

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
CLAIM NO. ANUHCV2004 / 0362
BETWEEN:

GRAHAM FERGUSON LACEY
and
ABRAHAM ZION
SEA SHELL REEFS LTD.

APPEARANCES:

Sir Richard Cheltenham KA; Q.C, Ph. D. and with him
Mr. Arthur Thomas, Mr. Kelvin John, Mr. Loy Weste and Mrs. Lisa Weste of
Thomas and John, for the Claimant.
Mr. Roger Ford Q.C., and with him Mr. Peighton Knight of Hill & Hill for the 1st
named Defendant.

.....
2009: February 6
2009: May 25
.....

DECISION

1. **Harris J.** This concerns both the breach of a Judgment Order for, *inter alia*, Specific Performance and the breach of a Subsequent Enforcement Order .There are two applications before the court alleging breach of the said order(s) ; one each from the claimant and defendant respectively. They were heard together and having considered them individually I now deliver the decision in both of the applications, together.

Background

2. By an agreement for sale dated the 5th day of March, 2004 ("the Agreement") the First Defendant, Mr. Abraham Zion acting for him and all the other shareholders of the 2nd named Defendant, Sea Shell Reefs Ltd, agreed to sell all the shares in Sea Shell Reefs Ltd to Graham Ferguson Lacey.
3. The main assets of Sea Shell Reefs Ltd are two (2) parcels of land in Antigua and Barbuda measuring 549 acres situate at "Five Islands" and "Jennings" respectively.
4. The Claimant, Mr. Lacey, filed a suit against the Defendant, Mr. Zion in September 2004 alleging Mr. Zion's breach of the agreement by, inter alia, failing to provide Mr. Lacey during the *due diligence* period, with all the relevant information relating to the company's documents as to its property and failed to give Mr. Lacey access to the appropriate professional advisors. And, in the end failing to transfer the shares in the company all as agreed to in the said agreement.
5. Further, Mr. Lacey alleges that the parties subsequently agreed in a separate agreement, for Mr. Lacey to purchase the two properties belonging to Sea Shell Reefs Ltd and not the Company and this agreement was also breached by Mr. Zion when he ultimately failed to execute it.
6. Mr. Lacey alleges further that in June of 2004 Mr. Zion purported to terminate the original executed Agreement.
7. Mr. Lacey claimed in¹ so far as is relevant to this matter;
 - 1) Specific performance of the Agreement
 - 2) An injunction restraining
 - 3)

¹ See pp 4 of Statement of Claim in ANU HCV 2004/0362

- 4) Further or alternatively, specific performance of an agreement between the Claimant and the Defendants for the sale by the 2nd Defendant to the Claimant of certain free hold property situated in Antigua registered in the name of the second Defendant and described as”¹
 - 5)
 - 6)
 - 7) Damages for breach of Contract.
 - 8) Such further or other relief as the Court deems just.
8. On the 16th day of February, 2007 the Hon. Mr. Justice Errol Thomas made a Judgment Order which included an Order for specific performance directing Mr. Zion to complete the agreement with Mr. Lacey for the sale of the 500 ordinary shares in Sea Shell Reefs Limited, within 30 days of the Order.
 9. The completion of the agreement for the sale of the shares had several components one of which was an arrangement, by way of Purchase Money Mortgage (“PMM”), for the payment of the Purchase price.
 10. Other components of the agreement for the sale of the shares include certain obligations set out in clause 5 of the agreement².
 11. On the 21st day of November, 2007, the Hon. Justice David C. Harris made an Enforcement Order which inter alia provided for (i) execution and enforcement of a form of P MM drafted and presented to the Court by the Claimant only; (ii) the deduction by the Claimant, Mr. Lacey, *“from the purchase price such liabilities and contingent liabilities that are now known or which shall become known to the Claimant upon assuming control of the 2nd Defendant Company”*; (iii) *“deduction from the purchase price the reasonable cost of*

¹ See Cl. 9 and Cl. 10 of the Statement of Claim, Supra .This is the separate agreement referred to in para 5 above.

² These obligations included freeing the 2nd defendants property from liens ,charges, and incumbrances. Further, it required the claimants to be satisfied of the good standing of the defendant company.

removing a squatter now in occupation of a portion of the land or of perfecting any defects in title of the land;....."

