

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. 1928 of 2001

BETWEEN

DERYCK MAHABIR

PLAINTIFF

AND

COURTNAY PHILLIPS

DEFENDANT

Before the Honourable Mr. Justice Gregory Smith:

Appearances:

Ms. Nicole Basraj for the Plaintiff

Mr. Ravindra Nanga for the Defendant

REASONS

1. There were two applications before the Court in this matter. Firstly, an application by the Plaintiff by Summons filed on 10<sup>th</sup> July, 2001 for specific performance of an agreement for the sale of land dated 10<sup>th</sup> October 1996 and

other consequential relief pursuant to Order 83 Rule 3 of the Rules of The Supreme Court, and secondly, an application by the Defendant by summons filed on the 23<sup>rd</sup> October 2001 to strike out the Writ of Summons and all subsequent proceedings on the grounds that it is scandalous, frivolous or vexatious and/or an abuse of the process of court and/or under the inherent jurisdiction of the court pursuant to Order 18 Rule 19 of the Rules of the Supreme Court.

2. Both Counsel agreed that the Defendant's summons under Order 18 Rule 19 should proceed first.
  
3. The background of facts on this summons which are undisputed are that on the 8<sup>th</sup> October 1996, the Defendant and Plaintiff signed an agreement whereby the Defendant agreed (inter alia) to sell the property in question to the Plaintiff for the price of U.S.\$25,155.55 and the Plaintiff paid a deposit of U.S.\$2,515.51 to the Defendant. After several attempts, it was agreed that completion of the agreement for sale was to take place on the 28<sup>th</sup> May, 1997. This did not occur, and by fax dated 4<sup>th</sup> June, 1997 the Defendant indicated that he considered the agreement terminated. On the 25<sup>th</sup> July 1997 the Plaintiff herein commenced High Court Action No. 1888 of 1997 against the Defendant herein (hereafter referred to as "the 1997 Writ") seeking (inter alia) specific performance of the agreement for sale and the Plaintiff also registered a Lis Pendens relating to the 1997 Writ.

On the 24<sup>th</sup> February 1999, the Plaintiff withdrew the 1997 Writ but did not withdraw the related Lis Pendens.

On the 25<sup>th</sup> February 1999 the Plaintiff herein commenced High Court Action No. 365 of 1999 against the Defendant herein (hereafter referred to as “the 1999 Writ”) claiming similar relief as in the 1997 Writ; however, since more than two years have elapsed since the last proceeding by the Plaintiff in the 1999 Writ, that matter stood dismissed from sometime around April 2001 pursuant to Order 3 Rule 6.

On the 6<sup>th</sup> July 2000 the Plaintiff purported to register a Lis Pendens relating to the 1997 Writ even though he had withdrawn that action since the 24<sup>th</sup> February, 1999.

By Originating Summons filed on the 25<sup>th</sup> June 2001, the Defendant commenced an action to vacate this Lis Pendens. The Plaintiff subsequently withdrew this Lis Pendens, but on the 10<sup>th</sup> July 2001 the Plaintiff filed the present matter (hereafter referred to as “the 2001 Writ”) claiming similar reliefs, as he had done in the 1997 Writ and in the 1999 Writ and the Plaintiff also filed a Lis Pendens relating to this 2001 Writ.

On the 18<sup>th</sup> June 2001 the Defendant entered into an agreement to sell the property in question to a third party for the sum of \$375,000.00 (which is roughly double the selling price of the agreement with the Plaintiff).

4. The arguments on the Defendant’s summons were well set out in filed written skeleton arguments and I mean no disrespect to Counsel when I attempt to summarise them in this judgment.

