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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 367/95

BETWEEN :	**STRADA INVESTMENTS LTD**	**PLAINTIFF**
AND	**TEMORA INVESTMENTS LTD**	**1ST DEFENDANT**
	ADELPHI REALTY COMPANY LTD	**2ND DEFENDANT**
	COAST HILL DEVELOPMENT INTERNATIONAL COMPANY LTD	**3RD DEFENDANT**

Seen & A.

APPEARANCES : Peter Broadhurst for the plaintiff.
Guy Locke for the defendants.

October 7, 8, 9, & 10, 1996

BEFORE MURPHY J.

REASONS FOR DECISION

This is an action for certain declaratory relief, and damages, as a result of the breach of an alleged agreement to sell two parcels of land to the plaintiff.

On a consent application at the outset of trial, I ordered that there be a split trial. As a result, the evidence at trial dealt only with liability issues. In a nutshell, the legal

issues are whether the parties intended to be bound by a document dated May 18, 1994 ("the May 18 document"), whether the May 18 document together with other documentation relied upon by the plaintiff satisfied the test for a memorandum in writing under subsection 37 (2) of the Registered Land Law (1995 Revision), and whether a binding contract was formed by combination of other documentation.

THE FACTS

At trial, I heard the evidence of two of the principals of the plaintiff Gareth Forster ("Forster") and William Peguero ("Peguero"), estate agent Tony Thompson ("Thompson"), and the plaintiff's attorney in this transaction Waide DaCosta ("DaCosta"); and a principal of the third defendant Coast Hill Development International Company Ltd. ("Coast Hill"), Herbert Peintner ("Peintner"), John Barry Smith ("Smith"), attorney for the first and third defendants, and James Frank Banks ("Banks"), the attorney for the second defendant. I also admitted into evidence brief witness statements of the other two principals of the defendants . As is common in cases of this kind, the bulk of the record consisted of the documents relating to the transaction. It can fairly be said that there were relatively few, if any, significant factual disputes.

The property in question ("the property") consists of two parcels of land known as Prospect Block 23C, Parcels 43 and 94. At all material times the property was

owned by the defendants. Adelphi had a sixty percent interest, and the other two defendants had a twenty percent interest each.

Throughout this transaction, it appears that Quality Realty Ltd was acting for the principals of the plaintiff, Forster and Peguero, as well as for the defendants. A representative of Quality Realty Ltd had made inquiries of Peintner about the property in April 1994. At some stage in early May 1994 Forster approached Thompson. Forster and Peguero had decided that the property, which was vacant land, would be a suitable site upon which they could develop a strata title warehouse facility. There had been some preliminary contact with the Planning Department. According to Peguero, the zoning was suitable but it would be necessary for the construction plan to be approved.

At some point in early May, the principals of the plaintiff were engaged in various telephone conversations and meetings with Thompson. During these discussions, Thompson would communicate with the principals of the defendants. This process went "back and forth" according to Peguero. Negotiations related primarily to price. The problem was that one of the parcels was not demarcated by survey and so in order to arrive at an acceptable sale price it was necessary to base the price on U.S. $2.50 per square foot.

When this price was agreed upon, Thompson prepared a document dated May 18 1994 which I reproduce in its entirety as follows

"

May 18, 1994

Dear Herb:

Re our telephone conversation earlier, our clients have made an offer agreeing to pay US$2.50 per sq. ft. on Block 23C/Parcels 43 and 94.

They are ready to proceed with sale on the following basis:-

> US$ 108,000.00 down, balance paid over 5 years at 2 & 1/2% over prime.

Please note that although they are asking for 5 years, they have indicated that they expect to settle within 1 year without penalties. They are also requesting that we grant them six (6) months in which to commence payment on the principal. Interest payment will begin immediately the contract is signed and the down payment received.

The surveyor marks need to be put in place as soon as possible. I have contacted Roland Bodden in that regard, and they will endeavor to do so sometime next week.