12. Clause 1 of the said P.M.M provides for the payment of the purchase price in full by 20th November 2008 and for the payment of equal monthly interest payment of US\$62,500.00 until the payment of the purchase price.
13. Clause 3 of the P.M.M provides that if the purchase price less the deductions (if any) is not paid in full by 20th day of November, 2008 or if any interest is not paid on its due date the 1st Defendant, Mr. Zion, will be entitled and authorized to date the executed share transfer and deliver the said security document to the company for registration.
14. At the date of this application Mr. Lacey had **(i)** paid the monthly interest sums. **(ii)** been entered as the registered shareholder and appointed his director /officer of the 2nd Defendant Company. **(iii)** carried out various acts of ownership over Sea Shell Reefs limited, but, has not paid the purchase price or delivered the security documents to Mr. Zion as provided in the Enforcement order.
15. The claimant alleges that Mr. Zion, at the date of this application had not discharged the three (3) Charges standing against the Lands of the 2nd defendant company or, provided satisfactory evidence of so doing; had not provided the books, records and documents of the company so as to allow the claimant to satisfy itself of the existence and/or extent of liabilities of the company and had not removed the squatter on the lands of the 2nd named defendant company.
16. The Court has considered each application separately and made a finding that effectively disposes of both applications.

THE APPLICATIONS

17. By Notice of Application dated the 18th day of November, 2008, the Claimant sought an order that Mr. Zion file with the Registrar of the High Court three (3) signed discharges registered against the property belonging to Sea Shell Reefs Ltd together with satisfactory notarized evidence of proof of signature within 30 days from the date of the Order that the date for redemption of the Purchase Money Mortgage be set for 30 days from the date the signed discharges are deposited with the court.

18. So, at this time the Claimant, Mr. Lacey, is asking for an order in relation to four (4) items;
 - 1) The delivery of the signed discharges of the three charges registered against the property of the 2nd Defendant, Sea Shell Reefs Ltd. 2) Notarized evidence of the proof of the signature(s) on the discharges. 3) That upon failure of "(1)" and/ "(2)" above that the Registrar of the High Court be authorized to sign the said discharges on behalf of the stipulated charges and, 4) That the date for the redemption of the Purchase Money Mortgage be set for 30 days from the date the signed discharges are deposited with the Court.

19. By Notice of Application dated the 10th of December, 2008 the 1st Defendant, Mr. Zion sought the following order: *"That pursuant to CPR 36.5 permission is granted for the Registrar of the High Court to Pay Measures. Hill & Hill, Attorneys – at – Law for the applicant the sum of \$_____ which is the net proceeds of monies paid court pursuit to an Order made by the Honorable Mr. Justice David Harris on the 21st day of November, 2007."*

20. And further:
 - a *"That the Registrar of the High Court does deliver to the applicant the Security Document namely the share transfer which was executed by the Registrar in favor of the Claimant and the Undated Share Transfer which was executed by the Claimant in favor of the applicant."*

- b Alternatively, that in the Claimant does deliver to the applicant the said Security Document.*
- c A Declaration that, in the events that have happened, the Claimant has no interest in any property owned by the said Sea Shell Reefs Ltd.”*

The Claimant Submissions¹

21. Put shortly, the claimant contends that Mr. Zion simply failed to perform any of its obligations under the Agreement and completely ignored the Judgment Order and Enforcement Order and is accordingly in contempt of court.
22. The judgment Order, submits counsel for Mr. Lacey, required Mr. Zion to complete the sale within 30 days of the date of the Order on the basis set forth in the Agreement.
23. Counsel for Mr. Lacey submits that Mr. Zion was required to deliver, inter alia: the shares of Sea Shell Reefs Ltd free and clear of all liens, Charges and all other encumbrances and third party rights; the property of the company free and clear of all rights to the satisfaction of Mr. Lacey; the land certificates in respect of the property and; the banks and records of the company.
24. The Claimant submits that Mr. Zion failed to perform his obligation under the judgment and enforcement order respectively.
25. The Claimant submits that the Purchase Money Order does not stand alone but forms part of an overall transaction for which the first Defendant had failed to provide the necessary consideration. Mr. Zion cannot be in a position to exercise the security afforded by the PMM unless and until he has delivered the consideration for which the P.M.M was granted. Put shortly, the PMM contains but only one aspect of the obligations of the 1st defendant

¹ Submission on its application of the 18th November, 2008

and his other outstanding obligations under the original agreement, Judgment Order and the enforcement Order remain unsatisfied.