5. Counsel for the Defendant's submissions as stated in paragraph 14 of his skeleton arguments were that "the action herein is a hopeless proceeding, is calculated to harass the Defendant and the Plaintiff is guilty of laches and all of these factors would lead to prejudice to the Defendant." This seems to be a "rolled up" allegation that the continual filing of actions claiming the same relief was an abuse of the process of Court and that the Plaintiff's action must fail because of delay amounting to laches. Counsel expanded upon these submissions by referring to the conduct of the litigation as set out in paragraph 3 above. In particular, Counsel made reference to the filing of three actions for the same relief, withdrawing the 1997 Writ; allowing the 1999 Writ to lapse, re-registering a Lis Pendens in the very 1997 Writ that had been withdrawn and now this 2001 Writ and related Lis Pendens, all to show that the Plaintiff was not serious about his case and was merely filing actions and Lis Pendens to harass the Defendant. Counsel also referred to the fact that there was now an agreement for the sale of the subject property to a third party which was entered into at a time when there was no valid, subsisting Lis Pendens so that it would be highly inequitable to have specific performance of the prior agreement between the Plaintiff and the Defendant. Further, because of the time that had elapsed and the increased market value of the subject property (double its value from 1996), it could not be argued that the Defendant would not be prejudiced. Counsel also referred to the fact that more than four years had elapsed since the original agreement so that the claim for damages would be statute barred. In oral submissions, Counsel expanded on this limitation argument to state that since it was now clear that the Defendant had indicated his intention not to be

bound by the agreement for sale with the Plaintiff after the 28<sup>th</sup> May 1997, or, at the latest, by the 4<sup>th</sup> June 1997, when the Defendant communicated his intention to the Plaintiff, the action for specific performance had also become unenforceable at the latest, by the 4<sup>th</sup> June 2001, so that this 2001 Writ, which was filed on 10<sup>th</sup> July, 2001 could not successfully proceed.

Counsel for the Defendant also went on to refer to the Plaintiff's affidavit in response to show that it was lacking in material particulars and that it did not advance the Plaintiff's case in any material way. I will set out the details of these submissions after dealing with the Plaintiff's submissions.

6. The Plaintiff contended that any delay or laches in the completion of the agreement for sale was caused primarily by the Defendant. The Plaintiff's affidavit disclosed that it was the Defendant who postponed the date for completion on four occasions between the 14<sup>th</sup> March 1997 and the 3<sup>d</sup> April 1997. Later on, even when the date of the 28<sup>th</sup> May 1997 was set for completion, the Defendant had failed, refused or neglected to execute a conveyance in response to a request so to do from the Plaintiff attorneys around the 21<sup>st</sup> May 1997. Further, even after the 4<sup>th</sup> June 2001 the evidence showed that the Plaintiff kept corresponding with the Defendant with a view to completing the sale; so that while the Plaintiff was still willing to complete the sale, the Defendant stoutly refused so to do and this resulted in the 1997 Writ. Even after the 1997 Writ was filed, the Plaintiff attempted to complete the sale and met with the Defendant on three occasions between April and August 1999 to negotiate an amicable resolution of this matter; these negotiations resulted in

the Defendant proffering a new agreement for sale and soon thereafter withdrawing from that agreement. In the light of these facts, it was submitted that the delay which has occurred to date was caused by the vacillation of the Plaintiff.

With respect to the prior actions, it was contended that after the filing of the 1997 Writ, the Defendant went abroad to an address unknown to the Plaintiff so that the Plaintiff could not effect service of that Writ on the Defendant and that action lapsed. The Plaintiff subsequently changed attorneys and filed the 1999 Writ and attempted to obtain judgment upon a motion, which application was dismissed on the 15<sup>th</sup> April, 1999 for the non-appearance of the Plaintiff's Attorney. Later on, between April 1999 and August 1999 the Plaintiff and the Defendant were trying to negotiate a settlement of this matter which resulted in the Defendant proffering a new agreement for the sale of the subject premises (at a new price of \$210,000.00 and a completion date of 45 days after the 28<sup>th</sup> August 1999) however, the Defendant arbitrarily indicated soon thereafter that he was no longer willing to sell the property to the Plaintiff. When the 1999 Writ matter lapsed in 2001, the 2001 Writ was filed.

Counsel for the Plaintiff contended that based on these facts it could not be argued that the Plaintiff was guilty of laches. Further, to succeed on the issue of laches, the Defendant had to prove that there was unreasonable delay on the part of the Plaintiff and that as a result, it would be unjust to give a remedy or that some material prejudice would be caused to the Defendant. This was in effect a matter for the discretion of a judge based upon the facts of each case, which facts would have to be ventilated before it could be decided that this was

a case where the doctrine of laches could apply. In these circumstances, it was not proper to decide the issue of laches in an application under Order 18 Rule 19.