Quality Realty has agreed to accept 4% commission which will be paid immediately from the down payment of US$108,000.00

We hereby agree that the above terms are acceptable to all owners concerned.

"Herbert Peintner"
Coast Hill Development Int'l. Co., Ltd. Date:-------

"Herbert Peintner"
Adelphi Realty Co.,Ltd (On behalf of Owner) Date:-------

[unidentified signature]
Temora Investments Ltd. Date:------"

The May 18 document is central to the plaintiff's case.

It appears that to the extent that terms were agreed prior to May 18, they were incorporated into this document.

I observe in passing that while the May 18 document seems to contemplate a down payment, no down payment was made at this time or at any time thereafter. No commission was ever paid to Quality Realty.

The letter as drafted by Thompson, apparently addressed to Peintner, was later signed on behalf of the defendants. Peintner signed for Coast Hill and Adelphi, and an unidentified director of Temora signed for that company. It never seems to have been intended that the plaintiff would sign the May 18 document. It was clear from the evidence of Peintner that the defendants never regarded this as a binding contract, but rather as a mere indication of their intention to sell. Peintner said that the May 18 document simply "indicated that we were all prepared to sell". The principals of the defendants are all successful international businessmen, and while two of them apparently reside in the Cayman Islands, the principal of the majority owner, Spiros Milonas, resides in the United States. Peintner indicated that there was concern on the part of the purchaser or Thompson that Peintner be in a position to speak for all the principals of the defendants, and so that was the purpose of this document, according to him, "otherwise we couldn't proceed to prepare the contract". There is no indication in the evidence that at this time the defendants knew the identity of the prospective purchaser.

In his evidence, Peintner took the position that the May 18 document did not set out the basis of the payments of the deferred portion of the purchase price. Peguero thought that the payments would be monthly, but he seemed to be guessing.

Thompson testified that he understood the wording "immediately the contract is signed" to refer to the May 18 document itself. This is clearly not so, and even plaintiff's counsel conceded that this must refer to a later formal contract.

On May 20 Peintner instructed his attorney, Smith, to prepare the sales contract. A brief note in this regard identified the property and directed that the purchaser should have the right "to obtain title after the down payment is received by Quality Realty". Smith was also instructed to draft a mortgage agreement for the balance at 2 1/2 percent above prime. Smith was given the May 18 document. (He was, in fact, the only attorney ever to see it at any material time.)

On May 24 Smith wrote to Quality Realty Ltd advising that he was expediting the contract for the sale of the property. He observed that the purchaser's identity was not known at that point in time. He enclosed drafts of a charge and collateral charge.

Meanwhile the principals of the plaintiff, who themselves are sophisticated businessmen, proceeded to seek Planning Department approval. Peguero testified that he felt they would get it, though he recognized that it could be " a long drawn out process". In fact the first formal application, made by another corporate entity, G.W. Holdings Ltd, apparently on behalf of the plaintiff, was not submitted until August 2, 1994. Peguero indicated that the delay resulted from the lengthy period of time that was necessary for the architect to do his work. Peguero seemed to feel that even if the project were

rejected, the land could have been used for something like a mall, though approval would still be necessary for that.

Peintner paid for the surveyor to do his work. Initially it was anticipated that that would be done quickly, but it was not completed until October 17, 1994.

Forster and Peguero had anticipated pre-sales of their warehouse units, but no pre-sales were made at any material time.

In cross-examination, Forster agreed that it would have been more prudent for him to make sure everything was in line before committing.

Smith drafted an agreement (" the Smith draft") at some point in May. In it, the name of the purchaser was left blank. The price was fixed at $2.50 per square foot. There was provision for an increase or decrease based on the result of the survey. The $108,000 figure referred to in the May 18 document was, in the Smith draft, to be paid upon completion. The balance was to be secured by first and collateral charges as set out in a schedule attached. One of the schedules made reference to the mortgage terms but it necessarily contained numerous blanks in respect of the principal sum (because of the pending survey) and also the details of the principal and interest payments. In addition to numerous terms referred to by Smith as " boilerplate" there were provisions relating to commission and the vendors' right to rescind (which was later amended by the plaintiff's attorney). The completion date was left blank. In fact, no completion date was ever agreed upon at any material time.