26. The Claimant continues and submits also that completion of the transaction including the redemption of the mortgage, cannot take place until a squatter on one of the two parcels of land owned by the 2nd Defendant has been removed. In any event says the claimant, the equity of redemption persists until prescribed action is taken by the defendant to extinguish it.

The 1st Defendant's Submission¹

27. The 1st defendant, Mr. Zion, contends that having regard to the Sale Agreement of the 5th March 2004 and to the P.M.M; a breach of an obligation under the Sales Agreement does not give rise to a remedy under the P.M.M. The latter in time P.M.M, does not incorporate the terms of the sales Agreement and neither does the P.M.M provide for a remedy of a breach of the sales agreement. The PMM, submits Queens Counsel for Mr. Zion, is the document that governs the redemption of the mortgage.

28. Counsel for Mr. Zion submits further, that: *"the sales Agreement dated the 5th day of March, 2004 is executed and/or completed. Alternatively, it is submitted that the obligations under the sales agreement have merged into the share transfer and/or the obligations under clause 5 of the Sales Agreement has been waived by completion".*²

29. The 1st Defendant submits that the Claimant is bound by Clause 3 of the P.M.M and is not permitted to effectively obtain a grant of an extension of time in which to redeem the mortgage³. This P.M.M submits the 1st Defendant, was proffered by the Claimant and must be construed *contra preferendum*.

¹ Submissions of application of 10th December, 2008.

²See Cl. 15 of the 1st Defendant's submission filed February 6, 2009 for details in support of its contention that the sales agreement is completed.

³ L'Estrange v Graucob 1934 2 KB 391.

30. Further, counsel for the 1st Defendant submits that the Judgment Order of the Honorable Mr. Justice Thomas directs specific performance of the Agreement for the Sale of 500 shares only.
31. Counsel submits that if the court has the equitable jurisdiction to extend time for redemption of the PMM then such redemption should not be exercised in favor of the Claimant for he has not come with *clean hands*, having refused to honor his obligation under the P.M.M to deliver to Mr. Zion the security documents and now raising the requirements of the Non Citizen Land Holding Regulations Act to avoid compliance with his own P.M.M.
32. Mr. Zion contends that the registered land charges complained of by the claimant are, admittedly registered at the Land Registry, but submits that if they are not registered with the Registrar of Companies, then, by virtue of S. 250 of the Companies Act 18/1995, the charges will be void for non- registration.
33. In any event contends the 1st defendant, these charges filed at the land registry reflect on their face, a dollar value and the Claimant should have used those values and deducted them from the Purchase Price as provided for under the P.M.M and paid in the balance to the High Court Registrar on or before the 20th November 2008 as provided for in the P.M.M. The claimant was not precluded from complying with its obligations under the enforcement order to pay-in the purchase price by November 20 2008 on the basis that the said charges had not been discharged or that there was no sufficient evidence of its discharge.
34. The 1st Defendant contends that by virtue of the Enforcement Order of 21st November 2007 and the P.M.M, the Claimant has failed to honor it has obligation and duties thereto and the 1st Defendant is entitled to the Order asked for on its application of 10th December 2008.

FINDINGS

35. At the onset let me say that we are here concerned with the enforcement of the Judgment of Honorable Mr. Justice Thomas of the 16th day of February 2007. That Judgment provided in its Order for; inter alia¹, the specific performance of the agreement for the sale of the 500 shares in the 2nd Defendant, Sea Shell Reefs limited.
36. I do not accept the argument by counsel for the 1st Defendant that the decree of specific performance is limited to the sale of the shares only and not applicable to the agreement as a whole. The reference in the decree to the "sale of shares" merely identifies the original agreement of the 5th March 2004 and distinguished it from the other alleged and subsequent agreement for the purchase by the claimant from the 2nd Defendant of their property only, as opposed to the purchase of the company with its assets (and undetected liabilities perhaps).
37. Following from this, the Subsequent Enforcement Order of Mr. Justice David Harris enforces and gives effect to several (but not all) of the substantive elements of the contract of which specific performance had been ordered and that includes; the payment of the purchase price by way of the P.M.M and effectively verifying the good standing of the company along with disinfecting the assets of the company..
38. The making of the order for specific performance as an equitable remedy did not merge the contract with the judgment. The ambit of the Judgment Order of Thomas J. is still in effect. The contract remains in force in relation to the judgment order². The method for carrying out the PMM regime is carried out pursuant to the enforcement order. This order is ancillary to the Judgment Order. If it does not succeed in giving effect to the Judgment Order (including the order for specific enforcement therein) of Thomas J, the court may

