court power to grant summary judgment on the

claim or a particular issue if it considers that the Claimant has no real prospect of succeeding on the claim or issue or the Defendant has no real prospect of successfully defending the claim or issue or there is no other reason why the case or issue should be disposed of at a trial.

- [48] The test of whether the Claimant has a real prospect of success has been pronounced in the locus classicus case of *Swain v. Hillman* [2001] 1 All ER 91 CA where **Lord Woolf MR** stated:

“It is important that judges in appropriate cases should make use of the power contained in CPR Part 24 [to grant summary judgment]. In doing so, they will give effect to the overriding objective...It saves expense, achieves expedition, avoids the court’s resources being used up on cases that serves no purpose and is in the interest of justice. If a Claimant has a case, which is bound to fail, it is in his interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a Claimant should know that as soon as possible...useful though the power is, it is important it is kept to its proper role. It is not meant to dispense with the need for a trial...The proper disposal of an issue under **Part 24** does not involve the judge conducting a mini-trial; that is not the object of the provisions, it is to enable cases, where there is no real prospect of success, either way, to be disposed of summarily.”

- [49] He continues:

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful prospect of success’.”

- [50] The scope of the power of a court to grant summary judgment was also considered by the House of Lords in *Three Rivers District*

Council v. Bank of England (No. 3) [2001] 2 All ER 513 where it was held that a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. There, **Lord Steyn** stated at paragraph 95:

“For example it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible.”

[51] Likewise in *Bank of Bermuda Ltd. v. Pentium BVI Civil Appeal No. 14/2003*, **Saunders CJ (Ag)** had this to say at paragraph [18]:

“A judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant’s case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.”

[52] Where the case is of a nature that requires the court to embark on a mini-trial, it is one that is unsuitable for summary judgment. Similarly, if there are allegations of reprehensible conduct or complex issues of law and facts to be determined, the court should not be minded to give summary judgment – each case must be assessed as a whole.

[53] Other cases which discussed the application for summary judgment and the principles to be applied are – (1) Western United Credit Union Co-operative Society Ltd. v. Corrine Ammon Civ App. No. 103 of 2006; (2) ED&F Man Liquid Products v. Patel [2003] EWCA at page 8 and 10; (3) Royal Hospital NHS Trust v. Hammond (No. 5) [2001] EWCA Civ. 550; (4) Doncaster Pharmaceuticals Group Ltd. v. Bolton Pharmaceutical Co. 100 Ltd. [2007] F.S.R. 63; (5) Johnson v. Permanent Value Asset Management Limited et al 630 of 2014 [unreported].

Misdescription

[54] Generally, where there is a misdescription in agreements for the sale of land, the vendor may be entitled to specific performance and the purchaser to rescission of the contract and the return of his deposit where the misdescription is substantial – see Flight v. Booth (1834) 131 ER 1160. What is substantial therefore depends on the circumstances of each particular case and this was emphasized in Watson v. Burton [1957] 1 WLR 19 where it was held that a misdescription must be substantial as to deprive a purchaser of his bargain before he can claim rescission.

[55] In the case at bar, in the agreement for sale, namely at clause 3.3, the parties agreed that the balance of the purchase price “will be adjusted accordingly should the land prove to be more or less than the area of 493.774 acres as contained in the First Schedule.”

[56] It is the Claimant’s position that the parties never contracted on the basis that the extent of the land was certain as the property was

described in the First Schedule by estimation. The Claimant is also contending that the encroachments ‘affecting’ the disputed portion of land do not constitute a breach of contract and must be considered inconsequential since it is only 0.042% of the overall area of land agreed to. Therefore in keeping with the agreement the balance of the purchase price should be adjusted accordingly and calculated applying the formula agreed to.

[57] The Defendant on the other hand believes that it is not simply a question of value. They relied on the dicta of **Eve J** in *Lee v. Rayson* [1917] 1 Ch 613 at p. 618 which noted that:

“A vendor could not fulfill a contract to sell Whiteacre by conveying Blackacre, although he might prove demonstration that the value of the latter was largely in excess of the value of the former. Value, no doubt is an element to be taken into account in determining whether an error in description is substantial or material, but it is certain not the only element, nor, in my opinion, the dominant one.”