There is no doubt that the plaintiff was unable or unwilling to pay cash for the property. There was some evidence that it had enough cash for the down payment. However the plaintiff did apply to Bank of Butterfield for a loan of U.S. $108,000 as appears from a facility letter dated July 20. Forster's evidence that the money could be used for construction purposes is not consistent with the content of this letter in which it is stated that the purpose is " to assist with the down payment on properties registered as Prospect, Block 23C , Parcels 43 and 94". The loan was subject to planning approval for the construction of the warehouse units.

When pressed as to why the May 18 document made no reference to security in favour of the vendors in respect of the balance of the purchase price, Peguero testified that he "didn't see the whole contract drafted, but was sure that in the contract they drafted they put something in to protect themselves".

Initially Smith was acting for all vendors when he prepared his draft. At the same time, the plaintiff retained DaCosta to advise it on the draft. In response to questioning by me, DaCosta testified that he never saw a copy of the May 18 document until the day before trial. He was never told about it.

In a letter to Peguero dated June 2 1994, in which DaCosta reports on his review of the Smith draft, he comments that "I can only assume at this time that the Agreement as drafted contains all of the terms and conditions as agreed between the parties beforehand".

During June, Smith and DaCosta negotiated the price necessary to release Parcel 94 from the charge and the collateral charge. By this point the square footage of Parcel 94, but not Parcel 43, had been ascertained, as appears from an exchange of correspondence between Smith and DaCosta June 14 and 15. Smith's letter of June 14 seems to be his first letter to DaCosta, and it was marked "Subject to Contract". Almost invariably, his correspondence throughout this transaction was marked "Subject to Contract".

On June 23 Smith forwarded to DaCosta some amendments to the Smith draft reflecting the plaintiff's request that there be provision for the release of Parcel 94. In his correspondence at this time Smith speaks in term of the "exchange of contracts" anticipated in future. There is no evidence that anyone on the plaintiff's side, including DaCosta, made any objection at all to the characterization of the transaction to this point as "Subject to Contract".

By letter dated June 27, DaCosta advised Smith that he was in agreement with the sum proposed for the release of Parcel 94 and that as a result Smith could "prepare

the documents for signing". DaCosta testified that at that point in time he would have been happy for his clients to sign. In fact the Smith draft could not be executed as the parties were still waiting for the surveyor to complete his work. It does not appear that the plaintiff ever executed the Smith draft until October 17.

There is in evidence a resolution of the sole director of Adelphi Realty Company Ltd to the effect that the company should sell its 3/5 share in the property "in terms of the Contract For Sale, a copy which is annexed hereto" (the annexure was not put in evidence). The resolution also authorized the company to grant a power of attorney to Banks or one of his associates "for the purposes of executing the Contract For Sale, Transfer of Land forms and all other documentation required or expedient in connection with the sale of the Property".

In July it appeared that some of the attorneys would be on leave, and an attorney at DaCosta's firm wrote to Smith on July 6 advising that "we have been instructed by our client to put this matter on hold until all interested parties have returned to the Island".

Very few steps, if any, were taken to advance this transaction during the months of August or September.

On August 17 DaCosta wrote to Smith as follows:

> "Further to our telephone conversation of even date. I have contacted my client and have been instructed that its bankers require formal approval from the Planning Department with regards the development of the above referenced property. This approval should be obtained on or by 25th August 1994. I can confirm that my client is anxious to complete and once the planning permission has been obtained the contracts can then be executed.
>
> Thanking you in advance for your understanding in this matter". (emphasis added)

In his evidence Smith said that the plaintiff had never insisted upon the insertion of a condition precedent relating to planning approval. He felt that because the agreement was not conditional, the plaintiff was simply delaying to ensure that permission was obtained.