¹ See para 7 – 11, 21 above for further terms of the Judgment Order

² Austin of Eastham Ltd v Macey [1941] Ch. 338 per sir Wilfred Greene MR. at 341; Sudagaur Singh v Mazeer [1978] 3 ALL ER 817 at 821 per Megary V – C.

- make further orders to give effect to the judgment. The judgment is not wiped away as if it never existed. I have no authority presented to me that supports any proposition that has as its effect; the wiping away as it were, of the original Judgment of Justice Thomas.
39. The enforcement order is "*to give practical effect to the judgment*" Order by Justice Errol Thomas, as is the order the Claimant is now asking for in its application of the 18th November 2008.
40. The enforcement order and the relief now applied for by the claimant is providing a mechanism to give the Claimant what he bargained for, namely the purchase of the 2nd Defendant with its assets, more particularly its two parcels of land.¹ In the case of Gill v Tsang and another, Geoffrey Vos Q.C., Deputy Judge, noted that "*such relief may be granted in a whole range of circumstances in which a defendant has failed to perform both his original contract and the court's subsequent order.*" (See para 35 of that Judgment)². The relief referred to such orders as are just and equitable in the circumstances.
41. The role of the court here is to make such orders as are just and equitable in the circumstances so as to give effect to the substantive provisions of the contract .That is the intent of the Judgment Order of The Honorable, Mr. Justice E. Thomas.
42. The question is, whether the order asked for by the Claimant in the application of the 18th November 2008 is tantamount to making a new contract or a new Judgment Order as opposed to merely providing terms upon which the existing orders (Judgment Order and Enforcement Order) is to be worked out or put another way; merely providing a mechanism to give the Claimant and Defendants what they bargained for.³

¹ Gill v Tsang and Another [2003] ALL ER (D) 175 (Jul) per Geoffrey Vos QC Deputy Judge of the High Court. et para 33. *ibid*, para 35, see also Megary & Wade, The Law of Real Property 5th edit, chap 12.

² *Ibid*; Gill v Tsang at para 35.

³ *Ibid*

43. Alternatively, the question is whether not granting the order applied for by the 1st Defendant, Mr. Zion, on the application of 10th December is tantamount to rewriting the contract between the parties.
44. The Claimant having applied for and obtained an equitable remedy in the form of an order for specific performance, the mechanism of how the contract is to be carried out is in the hands of the court. The enforcement order does not re-write the parties original agreement.

The Enforcement Order

45. The Enforcement Order does not arise out of a new action and pleadings. It relates to the original action and pleadings.
46. Paragraph. 3 of the said order refer to giving effect to the agreement for sale. Para five (5) of the Enforcement Order is set out in part above in para 7 of this decision. Clause .5 of the agreement includes provision for the Defendant's removal of a squatter, and freeing itself from all liens, charges other encumbrances and 3rd party rights.¹
47. The Claimant says that it cannot perform its end of the bargain as imposed by the Enforcement Order, by delivery of the security documents to the Registrar and paying in the whole of the purchase price, until the 1st Defendant performs its end of the bargain by removing the squatter, extinguishing the land charges, and providing documentary proof of same and providing the claimant with all the necessary books, documents, etc of the company that the Claimant can satisfy itself as to the good standing of the company and in effect, the absence of any liability or contingent liabilities, and the defendant's ability to deliver good and marketable title to the shares and property. The claimants are now the shareholders so the defendants ability to give a good marketable title to the shares are not

¹ The order for Specific Performance often falls into two parts, the first being of a declaratory nature and the 2nd containing consequential directions, para 1376 Digest Vol. 40 (11), 2nd Reissue; see Megarry and Wade 5th edit pp611(g) in relation to the scope of "encumbrances".

now in dispute and in any event the claimant has not alleges otherwise in this application before the court.¹

48. In my view the Enforcement Order at Cl. three (3), is intended to, inter alia; give effect to clause 5 of the agreement. If it fails to do so then the court needs to exercise its equitable jurisdiction once again so as to give effect to the Judgment Order of Justice E. Thomas and as a consequence give effect to the relevant prevailing provisions of the 'sales agreement', all within the ambit of the applications now before the court..