[58] In *Jacobs v. Revell* [1900] 2 Ch. 858, a case concerning the sale of land with conditions of sale as it relates to misstatements and errors, inter alia, the court held that the defendants were not entitled to specific performance in respect of the part of property to which a good title has not been shown, and that the plaintiff was entitled to rescission of the contract and the return of his deposit. The agreement for sale described the portion of land for sale as containing 5 acres 0 roods and 26 perches but could only show a good title of 4 acres and 3 roods. One of the conditions of sale was “The property is believed and shall be taken to be correctly described in the particulars as to quantity and

otherwise...and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof.”

[59] Another part of the property offered for sale bordered on the lake, and the only title offered for that part was what was purported to be a title by possession for less than forty years.

[60] The Plaintiff claimed rescission of the contract and a return of the deposit paid by him and the Defendants counterclaimed for specific performance. The court held that even if the defendants had established a possessory title to the border land for 12 years, that would not have been sufficient, as the contract, so far as it related to that land, was an open one, in which a 40 years’ title by possession was required; the defendants were not entitled to specific performance in respect of the part of the property to which a good title had not been shown and the plaintiff was entitled to rescission of the contract and the return of his deposit.

[61] In the instant case the Claimant is contending that the area of land being encroached upon is miniscule and they have offered to make adjustments to the original purchase price by way of a deduction from the amount to be paid based on the area of land being encroached upon.

[62] The Defendant has paid the majority of the purchase price and have not indicated that he wants to rescind the contract – what he would

like is to have the issue of the encroachment dealt with by the Claimant.

- [63] It is therefore the duty of the court to consider whether the encroachment goes to the essence of the contract and materially alters the substance of it.

Good and Marketable Title

- [64] In contracts for sale of land, a vendor has a legal duty to provide the purchaser with a good and marketable title free from encumbrances. The meaning of the expression ‘good and marketable’ is well established – see *Pyrke v. Waddingham (1852) 10 Hare 1 at 8, 68 ER 813* at 816.

- [65] In the case of *Roseal Services Ltd. v. Challis, Clarke and Reid BB 2014 HC 74 Justice Kentish* noted:

“[86] In law, the word “title” may have a number of different meanings. In relation to a vendor’s duty to show good title, the term refers to the obligation for the vendor to show that he has ownership of the property that allows him to convey it to a purchaser who will be able to resist any claims or challenges made by any third parties...It is title that a purchaser can be compelled to accept by a decree of specific performance. *Jeakes v. White* (op. cit.)

[87]...“Good and marketable title” is a term regularly used by practitioners in conveyancing. It is a term of art whose meaning has received judicial consideration. In *McIntosh et al v. First Caribbean International Bank (Barbados) Ltd.* (Unreported) High Court of Barbados Suit No. CV 1339 of 2008, Decision of May 5, 2009, Crane-Scott J citing *Re Spollon and Long’s Contract* [1936] ch 713 observed at para. 19 that the expression referred to “a title which will enable the purchaser to himself sell the property without the necessity of making

special conditions of sale restrictive of the purchaser's rights." She then directed particular to the word "marketable", pointing out that a marketable title was, according to Farrand's Contract and Conveyance (3rd Edn.), a title in which the ownership of the estate was supported by the maximum evidence required by conveyancing law and practice and which contained "no blot to which a prudent purchaser might properly object."

[66] A good and marketable title was also discussed in the Bahamian case of *Synkova v. Albury BS 2017 SC21*. There the **Honourable Justice Winder** in considering what is a good and marketable title referred to the learning in the English Court of Appeal decision of *Barclays Bank PLC v. Weeks Legg & Dean [1998] 3 All ER 213* where **Millet LJ** in construing the expression "a good and marketable title" noted that two separate questions will arise, namely, the subject matter of the sale and the vendor's duty to prove his title to the subject matter of the sale. **Millet LJ** stated:

"A purchaser is entitled to be satisfied: - 'that his vendor is seized of the estate which he is purporting to sell, in this case the fee simple, and that he is in a position, without the possibility of dispute or litigation, to pass the fee simple to the purchaser.'...

Where the title shown is less than perfect, the question is whether the risk is so remote or so shadowy as to be one to which no serious attention need be paid...the test must always be: would the court, in an action for specific performance at the instance of the vendors, force a title containing the alleged defect upon a reluctant purchaser?'...