When questioned as to the August 17 letter, DaCosta, significantly, testified that "at that point it was brought to my attention that my clients were hesitant to make a commitment and the bank was equally cautious".

I cannot help but observe that DaCosta, whom I regarded as a forthright and truthful witness, was clearly uncomfortable having to testify in support of the position now taken by the plaintiff in this litigation. DaCosta was obviously working on the assumption that there would be an exchange of contracts in this transaction; he acknowledged that most attorneys work on the basis that the agreement is binding upon exchange of contracts.

The plaintiff's planning permission does not seem to have been forthcoming until early October, and the result of the survey was not known until October 17.

On October 13 Banks entered the transaction as attorney for Adelphi. He testified that the Smith draft was never sent over to him until October. The plaintiff and the first and third defendants had executed the Smith draft by mid October, but Banks never did execute on behalf of Adelphi. His evidence was that he, Banks, was "not prepared to sign until the issues were agreed". Banks did execute the transfer, charge and collateral charge which were then returned to Smith to await completion.

Once the square footage was known, the appropriate amendments to the dollar figures were made in the documentation.

On 17 October the board of directors of the plaintiff met and decided that Peguero "would be the sole signatory for Strada Investments Ltd, for the purchase of land at Red Bay with regards to the construction of warehouses".

On October 18 Milonas, the principal of Adelphi, faxed Peintner asking for comments as to the real estate commission and also the release of lot 84 (sic). As to the latter, Milonas commented that it "would be better security to have all the lots in our ownership till the full amount is paid".

Also on October 18 Banks communicated with Smith and DaCosta as to outstanding matters arising from the documentation. Firstly, he felt that the completion date

should be inserted. Secondly, he wanted the repayment schedule to be established, more specifically the monthly payments and possible adjustment of the interest rate. Thirdly, he made some queries as to how payments would be made to the three defendants. He concluded:

> "I have spoken to Waide DaCosta on the above and he agrees that the Second Schedule to the Charge should be amended to address the above issues prior to completion. I have suggested that he and you agree wording to amend the documentation and then run it pass me for my review.
>
> I look forward to agreeing the above points and moving to completion shortly".

These matters, however, were never attended to as they were overtaken by events. On October 19 Milonas' New York attorneys instructed Banks by fax "to hold off on the completion of the sale and transfer of the two parcels of land until otherwise advised". On October 20 Banks communicated with Smith to that effect. Bank's evidence was that his client had asked whether he had executed the agreement pursuant to the power of attorney, and upon learning that Banks had not, instructed him not to proceed.

There was some speculation in the evidence as to why Adelphi had refused to execute the agreement. Peintner testified that because of the passage of time since May, Adelphi wanted to be compensated for lost interest, expense and costs in the interim. Peintner felt that Adelphi was looking for an increase to U.S.$3.00 per square foot. (The motives behind Adelphi deciding not to execute the agreement are not

particularly relevant in respect of the issues I have to decide.) By October 19, all parties had executed the Smith draft except Adelphi, and all parties had executed the completion documentation including transfer and charges.

By letter dated October 24, DaCosta protested to Banks as to Adelphi's "unsettling and most unreasonable" stance. He pointed out "that the contents of the Agreement were agreed by all the parties from June 1994 and for various reasons the Agreement was never signed". DaCosta did not rely upon the May 18 document.

THE PLAINTIFF'S CASE

The plaintiff cannot succeed unless it can point to an enforceable agreement for the sale of the property. Plaintiff's counsel makes three alternative submissions in this regard.

Firstly, the May 18 document stands alone as the agreement. It reflects offer and acceptance and all necessary terms. It contains no uncertainty. It is not "subject to contract". Later efforts to "paper it", as counsel put it, do not detract from its nature as a fundamental agreement. It complies with subsection 37 (2) of the Registered Land Law.

