

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2007/CLE/GEN/00279**

between

**SIMON DAVID ARNSBY
Plaintiff**

and

**GISELA KAISER
Defendant**

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Michael L Barnett, Mrs Cheryl T Whyms
with him, for the Plaintiff

Mr Emerick Knowles, Mr Donovan Gibson with him,
for the Defendant

15 May 2008, 2 October 2009

DECISION

Adderley J

1. This action which was brought by writ filed 28 February 2008 which was amended and re-amended is for specific performance of an alleged agreement for sale between the plaintiff as purchaser and the defendant as vendor. The subject matter is a dwelling house known as "Sunset" located at Old Fort Bay, New Providence ("the Property"). The purchase price is \$2.5 million net net to the vendor meaning that the purchaser would pay all closing costs including government stamp duty, real estate brokerage commissions and legal fees.
2. An order restraining the defendant from, inter alia, selling or otherwise charging mortgaging or disposing of the Property or interest therein was filed the 29 May 2007 ("the Injunction") and is still in effect.
3. The plaintiff claims that the contract was entered into orally but that it is evidenced by a memorandum in writing to satisfy the Statute of Frauds 1677.

THE FACTS

4. The defendant who was an 80 year old widow at the time of the trial put the Property on the market in 2006. She had lived there with her late husband since its construction in 1977. Because of numerous break-ins in the area, she began to fear for her safety and wanted to move into a gated community. At the material time she had engaged Mr James Mosko of Mosko Realty as her real estate agent.
5. According to Mr Mario Carey the agent for the plaintiff, Mr Mosko had approached him on 22 September 2006, to find out if he had a client interested in purchasing a house. As the house was described, Mr Carey recognized it to be the type of house that the plaintiff, a rental client of his, was seeking especially because it had a boat lift and his client owned a boat. They arranged a viewing of the Property for 24 November when Mr Mosko, Mr Martin Croke, a friend of the

plaintiff and the plaintiff were present along with the defendant. The plaintiff arranged a further viewing on Saturday, 25 November when he discussed several items with the plaintiff. Arising out of those meetings several items were agreed between Mr Mosko and Mr Carey to be put forward as mutual points of agreement: asking price of \$2.5 million dollars net net, that the house could be inspected within 7 days of 28 November, closing to take place within 90 days of a signed sales agreement with the possibility of extension for a further 60 days provided the defendant gave the plaintiff 14 days prior notice. The plaintiff wanted house plans, site plans, and an inventory. Mr Carey stated that he received a call from Mr Mosko on 25 September where he stated that the defendant had accepted the terms.

6. The plaintiff confirmed that the Property was introduced to him by Mr Carey, that he viewed it on 24 and 25 November and that at the 25 November viewing the defendant expressed the concern that should he close she wanted to have time to remodel the house she would purchase. He agreed. Mr Carey explained to him that the term net net meant that he would pay for all costs of the sale including government stamp tax, the real estate brokerage commission, and the defendant's legal fees for closing the sale. He also agreed that the defendant and he would use the same legal counsel to reduce costs. He agreed to close in 90 days. They also agreed that an inspection of the house would be necessary in order to obtain certain measurements and to ascertain what furniture would be left. Later Mr Carey informed him that he had spoken with Mr Mosko who informed him that the defendant had agreed to all the terms except the \$2.45 million whereupon he authorized him to offer the \$2.5 million net and was informed by Mr Carey that the defendant had agreed to all the terms.

7. Mr Mosko then drafted a letter containing what he understood to be the main terms and early on that Sunday morning, 26 November 2006, took it to the defendant for her signature. There were no other signatures on the letter at the

time. The letter which was on the letterhead of Mosko Realty Ltd. ("the Letter") reads as follows:

"Mrs. Gisela Kaiser
Old Fort Bay
Nassau, Bahamas

Re: Purchase of residence "Sunset" Old Fort Bay

Dear Mrs. Kaiser,

On behalf of our client Mr Simon Darnsby we would like to make an offer on the above mentioned property with the following conditions listed below. A deposit of 10% of the purchase price will be held by Mosko Realty.

1. Purchase price U.S.\$2.5 million net (two million five hundred thousand U.S. dollars)
2. Vendor to provide house plans, site plan and inventory list with clear title.
3. Vendor to permit purchaser seven days as of November 28th 2006 to gain access for full inspection of the property at vendor's convenience
4. Vendor to permit a purchaser to use his attorney for both sides of legal transaction at the purchaser's expense.
5. Purchaser responsible for 100% of Bahamas Government Stamp tax. And 100% real estate commission to be shared between Mosko Realty and Bahamas Realty,
6. Purchaser to close within 90 days of signed sales agreement, if Vendor requires a further 60 days this should be requested 14 days before closing.

Accepted
Vendor Mrs. G Kaiser

Accepted
Purchaser Simon Darnsby

Sincerely

James Mosko"

The parties agree that the name Darnsby was a spelling error but referred to the plaintiff.

8. After the defendant had signed the Letter Mr Mosko then took the letter to the plaintiff to sign.

9. The plaintiff confirms that the Letter was delivered to him on Sunday at approximately 9:30 am. It was in triplicate signed by the defendant only. He read the letter and pointed out that his name was spelt wrongly and Mr Mosko advised that that could be easily corrected. Knowing that he was a client of Mr Carey he queried why the letter was written as if he was a client of Mr Mosko. Mr Mosko gave what he considered to be a satisfactory answer.

10 The plaintiff nevertheless refused to sign the letter at that time. He gave the following reasons:

“However I did have some concerns that the Offer Letter might not contain all the formalities required to constitute a binding legal document. In particular, the Offer Letter did not refer to any plans or the location of the Property, simply referring to it as Sunset (which I thought maybe confusing if another local property had the same name). The fact that the Offer Letter was dated 27 November 2006 (i.e. the following day) was another concern but I kept that concern between myself and Mr. Crooke.”

11. Therefore Mr Mosko signed the Letter in his presence and left the three copies with him.

12. After Mr Mosko left his house the plaintiff called and eventually reached a lawyer that he personally knew, Mr Pericles Maillis, and arranged to meet him in his office at 6:30 am the following morning, 27 November. While in the office at about 6:40 am reading the Letter Mr Mosko called him on his mobile and informed him that the defendant no longer wished to sell the property and “would be pulling out of the deal”. The plaintiff makes this statement at paragraph 47:

“After having discussed the position with Pericles Maillis, we agreed that I should sign the Offer Letter and proceed as if the sale of the Property was going ahead. Accordingly, I signed the Offer Letter while in his office.”

Later that day the plaintiff delivered a cheque for the deposit of 10% to the office of Mosko Realty in Charlotte House, Charlotte Street. That cheque was never presented and became stale dated.

13. What had happened was that after leaving the letter with the plaintiff Mr Mosko took the defendant to look at houses in Lyford Cay. She did not see any houses that she liked and formed the view based on the substantial security arrangements at the houses in Lyford Cay that she would be better off to remain in the Property. She therefore changed her mind about selling. In an affidavit filed 16 April 2007 she had sworn:

“I worried that I had not made the right choice in accepting Mr Arnsby’s offer and later that evening, decided not to go through with the sale. As it was too late in the evening to contact Mr. Mosko, I decided to wait until morning to communicate my decision to him.”

...

She contacted Mr Mosko at about 6:30 am on Monday, 27 November and immediately thereafter called Mr Emerick Knowles, her attorney on other matters, to withdraw her offer. He did so by fax to Mr Maillis’ office at 7:46 am. Later after arriving at the office Mr Maillis acknowledged receipt of the fax and said he would take instructions from the plaintiff whom he expected to see later that day.

14. The defendant further stated that as the Letter had no signature on it when brought to her she understood it to be an offer from her to the plaintiff. Furthermore, because of paragraph 6 she thought that even after the plaintiff would have signed the letter a formal contract of sale had to be drawn by the lawyer for signature by them, and until that time the agreement was “subject to contract” and not intended to create legal relations.

THE LAW

15 In order for a contract for the sale of land to be binding and enforceable it must satisfy the provisions of the Statute of Frauds 1677. The section is set out in Halsbury's Laws of England Vol 27 (1 ed) paragraph 44 as follows:

“By s.4 of the Statute of Frauds it is provided that no action shall be brought to charge any person on a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought or some memorandum or note thereof shall be in writing and signed by the party to be charged or some other person thereunto lawfully authorized by him...”

This differs from English law which now requires the contract itself to be in writing. The absence of such a memorandum is a bar to an action for specific performance. The nature of the memorandum is described at paragraph 45:

“Any note or memorandum is enough so long as it contains the terms of a concluded contract...”

16. A footnote at paragraph (p) to paragraph 45 summarizes the issue clearly as follows:

“The question is whether the parties have arrived at a complete agreement which simply requires formal expression, or whether they have only arrived at agreement as to some terms leaving others to be settled in the formal agreement...”

17. The principle that governs the approach to the question is set forth in a number of authorities cited by Mr Barnett. In **Crossley v Maycock** (1874) LR 18 Eq 180, for example, Sir George Jessel MR stated the principle as follows:

“The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party

making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce.”

This principle was applied in **Bonnewell v Jenkins** (1876) 8 Ch 70 by Fry, J at 72.

18. However, it is a matter of construction. As stated by Sir George Jessel in **Winn v Bull** (1877) 7 Ch. D 29 at 32:

“Where you have a proposal or an agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependant upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.”

19. The modern principles applied to construction of contractual documents is summarized in **I.C.S. Ltd. v West Bromwich B.S.** (H.L.(E)) 1 WLR 896 by Lord Hoffmann at 912 F to 913E. Of the 5 points I would abstract two which are particularly germane to this case:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

...

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent...”

The House of Lords case of **Prenn v Simmonds** [1971] 1 WLR 1381 was cited with approval in relation to (3). See also Lord Steyn’s speech in **Sirius Insurance Co v FAI General Insurance Ltd** [2004] 1 WLR 3251 at 3257 cited by Mr Barnett.

APPLICATION OF THE LAW TO THE FACTS

20. On the authorities such as *I.C.S. Ltd. v West Bromwich B.S* the compelling conclusion is that a reasonable person would take the Letter as not being intended to be legally binding having regard to the prevailing circumstances when it was signed.

21. The factual matrix prevailing when the Letter was executed was that the vendor was making a concerted effort to sell the Property for several months prior to November 2006 without success and had engaged several real estate firms. The purchaser had found in "Sunset" what he considered to be the ideal house for his purposes. A further background fact, taking judicial note, was that the sale of a house for \$2.5 million net net was a relatively large transaction for both parties.

22. Using the test in *I.C.S. Ltd. v West Bromwich B.S* under those circumstances one would expect that paragraph 6 of the Letter would convey to a reasonable person an attempt by the vendor and purchaser to secure a comprehensive written contract which would be binding. Such a reasonable person would likely expect at least the standard terms and conditions used in contracts of sale for much smaller transactions to be included by the lawyer and not to have such a major transaction proceed on the basis of a one sheet letter. I take judicial notice that standard terms would include among others whether a good documentary title instead of a possessory title is required (either of which could satisfy a "clear" title stipulated in the Letter), time for exchange of documents, time for making requisitions, the consequences of failing or refusing to answer requisitions, a good description of the property by meets and bounds, whether or not an abstract of title is required, any term relating to governmental approvals, defining the situations when the purchaser can get his deposit back, and when the vendor can seek return of her documents, when possession will take place, and indeed the circumstances in which either party can sue for specific performance.