A title which, though technically defective, is one which the purchaser is bound to accept, is known as, a good marketable title'. The meaning of the expression is well established. In *Pryke v. Waddingham (1852) 10 Hare 1 at 8, 68 ER 813* at 816 **Turner VC** said:

“...the rule rests upon this, that every purchaser is entitled to require a marketable title, by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and in all circumstances, be forced upon an unwilling purchaser...and that this is the true rule to be applied in such cases, is, I think, the more apparent, from the repeated decisions that the court will not compel a purchaser to take a title which will expose him to litigation or hazard...”.

[67] In the instant case one of the conditions contained in the argument is that the Defendant should be satisfied that the Claimant has a good and marketable title to the property. Clause 4.3 provides:

“It is a condition of completion that the Purchaser be satisfied that the company has a good and marketable title to the property such that a purchaser could be compelled to accept that the title under a contract for the sale thereof under the Laws of Barbados as if this Agreement were a contract for such sale. The provisions of clause 3.6 shall be complied with at completion.”

[68] Clause 4.4 contains:

“If a good and marketable title is not shown to the Property then the Purchaser shall be entitled to rescind the Agreement and to be repaid the deposit paid in accordance with sub-clause 3.1 hereof.”

[69] The Defendant is entitled to a property with a good and marketable title and the Claimant has to show that with respect to the entire property to be sold, that he can deliver a good and marketable title to the property.

Encroachment/Encumbrance

[70] The Claimant and the Defendant have provided the court with divergent views of the encroachment. The Claimant submitted that the encroachment is not an encumbrance. He further submitted that whether the ordinary meaning is used or the ‘ejusdem generis principle’, an encroachment is not an encumbrance as it does not create a charge. Conversely, the Defendant is of the view that the ‘ejusdem generis’ principle is not applicable as one cannot apply a common category or generic string of the words as referring to “securing a debt against real property”, moreover, if it is applicable in this context, the only feature that can be designated to the words mortgages, charges, liens and encumbrances is a claim or entitlement to another’s property. They maintain that the encroachment in this matter is an encumbrance and contend that the encroachment should be rectified before the final payment is made.

[71] According to Black’s Law Dictionary an encroachment is defined as:

- “1. An infringement of another’s right.
2. An interference with or intrusion onto another’s property.

[72] A determination therefore has to be made of whether the encroachment in question amongst to an encumbrance depriving the Defendant of a good and marketable title to the property. Such determination must take into account – the nature of the encroachment, the length of time the encroachment has been in

existence and whether any third party rights may have been acquired under the Limitation and Prescriptions Act, Cap. 232.

Vacant Possession

[73] According to Halsbury Vol. 42 at paragraph 123, “in order to give vacant possession the vendor must eject not only those lawfully in possession but also any person who has no claim of right.” Simply put vacant possession means free from any occupation by the vendor or a third party and free from any claims of a right to possession. Likewise free from encumbrances implies that it is a term of the contract that the purchaser on completion should be put in actual possession.

[74] It goes without saying therefore that where rights have been acquired by a third party, the Claimant would be unable to give the Defendant vacant possession of the disputed area as vacant possession means free from any occupation by the vendor (Claimant) or a third party.

CONCLUSION

[75] In keeping with the principles set out in Swain v. Hillman supra, the court should be loathe to make an order for summary judgment where there are clearly facts in issues to be determined. In the case at bar there are issues with respect to the area of the land and whether there are any encroachments which would affect the sale of the land, whether a good and marketable title can be conveyed, whether vacant possession can be given and whether there has been a breach of the contract and/or warranties contained in the agreement for which damages should be awarded.

- [76] To seek to resolve these issues at this stage would be tantamount to conducting a mini-trial, which should definitely be avoided in applications of this nature.
- [77] After considering all of the material before the court and in observing the overriding objectives of the CPR, I have determined that there are clearly issues in dispute which can only be resolve by a full ventilation of the facts in issue at a trial. I am satisfied that the Defence is more than merely arguable and that it carries some degree of conviction with the Defendant having a reasonable prospect of successfully defending the claim.
- [78] The application for summary judgment is dismissed with costs to the Defendant to be agreed or taxed.

PAMELA A. BECKLES
Judge of the High Court