Secondly, and alternatively, the May 18 document can be linked to other documents with the result that a contract is formed meeting the criteria of subsection 37 (2).

Thirdly, and in the further alternative, even if the May 18 document has no legal effect, a contract can be found by combining other documents which were generated during the four - month history of this transaction.

The defendants argue, quite simply, that there was never any enforceable agreement at any material time.

WHETHER THE MAY 18 DOCUMENT IS THE RESULT OF AN INTENTION TO CREATE A CONTRACTUAL RELATIONSHIP.

In my view, on its face, the May 18 document is at best a contract to enter into a contract. It includes the words " interest payment will begin immediately the contract is signed and down payment received". Plaintiff's counsel makes much of the fact that the words "subject to contract " are not actually used in this document. In my view, "immediately the contract is signed" amounts to the very same thing. In signing this document, the representatives of the defendants were acknowledging that they would sell this property pursuant to an agreement of purchase and sale yet to be drafted. They did little more than acknowledge that they were of one mind, and that the price at that point in time was acceptable to them.

The difficulty the plaintiff has in relying upon the May 18 document alone, is demonstrated by the evidence of the estate agent, Thompson. He felt that the words

"ready to proceed with sale" meant that the only remaining documentation would be the formal transfer. The "contract" referred to, he felt, was the May 18 document itself. As to interest payment, he felt that interest would have to be calculated and paid retroactively when the survey had been obtained. Similarly, the "down payment" would only have to be made when the survey was finished. Sophisticated businessmen such as the principals of the plaintiff and defendants could not seriously regard this approach as workable.

The principals of the defendants clearly regarded the May 18 document as nothing more than a letter of intent.

The principals of the.plaintiff, sophisticated businessmen themselves, would not have structured any transaction of this sort on the basis of this simple document alone. In my view it was merely an afterthought to revert to the May 18 document for purposes of this litigation as it was the only document signed by Adelphi.

In fact, at all material times, everyone connected with this transaction proceeded in accordance with the Smith draft, as further refined from time to time.

As Lord Cranworth, C. said in Ridgway v Wharton (1857), 6 H.L. Cas. 238, at 268 (applied in Branca v Cobarro [1947] K.B. 854):

> " I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that

> they did not intend the previous negotiations to amount to an agreement".

Shortly after the creation of the May 18 document, the plaintiff engaged DaCosta to negotiate with Smith in respect of the Smith draft.

As to the lack of mention of vendors' security in the May 18 document, Peguero testified that while he didn't see the whole contract drafted he was sure that "in the contract the vendors would have put something in to protect themselves". He obviously did not regard the May 18 document as the contract.

Plaintiff's counsel in argument regarded the Smith draft as a mere elaboration of the May 18 document. It is, however, considerably more than that. Apart from terms which Smith regarded as "boilerplate", the Smith draft contains provisions that go beyond the May 18 document. The precise prime rate was specified. Mortgage security and collateral security were introduced. The frequency of the payments was specified. The plaintiff itself introduced a provision for the release of Parcel 94. There was a right to rescind inserted, and it was renegotiated by DaCosta. I do not accept the submission that the Smith draft was merely a "fill-in-the-blanks exercise".

In reality, the May 18 document was effectively ignored as an operative instrument. The "down" payment was never made at any material time. Instead it was transformed into the balance due on completion in the Smith draft. Interest was never paid at any time.

Significantly, DaCosta never saw, nor was told about, the May 18 document at any material time. He did not rely upon it in his letter of October 24 complaining about Adelphi refusing to execute the agreement.