The Plaintiff also quoted Lord Herschell's dicta in Lawrence v Lord Norreys [1886 – 1890] All E.R. Rep. at pg 863, where it was stated that:

*“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of process of the Court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbably and one which it was difficult to believe could be proved.”*

The Plaintiff submitted that even if the court found the explanations of the Plaintiff were not convincing, this was still not a case to strike out the Writ without a trial.

7. With respect to the issue of limitation, Counsel for the Plaintiff contended in oral submissions that the negotiations between the Plaintiff and the Defendant in August 1999 leading to the subsequent agreement for sale which was signed only by the Defendant, showed that there was a waiver of any breach of contract and that the time for bringing a claim for specific performance of the agreement for sale only began to run after August 1999 so that the claim was not statute barred or otherwise unenforceable.
8. In response to the allegations that the non completion of the agreement for sale was caused by the Defendant, Counsel for the Defendant pointed out that the

evidence from the Plaintiff's own affidavit indicated firstly that the Defendant only agreed to extend the date for completion upon the payment of interest by the Plaintiff and the Plaintiff never indicated that he tendered such interest to the Defendant, so that the Plaintiff did not show that he was ready, willing and able to perform the contract. The evidence also showed that while the Defendant did not execute a conveyance on or before the 28<sup>th</sup> May 1997, the Plaintiff failed to indicate that he tendered the balance of the purchase price due to the Defendant, so again the Plaintiff did not show that he was ever ready, willing and able to complete the agreement for sale. In that case the Plaintiff's claim for specific performance was doomed to failure.

With respect to the reasons advanced by the Plaintiff for filing three Writs claiming the same relief, Counsel for the Defendant submitted that the fact that the Defendant had gone abroad was no excuse for not applying to extend the validity of the 1977 Writ, and the evidence, even on the Plaintiff's affidavit is that the parties kept in touch up to August 1999 so that there was no valid reason why the 1997 Writ should have lapsed. Further, no explanation was given as to why the 1999 Writ was allowed to lapse.

With respect to the question of the negotiations in 1999, it was submitted that the evidence fell far short of showing any waiver of the Defendant's position but only reaffirmed his position that he was not going to complete the 1996 agreement for sale, as evidenced by the Defendant tendering an entirely new agreement for sale which he alone signed; further, the fact that the Plaintiff did not sign this second agreement was evidence of his inability, unwillingness or

lack of readiness to complete the agreement, so that in all events this present action was doomed to failure.

Findings:-

9. On the question of laches, I accepted the correctness of the citation from Spry's Equitable Remedies 3<sup>rd</sup> ed. Pg 229 which states:

THE GENERAL DISCRETIONARY CONCEPT OF LACHES

*It has been seen that a court of equity, when it is deciding whether the defence of laches should prevail, enquires, first, as to the unreasonableness of the delay of the plaintiff, and secondly, as to any consequent prejudice or detriment to the defendant or third persons in ordering specific performance. If these two matters are established, prima facie the plaintiff will fail. But he will fail only because in these circumstances it is ordinarily found to be unjust that he should succeed. It should not be forgotten that the real enquiry by the court relates to the "balance of justice or injustice in taking the one course or the other", that is, in the grant or refusal of relief.*

In the present matter a lot of argument has been focussed upon the determination of who was responsible for the delay in completing the 1996 agreement for sale and whether such delay was unreasonable in the circumstances.

On the arguments presented it does seem as though the Defendant has a very strong case that the delay in completing the agreement for sale was caused by the Plaintiff's tardiness and/or his inability to meet his end of the bargain. However, I could not ignore the Plaintiff's case that it was the Defendant's vacillations after arriving at agreed positions which was the root cause of the delay and that these vacillations occurred even up to August 1999 when the

Defendant led the Plaintiff to believe that he would complete the agreement or at least enter into a new agreement for sale, and then the Defendant suddenly changed his mind. Even though the Defendant's story is more probable, I could not find as a fact that the Plaintiff's story, though less credible, was one that was bound to fail and the issue as to the reasonableness or unreasonableness of the delay, being an important ingredient in the application of the doctrine of laches, is one which should be decided after a trial.

10. Further, on the question of the prejudice suffered by the Defendant, if this prejudice was as a result of his own vacillations, he could hardly be heard to complain. Even the fact that he had entered a subsequent sale at a higher price would be of no avail to the Defendant if he did so solely for the purpose of avoiding the earlier bargain which, according to the Plaintiff, was still being kept alive by the representations and/or negotiations that were taking place and which, as an earlier subsisting equity would take precedence over the later agreement for sale.
11. In any event, the issue of whether it would be unjust in all the circumstances of this case to order specific performance because of the Plaintiff's delay was, as a result of my prior findings, a question which was best left to be decided at a trial.
12. Closely associated to the question of delay and laches was the allegation that these actions and Lis Pendens were pursued with the view of harassing the Defendant and were an abuse of the process of court. On the facts presented, I

was not satisfied that the reason behind the three actions and the various Lis Pendens was the desire of the Plaintiff to harass the Defendant. The Plaintiff had legal advisers and it may very well be that the case that the various actions and Lis Pendens stemmed from the advice of his attorneys and/or even from the breakdown in the relationships with his various legal advisers. In any event, I could not rule out the Plaintiff's alleged bona fide belief that he was pursuing a valid claim as best as he could and was also relying on negotiations between himself the Defendant and their pastors to resolve the matter amicably, hence the reason for not pursuing litigation as vigorously as he should have done. I could not therefore find as a fact that the litigation was being conducted in a manner that was intended to harass the Defendant.

13. On the issue of Limitation, even on the Plaintiff's own affidavit, it was clear that by the 4<sup>th</sup> June 1997 the Defendant had indicated that he was no longer going to be bound by the 1996 agreement for sale. The Defendant's unequivocal refusal to perform the contract after the 28<sup>th</sup> May 1997 or at the latest by the communication to the Plaintiff on the 4<sup>th</sup> June 1997 was the time from which the cause of action based on the 1996 contract ran. This being the case the limitation period for bringing an action at law would have expired four years after the 4<sup>th</sup> June 1997, namely, on the 4<sup>th</sup> June 2001 unless there were some written acknowledgement or part performance of the 1996 agreement (see sections 5 and 7 of the Limitation of Personal Actions Act Ch. 5 No. 6) neither of which has been alleged in this case.

14. Further, a court of equity would follow a court of law in relation to the issue of limitation except in exceptional cases as where fraud is alleged. Since there is no allegation of fraud or other circumstances which would render this case an exceptional one, a court of equity would also refuse the relief of specific performance to this Plaintiff since his action at law was statute barred.

15. With respect to the argument that there was a waiver of the breach of contract by the Defendant by his negotiations with the Plaintiff during April to August 1999, even if this could extend the period of limitation (which is not accepted), this waiver has not been shown to have occurred on the facts of this case. At paragraphs 18 and 19 of the Plaintiff's own affidavit filed herein on the 7<sup>th</sup> November 2001 it is alleged that during the relevant period the Defendant insisted that he no longer wanted to sell the property and that he was only willing to return the deposit, and later he gave the Plaintiff an entirely new agreement for sale at a substantially increased purchase price, which he subsequently reneged upon.

These facts do not show a waiver by the Defendant of his position but clearly evince that the Defendant never resiled from his position taken on 4<sup>th</sup> June 1997, that he was not going to perform the 1996 agreement. In fact the actions of the Defendant were an affirmation of his position taken in June 1997.

In all the circumstances there was no answer to the argument of Limitation as was being raised by the Defendant.

16. That being the case I noted the learning in the 1999 White Book at paragraph 18/19/11:

*“Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court (Riches v Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935,CA, as explained in Ronex Properties Ltd v John Laing Construction Ltd, above).*

In the circumstances, I considered that this was a proper case to strike out the claim as being frivolous and vexatious or an abuse of the process of court and/or a case to strike out the claim under the inherent jurisdiction of the court and I ordered the Writ and all subsequent proceedings be struck out and that the Plaintiff do pay the Defendant’s costs of the summons.

Dated this 1<sup>st</sup> day of May 2002

**Justice Gregory Smith**  
**JUDGE**