49. The Claimant has by virtue of the enforcement order been registered as the proprietor of the shares of the company and has since appointed its own directors. The Claimant can in my view now effect Cl. 3(b) of the Enforcement Order, along with 3 (c) and 3 (d).

50. I accept that 3 (a) of the enforcement order cannot be entirely effected in the absence of the relevant documents referred to in para 1 of the said PMM, and those contemplated that would be required to satisfy Clause 5 (e) of the sales agreement. I note also that the documents set out in clause 4 of the agreement may also be of the same or similar character as that required under para 1 of the PMM and indeed what may be required for the claimant to satisfy itself under clause 5(e) of the agreement. Whatever may be the case, the unregistered and/or undetected liabilities and/or encumbrances on the company and/or its assets can be significant. The prior and what appears to be the continuing breach of the 1st Defendant to provide the relevant documents, prevents the Claimant from pursuing to conclusion, the Judgment Order and the enforcement mechanism provided in the Enforcement Order of November 21st 2007.

51. It cannot lie in the mouth of the 1st Defendant at this point to say that the contract is now subsumed under the Enforcement Order – of which the P.M.M is only a part – and allege non performance by the Claimant when the 1st Defendant has itself has not done what is required to give effect to the several Court Orders and to satisfy what is quite clearly a

¹ Albeit, that the Registrar was required to execute the share transfers on behalf of what appears to be reluctant defendants(s).

condition precedent for the full compliance of the Enforcement Order by the Claimant. I have perused the affidavit of the 1st Defendant filed on the 10th December 2008 and am not able to find his assertion of his acting on satisfying any aspect of the Judgment Order or Enforcement Order¹.

52. The Enforcement Order is not a new bargain or intended to give effect to a new bargain between the parties with respect to the agreement for the purchase of the 2nd Defendant along with its assets; it is merely an arrangement to give effect to the existing agreement between the parties over which lies the primary Judgment order of Justice Thomas.

OTHER ISSUES

53. I reject the alternative contention by the Claimant with respect to the effect of the Alien land holding license regime in Antigua and Barbuda. I believe that the counsel for the 1st Defendant has adequately dealt with that contention in his submissions. The parties will not be allowed to resile from their contractual or for that matter, pre contractual representations and obligations now. For our purposes here, the matter with respect to the Alien Land Holding license is between the respective parties and the State.

54. I do not agree with the 1st Defendant that the onus is on the Claimant to establish the existence of a charge on the company. I note that Clause 5 of the agreement provides that the vendor, Mr. Zion, will ensure to Mr. Lacey's satisfaction that the shares "*will be free of all liens charges..... etc....*"². What proof meets Mr. Lacey's satisfaction has to be reasonable in all the circumstances. I am not convinced by any evidence in this matter that Mr. Lacey's dissatisfaction is unjustified.

¹ Save that he said that he had been advised that his agent delivered all books and records of the 2nd Defendant a fact which is denied by the Claimant and accepted by the court.

² See Clause 5 (b) of the Agreement for Sale.

55. The 1st Defendant's contention that the 'completion' of the sales Agreement had already taken place, a matter referred to in the recital of the P.M.M, flies in the face of the substantive provisions of the said P.M.M, the Enforcement Order and the facts disclosed in the various affidavits.
56. On another issue; the Claimant, now being the beneficial owner of the company and its lands is the proper party to institute and/or continue any legal action for possession of the lands occupied by the squatter. Trespass, if that is what it is, is against the registered proprietor in this case. The issue over the responsibility for the removal of the squatter is now put to rest. The claimant is to calculate the cost of removing the squatter and deduct that cost from the purchase price all as provided for in the enforcement order.
57. On the question of the charges being void by virtue of their non registration with the Registrar of Companies within 28 days of their execution, I accept that an application can be made to the court to extend time for their registration. The outcome of such an application cannot with any certainty be determined at this stage. Further, if contentious, the question of the validity of the charges in the context of the Company Act and the application for the extension of time are matters that will involve a mix of fact and law best left for a trial. In these circumstances the claimant cannot reasonably be expected to arrange its affairs on the basis of the defendant's assertion that the said Charges are void.
58. The equity of redemption: _Even though the legal date for the redemption of the mortgage has passed in relation to the court approved PMM, the equitable right to redeem persists until the happening of certain events. The defendant has not taken the appropriate action to bring the right to an end. Further, for the reasons I have provided in this decision, I do not subscribe to the view expressed by counsel for the 1st defendant in para 30 above, that the claimant does not come with clean hands on this issue. Further still, the court cannot lose sight of the enforcement purpose of the Enforcement Order within which the PMM has been given its force and character.

59. The Judgment Order and the enforcement order is, as I said, for the purpose of enforcing the agreement between the parties and is intended to compel both the claimant and defendant to carry out their obligations under the bargain. The claimant must also be ready to perform its side of this bargain as contemplated by the bargain/agreement as buttressed by both court orders and now this order. The court is not going to carve out a new bargain for the claimant or the parties.

CONCLUSION

60. In the end, the Orders of the Court, being the Judgment Order of Mr. Justice Thomas and the Enforcement Order of Mr. Justice Harris are both being flouted and the Claimant being kept out of the benefit of being in the Judgment seat as it were.

61. This court is of the view that it is required to remain as and deal further with this matter as a Court of Equity so as to give effect to the Judgment and Enforcement Orders and bring this matter to a close.

62. The Claimant has asked that their order made on the instant applications require the Defendant to sign the discharges of the Charges within 30 days of this order failing which the Registrar of the High Court sign the Discharges on behalf of the stipulated chargees or their respective executors, personal representatives or assigns.

63. This request is puzzling when one has regard to the myriad allegations of short comings made against the 1st Defendant's performance of his obligations under the agreement and several court orders. The Charges referred to in Cl.1 of the Claimants draft Order are those *Charges* under the R.L.A against the property. These *Charges*, according to the evidence, are of a discernable value, a 'finite' dollar value registered at the land Registry.

64. I am not satisfied as to the validity of an order; that the Registrar sign these discharges, discharging the company from indebtedness to person(s)/3rd parties who are not, in their capacity as Chargees, party to this litigation.
65. It appears to me that the Claimant can now simply comply with Cl. 3 of the Enforcement Order and deduct these values from the purchase price, paying over to the chargees directly through the Registrar of the High Court, the deducted sums. The other potential liabilities set out in clause 3 can also be deducted from the purchase price once the company books and records and other documents captured by the provisions of the original agreement and enforcement order(along with the court approved PMM) are presented to the claimant. It appears to me that the draft order of the claimant has already factored in the time it takes to satisfy itself of the 'standing' of the 2nd defendant with respect to it's liabilities and contingent liabilities once it has the stipulated outstanding books, records and documents in its possession.
66. The claimant has not asked for costs nor made provision for costs in its two versions of the draft order¹. The court is guided by Part 11.13 of the CPR 2000.
67. In light of the reasons given above, the order prayed for in the application of the 10th of December 2008 cannot be sustained
68. For the reasons provided above **IT IS HEREBY ORDERED AS FOLLOWS:**
- (i) That the First Defendant do file with the Court the signed Discharges of Charge with satisfactory notarized evidence of proof of signature, within 30 days of this order, failing which the Claimant shall comply with Cl. 3 of the Enforcement Order of Justice David C. Harris dated the 21st November 2007, within 15 clear days thereof;.

¹ One version is backed by Sir Richard Cheltenham KA; Q.C., Ph.D and the other by "Thomas John and Company". The two versions are not the same.

- (ii) That the date for redemption of the Purchase Money Mortgage (PMM) be set for 15 clear days from the date the signed Discharges are filed with the Court pursuant to this order or from the time limited for the defendant's compliance only with clause 68(i) of this order;
- (iii) That the application of the 10th of December 2008 is dismissed;
- (iv) liberty to apply.

David C. Harris
High Court Judge
Antigua and Barbuda