In my view, it is fanciful to suggest that the principals of the plaintiff ever regarded the May 18 document as the agreement of purchase and sale . Everything focused upon the Smith draft instead. In fact, it served the plaintiff's purposes not to bind itself under the Smith draft until late in the day because planning approval had not been obtained until October. One can easily be sceptical as to whether the plaintiff would be taking the legal position it now adopts, if planning approval had never been forthcoming. As DaCosta frankly put it in testifying about the August 17 letter, "my clients were hesitant to make a commitment and the bank was equally cautious". In my view the plaintiff did not press the defendants for commitment until late in the day, as the plaintiff itself was content not to commit. By the time it did commit it had run the risk that one of the defendants might not execute the agreement. That is just what happened.

In a nutshell, the May 18 document on its face negatived for the time being the intention to enter into legal relations: Treitel, The Law of Contracts 9th ed. 1995, p. 46. In addition, the evidence before me suggests strongly that none of the parties intended to be bound by this particular document.

As Lord Selbourne put it in Hussey v Horne-Payne (1879) 4 App. Cas. 411:

> " The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement". (emphasis added)

Counsel for the plaintiff referred me to authority mitigating, in effect, the requirement of "exchange of contracts": see for example Chitty on Contracts 27th ed. 1994 para 2-086 at p.139. I have examined the circumstances in such authorities and conclude that the present case does not fall among them. The Smith draft, was not, for example, mere "administrative tidying up". The present case is unlike the situation in Gray v Smith (1890), 43 Ch.D. 208, for example, where a rough draft was held sufficient even though a more formal document was intended. There, the rough draft contained very precise terms as to the amounts and frequency of the payments involved.

In the result I conclude that there was no intention to be bound by the May 18 document and thus no contract formed as at that date.

THE SUFFICIENCY OF THE MEMORANDUM UNDER SUBSECTION 37(2) OF THE REGISTERED LAND LAW

If I am wrong in my conclusion that there was no intention to create contractual relations as at May 18, and on the assumption that there was a contract reflected in

the May 18 document, I consider now whether the May 18 document satisfied the requirements of subsection 37 (2) of the Registered Land Law.

Section 37 reads as follows:

> "3(1) No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any state, right or interest in the land , lease or charge.
>
> (2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:
>
> Provided that such an action shall not be prevented by reasons only of the absence of writing, where an intended purchaser or lessee who has performed or is willing to perform his part of the contract-
>
> (i) has in part performance of the contract taken possession of the property or any part thereof; or
>
> (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

Subsection 37(2) mirrors, word for word, section 40 of the Law of Property Act 1925 which reproduces with a few minor alterations part of section 4 of the Statute of Frauds 1677, a Statute passed for the "prevention of many fraudulent practices which were commonly endeavored to be upheld by perjury or subordination of perjury". The effect of this subsection is that a contract for the sale of land must be evidenced in writing to be enforceable and no oral evidence by way of parol evidence as to its terms is permitted. If there is an insufficient memorandum under subsection 37 (2) of the Registered Land Law no action may be brought to enforce a contract for the sale of land.

Defence counsel argues that the May 18 document cannot be enforced, amongst other reasons, because it does not identify the purchaser. The purchaser is in fact referred to therein as "our clients". The use of "client" instead of the actual name of the party has been held to be insufficient for purposes of the English equivalent of section 37 (2): Jarrett v Hunter (1887), 34 Ch.D. 182; Lovesy v Palmer [1916] 2 Ch. 233. On the same authority, parol evidence is not admissible to establish the identity of the party not mentioned in the memorandum, so as to make it sufficient for subsection 37 (2) purposes. According to the text writers cited to me, this appears to be consistent with the present state of the law.

The identity of the purchaser can, of course, be ascertained by reference to documents generated later in this transaction, but as a legal matter it is essential that if identity is to be ascertained it must come from some other document which is sufficiently connected with the memorandum by clear reference. That inevitably means some other document previously existing: Lovesy v Palmer at 243. In this

regard, plaintiff's counsel pointed to what he regarded as a covering letter also dated May 18 from Quality Realty to Peguero. It seems to me that this can be of no assistance to the plaintiff, as Peguero was not in fact the plaintiff in this action. I do not regard the cases cited by plaintiff's counsel on this point as helpful. I prefer the cases cited above as they are directly on point, considering as they do the use of the word "client" in the context of an agreement for sale of land. I do not regard this point as a mere narrow technical objection. The identity of the purchaser is fundamental . In the result, I hold that the May 18 document , if it reflects a contract, is unenforceable for this reason.

