

*Liberty Island*

CAUSE NO. 297 OF 2006

*Civil 22/6/07*

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

**BETWEEN:            DOMINIC WILLIAMS            PLAINTIFF**

**AND:                 MILLARD VANDERFORD            DEFENDANT**

**Appearances:**

Mr. William Jones of Ogier for the Plaintiff

Mrs. Keva Reid of McKinney Reid & Company for the Defendant

**Before:**            Mr. Justice A. Smith (Acting)

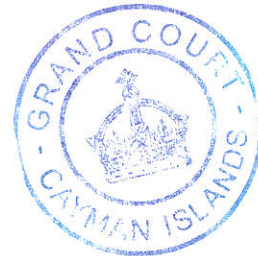
**Hearing Date:** 22<sup>nd</sup> June 2007



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**JUDGMENT**

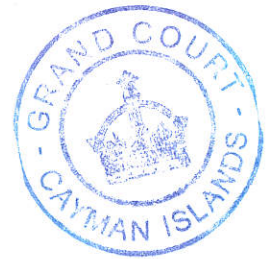
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Before me is a Summons by the Plaintiff for Summary Judgment pursuant to Order 86 of the Grand Court Rules.

On July 14, 2006 the Plaintiff filed a Writ endorsed with the following Statement of Claim.

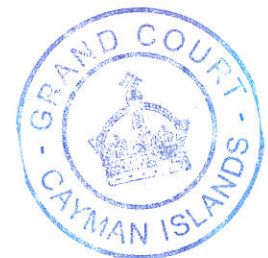
1. By a written agreement made on 25<sup>th</sup> April 2006 between the Plaintiff and the Defendant, the Defendant agreed to sell and the Plaintiff agreed to buy the property known as Parcel 25 of Block 61 A of the North East Coast Registration Section of Grand Cayman at the price of one hundred and ten thousand Cayman Islands dollars (CI\$110,000.00).
  
2. Clause 4 of the agreement provided that completion of the sale should take place on or before 15<sup>th</sup> June 2006 ("the contractual completion date") and clause 46 of the agreement provided that vacant possession should be given on completion.
  
3. Pursuant to the said agreement the Plaintiff duly paid a deposit of five hundred Cayman Islands dollars (CI\$500.00) in respect of the purchase price.



4. The Defendant in breach of the contract failed to complete on the contractual completion date and despite notice to complete within 7 days being given by the Plaintiff's Attorney-at-Law on 27<sup>th</sup> June 2006, unlawfully continues to fail and refuse to complete;
5. At all material times the Plaintiff has been and remains ready, willing and able to perform his own outstanding obligations under the said agreement.

AND the Plaintiff claims:

1. Specific Performance of the said agreement;
2. All necessary accounts and enquiries;
3. Damages of breach of contract in lieu of or in addition to specific performance;
4. Further or other relief; and
5. Costs."



On October 30, 2006 a Defence to the Plaintiff's claim was filed. Paragraphs 1 and 2 of the Statement of Claim were admitted. Paragraph 3 was accepted during the hearing.

Paragraphs 4, 5, and 6 are as follows:

- "4. Paragraph 4 of the Statement of claim is denied and the Defendant states that he was willing and ready to complete at the Completion Date, but the Plaintiff failed to complete by the Completion Date and in fact sought to complete after the Completion Date.
5. The Defendant avers that the Plaintiff failed to complete on the contractual Completion Date and that the Defendant was entitled to consider that contract at an end after the Completion Date.
6. That no admissions are made as to paragraph 5 of the Statement of Claim."



On April 26, 2007 the Plaintiff filed the Summons referred to at the outset seeking Summary Judgment.

Three affidavits were filed in support of the Plaintiff's claim and one by the Defendant in opposition. The burden of the Plaintiff's case, is that the Defendant agreed to extend the Completion Date from the 15<sup>th</sup> June to the 16<sup>th</sup> June 2006. The Defendant has denied this. Rule 1 (1) of Order 86 of the Grand Court Rules provides in part:

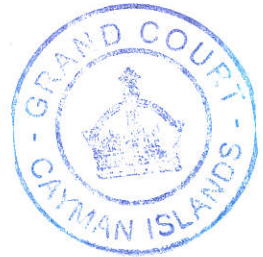
"1. In any action begun by writ indorsed with a claim –

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property or for the grant or assignment of a lease of any property with or without an alternative claim for damages; or

(b) .....

(c) .....

the Plaintiff may, on the ground that the Defendant has no



defence to the action apply to the Court for judgment.”

Rule 3 of the said Order provides:

“Unless on the hearing of an application under rule 1 either the Court dismisses the application or the Defendant satisfies the Court 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 of the action, the Court may give judgment for the Plaintiff in the action”.



At Paragraph 86/4/2 of the Supreme Court Practice 1999 it is stated that Rule 3 reproduces in simplified form Order 14 Rule 3(1). Thus the general principles which relate to Summary Judgment under Order 14 also apply to an application under Order 86 for specific performance.

It has been said that even a fair probability that the Defendant has a bona fide defence would entitle him to have leave to defend. However in *National Westminster Bank Plc. V. Daniel (1993) 1 WLR 1453*, after reviewing the authorities, the English Court of

Appeal held that if the evidence of the Defendant is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the Defendant has a real or bona fide defence and judgment will be given to the Plaintiff. See The Supreme Court Practice (1999) Vol. 1 14/4/9 at page 174.

The real question for me, therefore, is whether or not the evidence of the Defendant is incredible in a material particular. The "material particular" in this case is whether or not the Defendant had agreed to extend the Completion Date to 16<sup>th</sup> June 2006 at 10:00 a.m. I must therefore examine the evidence on this issue.

According to the Plaintiff on the 13<sup>th</sup> June, it became obvious to him that the bank draft for the balance of the purchase price (CI\$109,500.00) would not be ready for the 15<sup>th</sup> June 2006, that is, the Completion Date. He therefore telephoned Mr. Alistair Ayers of Century 21, the Defendant's real estate agent, and asked him to discuss with the Defendant the extension of the Completion Date for one week.

Mr. Ayers in his affidavit (paragraph 6) said that he sent the Plaintiff's request by email to the Defendant and also spoke to the Defendant by telephone. The Defendant he said, told him that, if the Plaintiff "got everything together in the next few days that would be o.k."

The Defendant's response was communicated to the Plaintiff.



On the 15<sup>th</sup> June 2006 the Defendant telephoned Mr. Ayers. The Defendant intimated that he wanted ten thousand dollars in cash as a further deposit on the following morning. Mr. Ayers telephoned the Plaintiff and told him this. The Plaintiff said he would only make the further deposit if the Defendant would sign the transfer documents and leave them with Mr. Ayers. The Defendant did not agree.

The Plaintiff explained the position to Ms. Davina Ebanks of Truman Bodden & Company the bank's attorneys. Later he called Mr. Ayers, and told him that everything would be ready at 2:00 p.m. on the 16<sup>th</sup>.

Mr. Ayers telephoned the Defendant and told him that the Plaintiff would have all the monies at 2:00 p.m. the next day. The Defendant told him that 2:00 p.m. would be too late and that it would have to be ready by 9:00 or 10:00 a.m.

Mr. Ayers immediately telephoned the Plaintiff and told him that the Defendant was insisting on 9:00 or 10:00 a.m.

The Plaintiff called Ms. Ebanks and implored her to speed up things. Ms. Ebanks was able to persuade the bank to expedite the matter. The Plaintiff then called Mr. Ayers and confirmed that he would be ready to pay the balance of the purchase price by 10:00 a.m. the following day.



Mr. Ayers relayed the Plaintiff's confirmation to the Defendant. Mr. Ayers said (paragraph 22) that the Defendant "confirmed that he was happy to meet at the offices of Truman Bodden & Company at 10:00 a.m. the next day to complete the transaction".

On the 16<sup>th</sup> June 2006, at about 10:00 a.m., the Defendant, Mr. Ayers and Mr. Clarence Brown and his son, Mr. Toni Brown, arrived at the offices of Truman Bodden & Company. There they met Ms. Davina Ebanks who escorted them to the conference room.

A few minutes later the Plaintiff and his fiancée arrived. Ms. Gina Berry of Truman Bodden & Company joined them in the conference room. Ms. Davina Ebanks asked if the bank drafts in Cayman dollars were alright. The Defendant said he needed United States dollars. Ms. Ebanks called the bank and then told the Defendant that she could quickly get replacement drafts in United States dollars.

Mr. Ayres said that at that time the Defendant told him that he had decided to sell to Mr. Brown. Mr. Ayres said that he told the Defendant: "you have a contract and you have agreed to accept at this time today. We can quickly get United States draft. I advise you to accept it." The Defendant told him "no, I have decided to sell to Mr. Brown".



Mr. Brown stated that since the Completion Date had passed the contract was null and void. On hearing this Ms. Berry pointed to the relevant section of the contract and said that the Defendant would have to give seven days written notice. She invited Mr. Brown to read Section 17 B (2).

Subsequently the Defendant asked Ms. Berry if he would go to prison if he did not sell to the Plaintiff. Ms. Berry told him that he would not go to prison, but that he "would get in trouble as he had a contract."

Ms. Berry's account as to what took place after the Defendant indicated that he wanted payment in United States dollars is as follows: She instructed Ms. Ebanks to contact the Cayman National Bank and arrange for a replacement draft. When the draft was ready she dispatched her office messenger to collect the replacement draft. She advised the parties that the replacement draft was sent for. Just before the arrival of the draft the Defendant asked whether he had to go ahead with the sale to the Plaintiff. Mr. Clarence Brown stated that the contract was null and void because the Completion Date had passed. Ms. Berry suggested that the parties should carefully read the section dealing with rescission and the appropriate notice. She said, the Defendant asked her whether he would go to prison if he failed to complete. She advised him that he would not go to prison, but that he should seek legal advice because if there was in fact a breach of contract, there could certainly be consequences.



The Defendant in his affidavit denied that he agreed to extend the Completion Date. He said (paragraph 3) that in his telephone conversation with Mr. Ayers on the 13<sup>th</sup> June, Mr. Ayers asked him to cancel his flight and to give the buyer 10 more days after the closing date of June 15, 2006 for him to come up with the balance of the money. His reply, he said, was "Positively Not." He said that on the 15<sup>th</sup> June, he told Mr. Ayres that he wanted the sale completed that day in accordance with the contract of sale. He continued (paragraph 4): "We referred again to the extension of time and I told him that I would only grant an extension if the purchaser came up with US\$10,000.00 in cash that day. He later called me back and said that the Purchaser would have all the money by 2:00 p.m. the next day. I told him that would be too late. I later agreed to meet him in front of the Post Office at 10:00 a.m. on the 16<sup>th</sup> June. My only intention was to confirm my position to him at that time that I was not proceeding with the sale as the date had passed. It should be noted that from the very beginning I had advised that I was to be paid in United States dollars. When I met Mr. Ayres I told him again that they had missed the closing date, and I was selling to Mr. Brown." As to the question he asked about going to prison if he decided not to sell the land to the Plaintiff," he said that this was said in jest. He insisted that in the conference room he made it plain at the outset that he intended to sell the land to Mr. Brown as the date for completion had passed.



Mr. William Jones for the Plaintiff submitted that in the light of Mr. Ayers' and Miss Berry's affidavit evidence the evidence of the Defendant is incredible. Mr. Ayers he

said, was the real estate agent of the Defendant and has no reason to give false evidence against him. Mr. Ayers' evidence that the Defendant agreed to extend the Completion Date, he submitted, is supported by the fact that the Defendant attended the Completion meeting at the offices of Truman Bodden & Company.

Ms. Keva Reid, for the Defendant, submitted that the Defendant was entitled to rescind the contract without giving notice once the Completion Date had passed since the contract stated that "time was of the essence." She submitted that the Defendant had made it clear that he wished the contract to be completed on the Completion Date and that he was not prepared to grant an extension. She referred to *Union Eagle Ltd. V. Golden Achievement Ltd. (1997) 2ALL E R 215* and *Raineri V. Miles and another (1980) 2ALL E R 145* and submitted that the Defendant had an arguable defence.

As I have stated before the issue for me in this exercise is whether or not the Defendant's evidence is incredible in a material particular.

Did the Defendant agree to extend the time for completion to the 16<sup>th</sup> June? It is not in dispute that the Defendant attended the conference on the 16<sup>th</sup> in the morning. Mr. Ayers' evidence is that the Defendant attended the meeting because he had agreed to extend the Completion Date to that day at 10:00 a.m. The Defendant's explanation for attending was to "confirm his position and ensure that he (Mr. Ayers) got his commission on the sale to Mr. Brown."



*In Banque des Pays-Bas (Suisse) S.A. V. Costa de Naray (1984) 1 Lloyds Rep. 21, Lord Actner L.J. said:*

"It is of course trite law that Order 14 proceedings are not decided by weighing the affidavits. It is also trite law that mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the Defendant has satisfied the court that there is a fair or reasonable probability of the Defendant having a real or bona fide defence".

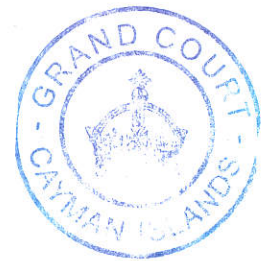


This statement was quoted with approval by the Court of Appeal in the National Westminster Bank case (supra).

In my judgment, on the evidence, the only plausible explanation for the Defendant's attendance at the completion meeting is because he had agreed to extend the Completion Date to the 16<sup>th</sup>. Looking at the whole situation I find the Defendant's

evidence as to his reason for attending the conference incredible for the following reasons:

- (i) The Defendant did not have to attend the conference if he did not agree to extend the Completion Date.
- (ii) To say that he attended the conference merely to confirm his position and to ensure that Mr. Ayers receives his commission is implausible.
- (iii) His enquiry as to whether he would go to prison if he failed to complete, is inconsistent with his assertion that he did not agree to extend the time.
- (iv) His statement to Miss Ebanks that he wanted payment in United States dollars and not Cayman dollars, clearly supports the evidence of Mr. Ayers that he had



agreed to accept the balance of the money on the morning of the 16<sup>th</sup>.

- (v) The Defendant's assertion is inconsistent with the compelling evidence of Mr. Alistair Ayres.

For the above reasons I am not satisfied that there is a fair or reasonable probability of the Defendant having a real or bona fide defence.

Accordingly it is ordered that judgment be entered for the Plaintiff in this action under Order 86 rule 1 of the Grand Court Rules.



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Smith J  
Acting Judge of the Grand Court