Defence counsel also argues that subsection 37 (2) is not satisfied because there are material terms missing from the May 18 document. It can be an objection that the contract evidenced by the writing is different from the contract actually made. In fact, there was no actual evidence before me of any agreed term that did not find its way into the May 18 document. Put another way, to the extent there was agreement on anything, it was reflected in the May 18 letter. However, defence counsel also argues that the May 18 document cannot be enforced because its terms are uncertain. This submission is well-founded in my view. There is uncertainty on the face of the May 18 document. A six month deferment of payment of principal is characterized merely as a "request". There is deferred payment, but no details of security arrangements. There is no indication of the frequency with which either principal or interest must be paid. There is no indication of what "prime" rate would be applicable. In cross - examination, Forster, Peguero, and Thompson were clearly guessing as to the finance arrangements envisaged by the May 18 document. Such

terms are obviously important in a case like this where the vendors were expected to provide finance.

In my view the certainty of the terms must be considered in the context of the transaction and the sophistication of the parties. I am reinforced in this view by the comments of Lord Greene M.R. in Clifton v Palumbo [1944] 2 All E.R. 497 at 499.

In all the circumstances, I regard the provisions as to finance as being too uncertain to be enforceable and I would regard the May 18 document, assuming it is a contract, as unenforceable on that basis as well.

WHETHER THE AGREEMENT WAS CONTAINED IN SEVERAL DOCUMENTS.

The plaintiff's counsel argues that, assuming the May 18 document does not satisfy the requirements of subsection 37 (2), the defects are cured by reference to other documents. In the further alternative, reference may be made to other documents, exclusive of the May 18 document, for purposes of ascertaining the agreement and enforcing it. The rather broad thrust of this submission is captured in paragraph 2 of the Re-Amended Statement of Claim which sought a declaration that:

> "2. Further, and in the alternative, that the accepted Offer of May 18, 1996 [sic], together with all the changes approved by Banks as Attorney for Adelphi and as communicated by Banks on October 17,1994, and October 18, 1994, and together with all of the communications, correspondence and documents prepared by the parties or their Attorneys-at- Law, instructed on their

> behalf, constitute a contract or memorandum and notes thereof for the disposition of land pursuant to s. 37 (2) of the Registered Land Law (1995 Revision) and as such should be binding upon the Defendants, two of whom actually executed the Contract".

The law as to reading documents together for purposes of satisfying the memorandum requirements is well settled, it seems to me. One of the best statements appears in Timmins v Moreland Street Property Co. Ltd. [1958] 1 Ch. 110 where Lord Justice Jenkins said at page 130:

> "I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be , to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40".

It will be noted that it is necessary that the document signed by the party to be charged (that is, the defendant) must "contain some reference, express or implied, to some other document or transaction". I accept that this effectively means that the incorporated document must pre-date or be contemporaneous with the document signed by the party to be charged; see the observations of Romer L.J. in Timmins v Moreland Street at page 133; and Lovesy v Palmer at 243.

Significantly, the passage I have quoted above from the Timmins case was accepted by the House of Lords as a correct statement of the modern law in Elias v George Sahely & Co. (Barbados) Ltd. [1982] 3 All E.R. 801 at p. 807.

If the May 18 document is insufficient for purposes of the requirements of subsection 37 (2), there is no document contemporaneous with or predating it to remedy the defects. That is why the plaintiff now seeks to rely on some later document by arguing that it refers implicitly to documents that have gone before, with a view to putting together all the elements of a contract. Initially, plaintiff's counsel seemed to rely on letters of 17 and 18 October, signed by Banks. He argues that these effectively constitute documents signed by the attorney (pursuant to a power of attorney) for Adelphi, and reflect final agreement. I reject both contentions on the facts. In these fax letters Banks did nothing more than refer to additional proposed amendments to the Smith draft. Furthermore, his signature on his letters does not amount to Adelphi's execution of an agreement. To suggest this is fanciful.

Even if these letters constituted memoranda signed by the party to be charged, it is not possible to refer them back to others and arrive at a concluded agreement. On my review of all the documentation, it is apparent that all communications were focussed on the Smith draft which clearly had yet to be executed by all parties. Reference back to a document will not avail a plaintiff if the documents themselves suggest that there is no contract: Tiverton Estates Ltd v Wearwell Ltd [1974] 1 All E.R. 209 at

216-218, 221-22. It would be a gross distortion of the facts of this case to maintain that anything in the sequence of documentation suggested a concluded agreement at any material time. Smith's communications were always marked "subject to contract" and no one took issue with this: see Cohen v Nessdale Ltd [1982] 2 All E.R. 97 at 103. It is clear that negotiations were ongoing until one of the vendors, Adelphi, withdrew.

It does not avail the plaintiff to attempt to refer back to the May 18 document. After May 18 there is no reference anywhere to that document until it was resurrected in this litigation. Banks had no knowledge of it at any material time. More to the point, neither did the plaintiff's own attorney.

In the circumstance of this case, it is not possible for the plaintiff to connect documents in order to arrive at a concluded agreement.

On the final day of argument, plaintiff's counsel seemed to take a somewhat different approach. This was to the effect that, even absent any reference to the May 18 document, the totality of the remaining documents evidenced a contract. Specifically, the letters signed by Banks in October related back to the Smith draft, and amounted to an agreement. I reject this approach, as indicated above, on the basis that the signature on his letters does not amount to Adelphi's execution of the agreement. In any case Banks was simply engaged in further refinement of the terms of the Smith draft.

The plaintiff's counsel argues in the alternative that the Smith draft was effectively executed by Adelphi by virtue of the Adelphi corporate resolution dated July 1. I reject this contention as well. The corporate resolution only gave authority for the grant of a power of attorney to Banks for the purposes of executing the necessary documents including the contract. Banks never exercised this power in respect of the Smith draft. In any case, his authority was revoked by the fax he received on October 19.

All participants in this dealing contemplated the formal execution of the Smith draft, in the normal way, by exchange of contracts. On my view of the evidence, the terms of the Smith draft continued to be fine-tuned right up until Adelphi indicated its unwillingness to execute the agreement.

The argument of plaintiff's counsel, made late in the day, seems to amount to this - that formal execution is not actually necessary as long as the documents suggest that the defendant intended to agree to the sale. No authority was cited to me for that proposition.

If I were to accede to the submissions of plaintiff's counsel in this case, mass confusion would be introduced into conveyancing practice. Amongst other things, if

plaintiff's counsel's submissions are correct, serious inroads would be made into the practice of providing letters of intent with respect to preliminary matters such as price. Indications that negotiations are "subject to contract" would be rendered virtually meaningless . Attorneys would be reluctant to prepare corporate resolutions, or completion documentation to be held in escrow, for fear that some agreement might be implied by their very existence. It seems to me that the plaintiff's submissions here are tantamount to the musings of Denning M.R. in Gibson v Manchester City Council [1978] 2 All E.R. 584 where he said at 586:

> " To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so; but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through".

The House of Lords ([1979] 1 All E.R. 972) had no trouble rejecting that approach, and I reject it as well.

Notwithstanding the very comprehensive submissions by Mr. Broadhurst for the plaintiff, this action must be dismissed with costs to the defendants.

Dated this 22nd day of October, 1996.

J. D. Murphy

Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS