In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 2

BETWEEN:

TAHIR SHAWKI

Plaintiff

and

LENA MAE DRAKE

Defendant

RULING

Date of Hearing: **3 December 2024, 2 June 2025**
Date of Ruling: **18 June 2026**

Appearances: **Paul Harshaw, Canterbury Law Limited, for Plaintiff**

Dantae Williams, Marshall Diel & Myers Limited, for Defendant

RULING of Mussenden CJ

Introduction

1. This matter appears before me by way of the Plaintiff's summons for directions issued 5 June 2024 in respect of the trial of the true meaning and effect of the Sales and Purchase

Agreement dated 4 December 2019 (the "**SPA**") together with a claimed amendment thereof by exchange of correspondence in December 2022 and January 2023 to be treated as a preliminary issue. By an Order dated 18 July 2024 of Wheatley AJ, the question to be determined as a preliminary issue is whether there was at the date of the issue of the Writ of Summons in this matter a valid and subsistent SPA between the parties relating to the sale of certain real property (the "**Property**") described in the Schedule to the SPA (the "**Preliminary Issue**"). The Preliminary Issue was to be determined prior to the determination of any other issue in the matter.

2. The Plaintiff seeks an order that there is a valid and subsisting SPA between the parties. The Defendant rejects the Plaintiff's claim, seeking an order that there is no valid and subsisting agreement between the parties.

3. The Plaintiff relies on his Second Affirmation affirmed 8 May 2024 ("**Shawki2**") with Exhibit TS-2 and his Third Affirmation affirmed 18 July 2024 ("**Shawki3**") with Exhibit TS-3.

4. The Defendant relies on the affidavits of (i) Roshanda Smith sworn 5 August 2024 ("**Smith1**") with Exhibit RS-1; and (ii) Timothy Drake sworn 6 August 2024 ("**Drake1**") with Exhibit TAD-1. Mr. Drake is the son of the Defendant. Mrs. Drake sadly passed away on 29 May 2024.

<u>Background</u>

5. The Plaintiff caused a Generally Indorsed Writ of Summons to be issued 3 January 2024 (the "**Writ**") and a Statement of Claim dated 8 April 2024 (the "**SOC**"). The pleadings set out that the claim related to a SPA entered into by the parties on or about 4 December 2019 and varied by agreement in or about January 2023 for the sale by the Defendant to the Plaintiff of the Property situated at Texas Road in St David's, Bermuda. The total price payable for the purchase of the Property in accordance with the SPA was $190,000 to be paid in two tranches as follows: (i) $40,000 payable immediately on execution of the SPA; and (ii) $150,000 payable out of any pre-construction money balances connected with

construction and thereafter out of the proceeds of sale money from the sale and occupancy of the first unit constructed. The Plaintiff paid the initial sum of $40,000 to the Defendant on or about 5 December 2019. There was a special condition where the parties agreed that a two-year construction period was to commence on the granting of Planning Approval and Issuance of a Building Construction Number.

6. The Plaintiff set out that in 2020, he entered into occupation of the Property pursuant to an equitable interest and in accordance with the provisions of the SPA. Planning permission was granted in August 2020. In or about January 2023 the parties agreed to amend the SPA so that the Plaintiff could tender the remainder of the purchase price, being $150,000, irrespective of the state of development of the Property. The variation also amounted to the waiver of the "two-year construction period". The Plaintiff has, since 18 May 2023, been ready, willing and able to pay the sum of $150,000.

7. The Plaintiff seeks to enforce the SPA as varied but claimed that the Defendant would not respond to the Plaintiff who had received information that the Defendant, at the time, no longer resided in Bermuda. The Plaintiff claims that the breach of the SPA has interfered with his possession of the Property and has sought to frustrate the SPA. The Plaintiff claims damages in excess of $25,000 and specific performance of the SPA.

8. The Defendant filed a Defence and Counterclaim dated 22 April 2024. His Defence maintains that: (i) only $39,100 of the $40,000 was paid; (ii) by way of execution of the SPA, the Plaintiff acquired an equitable interest in the Property, contingent on satisfying the conditions of the SPA to pay the $40,000 and complete the construction within the two-year period from the grant of the building permit dated 6 August 2020; (iii) rather than taking occupation and possession of the Property, the Plaintiff was granted a non-exclusive licence to occupy the Property for undertaking construction; (iv) that there was no variation of the SPA, relying on section 3(1) of the Conveyancing Act 1983 that any agreement be in writing and signed by the relevant party; (v) that there was no agreement to vary the two-year construction period, such term which was breached by the Plaintiff; (vi) that the SPA was discharged by the breach of the Plaintiff; (vii) the Plaintiff has no right to specific

performance of the SPA, as amended or otherwise; and (viii) as the performance of the SPA became impossible, the Defendant was discharged from further performance of the SPA. The Defendant's counterclaim seeks: (i) a declaration that the SPA has been rescinded; and (ii) damages or the right to set-off in the amount of the remediation works required to the property.

The Evidence

9. The Plaintiff's position in Shawki2 and Shawki3 reflects what I have set out above in respect of the background to the matter, in particular the Writ and the SOC. He sets out the terms of the SPA and notes that only a few months after the execution of the SPA, Bermuda was faced with the Covid-19 pandemic which restricted movement and interaction between people in Bermuda. He stated that on 10 January 2023, the parties through their lawyers (Ms. Roshanda Smith of Marshall Diel & Myers Limited ("**MDM**") for the Defendant and Mr. Perry Trott of Trott & Duncan Limited ("**T&D**") for the Plaintiff) agreed a variation of the SPA, by way of an email of even date, from Ms. Smith to Mr. Trott as follows:

   "I have spoken with our client and she has agreed to accept Mr. Shawki's offer to vary the Sales and Purchase Agreement on the basis that he obtains satisfactory financing and then pays her the remaining 150K, at which time she will convey the property over to him and they go their separate ways. We anticipate that it will take 30 to 60 days to complete. If he fails to obtain financing, then we will have to renegotiate the return of his deposit and consider any value that he may have added to the property as a result of his works."

10. The Plaintiff stated that, despite the aspirations of completion within 30 to 60 days, he did not fail to secure financing and no date for payment ever existed and the email did not impose a 30-day restriction on payment of the balance of the purchase price. He stated that he had the ability to pay the balance of $150,000 but the Defendant will not accept the funds and has sought to frustrate the SPA. He exhibited a chain of emails in respect of the variation and stated that no "replacement agreement" exists or was ever agreed. In respect

of the first payment of $40,000, he explained that on 5 December 2019 he went to the HSBC Bank Bermuda Church Street branch where, at the Defendant's request, he obtained 2 bank drafts, one for USD$30,000 and the other for USD$9,100 along with $900 in cash. He then walked outside to the Defendant and gave her the $40,000 to her satisfaction. He stated that until this litigation, no one had complained that the full deposit was not paid.

11. Smith1 set out that she is a Barrister and Attorney at MDM which was retained by the Defendant on or around 18 October 2022, and engaged in discussion with Mr. Trott of T&D, initially as the Defendant sought to rescind the SPA due to repudiatory breach of the contract by the Plaintiff. However, the discussions shifted to varying the SPA to cure the said breach and to proceed with the sale, such efforts which eventually failed. Her evidence is about the circumstances of the failed variation. She also asserted that the SPA executed by the parties on 4 December 2019 does not have stamp duty affixed and according to section 9 of the Stamp Duties Act 1976, it shall not be admitted into evidence in any proceedings whatsoever. Smith1 set out that there were further emails exchanged between the parties wherein the discussion referred to above in Shawki2 and Shawki3 continued as follows:

> *<u>10 January 2023</u>*
> *<u>From Roshanda Smith to Perry Trott</u>*
> *Hi Mr. Trott,*
> *Further to my last email, we propose drafting a new form of replacement agreement for your clients to consider. Please confirm if your client is okay to proceed on this basis.*
> *Thanks and regards,*
>
> *<u>11 January 2023</u>*
> *<u>From Pery Trott to Roshanda Smith</u>*
> *Good afternoon Roshanda,*
> *Thank you for your email.*
> *Our client is in agreement with the contents of your email. We look forward to receiving the draft replacement SPA for his review.*
> *Kind regards,*
> *Perry P. Trott JP*
>
> *<u>6 February 2023</u>*
> *<u>From Roshanda Smith to Terr-Lynn Brown of T&D, copying in Perry Trott</u>*

Good morning Terri Lynn
I am just following up on Mr. Trott's comments on the draft SPA.
Kind regards,
Roshanda

<u>6 February 2023</u>
<u>From Perry Trott to Roshanda Smith</u>
Good morning Roshanda,
Thanks for your email.
I should be able to revert to you in a few days. The delay is that my clients now needs to add other parties to the agreement and therefore we will require additional information.

12. Smith1 also makes reference to a series of emails between counsel in respect of the draft SPA as follows:
    a. 6 & 23 Feb – Ms. Smith is seeking any comments on the SPA from Mr. Trott;
    b. 27 Feb and 1 March – emails between counsel about adding a non-Bermudian to hold an interest in the Property;
    c. 3 March – Mr. Trott's email to Ms. Smith with attached comments in relation to the draft SPA;
    d. 14 March – Ms. Smith thanking Mr. Trott for the 'attached' and stating that she will revert in due course;
    e. 13 April – Mr. Trott's email to Ms. Smith stating: "*I am following up on this matter. Please advise as to when we can expect to receive the engrossed agreement for our clients' signatures.";* and
    f. 14 April – Ms. Smith's email to Mr. Trott stating: "*Apologies for the delayed response. We write to inform you that our client no longer wishes to proceed with the sale of her property and will not be entering into a new Sales and Purchase Agreement with your client.*".

13. Drake1 sets out that he is the Defendant's son and sole executor of her estate. He states that the Defendant was, at all material times, the owner of the Property, which was a vacant lot, now part of her estate. He understands that the Defendant was approached by the Plaintiff around 2018 in order to purchase the Property on which he would build three residential units. They entered into the SPA when she was 72 years old. Upon his review of the

Defendant's documents, the Plaintiff paid two HSBC cheques in the amounts of USD$30,0000 and USD$9,100 respectively and never paid the remaining $900. He then asserts his understanding of the two-year construction period being breached and of the circumstances of the purported variation agreement. His position is that the Plaintiff would never be able to complete the construction development or pay the Defendant the outstanding funds owed to her.

<u>The Issue of Stamp Duty</u>

14. At the hearing on 3rd December 2024, I heard submissions by counsel that the SPA document should be excluded from evidence because the version filed in these proceedings did not have the appropriate revenue stamps affixed to it. At that hearing, I denied the application to exclude the SPA document on the basis that the original copy may show the revenue stamps affixed to it, noting that even if the original did not, then there was an application process set out in the Stamp Duties Act 1976 to allow for late payment of the stamp duty. I granted leave for Mr. Harshaw to take steps to find the original SPA or find out if stamp duty had been paid, and if not, then to make application for late payment.

15. Mr. Harshaw filed an affidavit sworn 9 December 2024 wherein he stated that he had communicated with Mr. Michael Scott, the lawyer who drafted the SPA, asking him whether revenue stamps were affixed to the original SPA. He exhibited the correspondence with Mr. Scott's reply letter dated 9 December 2024 wherein he stated that he recalled that he generated three copies for the signing of the contract of sale and to the best of his knowledge he affixed the required revenue stamps to an original. He met with Tahir Shawki and Lena Drake and her friend Ian at Lane House, East Broadway, Hamilton, when the original stamped copy and two other copies were signed and witnessed. He recalled retaining the stamped copy and giving one of the office copies each to the parties, Lena Drake and to Tahir Shawki.

16. At the continued hearing on 2 June 2025, Mr. Williams submitted that Mr. Scott's letter was not a cure for the issue and that Mr. Harshaw's undertaking had not been fulfilled. Mr.

Harshaw submitted that Mr. Scott's explanation should be accepted to show that stamp duty had been paid, noting that Mr. Scott is an officer of the court, a Justice of the Peace and a former Attorney General. At that time, I ruled that I saw no reason why I should not accept Mr. Scott's letter and explanation. In addition to the reasons in my Ruling which I made on the 3 December 2024, in the present circumstances of this case, I am satisfied to accept that there is an original SPA that has the required stamp duty affixed to it. I accept the affidavit evidence of Mr. Scott who is a long-standing member of the Bermuda Bar, who recalls that he personally affixed the revenue stamps to the original SPA, keeping a copy and giving each of the parties a copy. This evidence is not contradicted in any way. Further, I agree with Mr. Harshaw that there has been no suggestion, much less any evidence that the original SPA did not bear the appropriate revenue stamps, and that Ms. Smith admits the SPA was executed.

<u>The Plaintiff's Submissions</u>

17. Mr. Harshaw submitted that a number of statements in the affidavit of Mr. Drake were outside of his knowledge and consisted substantially of hearsay evidence. Further, despite stating in the opening paragraphs of his affidavit that he would state the source of his information where it was not in his personal knowledge, Mr. Drake does not state sources, rather he states that he "understands" the information to be something, the result being that it cannot be tested on cross-examination. For example, that issue applied to statements attributed to a Mr. Ian Gordon who could no doubt give his own evidence. Thus, generally the evidence of Mr. Drake is objectionable.

18. Mr. Harshaw submitted that there was nothing inhibiting the parties, through their respective lawyers, from agreeing to vary the SPA so as to allow for payment of $150,000 prior to receiving the '*proceeds of sale of the first unit that is to be constructed and developed on the Property*' in return for the conveyance of the whole of the interest in the Property prior to the sale of the '*first unit that is to constructed*'. He argued that that is precisely what the correspondence between the parties' respective lawyers showed that they did. The fact that the Defendant does not now want to accept the sum of $150,000 or

convey the Property to the Plaintiff cannot change that agreement to vary the SPA. He reiterated that: (i) the evidence shows that it was an agreement to vary the original agreement and nothing more; (ii) the whole of the original agreement was not subsumed by the agreement to vary; and (iii) only the varied terms of the original agreement were subsumed by the agreement to vary. He relied on *Chitty on Contracts* Thirty-Fourth Edition at 25-034 and 25-035 and the case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 and Lord Sumption's reference to the judgment of Cardozo J. in the Court of Appeals for the State of New York.

19. Mr. Harshaw submitted that the email of 10 January 2023 sent at 3:21pm was important in several key respects. First, the first sentence setting out the agreement was evidence of a clear intention to vary the SPA. However, the second sentence "*We anticipate that it will take 30 – 60 days to complete.*" was an expression of hope that was not connected to the first statement setting out the variation. Mr. Harshaw then referred to the email of the same date sent at 3:40pm by Ms. Smith to Mr. Trott stating "*Further to my last email, we propose drafting a new form of replacement agreement for your clients to consider. Please confirm if your client is ok to proceed on this basis.*". He submitted that the 3:40pm email was sent some 19 minutes later and thus it was too late to be a part of the agreement in the earlier email, as it was unilateral and not agreed. Further, he submitted that the later correspondence did not further vary or impact on the agreed variation, noting that no replacement agreement was ever produced, the result being that the 3:21pm email was a clear acceptance of a variation. Mr. Harshaw submitted that the sentence "*If he fails to obtain financing, then we will have to renegotiate the return of his deposit and consider any value that he may have added to the property as a result of his works.*" was vague and in the alternative, but that nothing in the agreement to vary the SPA contemplated a simple refusal by the Defendant to proceed with the SPA.

20. Mr. Harshaw submitted that in respect of the downpayment, the evidence showed that the full $40,000 was paid and that there was no contemporaneous evidence that the full amount had not been paid. He referred to the Shawki3 Exhibit which showed an email dated 8 December 2022 from Mr. Trott to Ms. Smith wherein Mr. Trott stated that the Plaintiff had not only paid the agreed deposit of $40,000, but that he had substantially commenced work

on the property. Mr. Harshaw made the point that if the full amount had not been paid, then this statement would have been addressed by Ms. Smith, however, it was never contradicted. Further, he referred to an email from Ms. Jones to Mr. Trott dated 10 January 2023 wherein Ms. Smith makes reference to the purported variation and states that he pays her the remaining $150,000, not $150,900.

The Defendant's Submissions

21. The Defendant opposes the application for several reasons.

22. First, Mr. Williams submitted that the Plaintiff's reliance on email exchanges which purportedly varied the SPA fails, as a variation of the SPA amounts to a contract for the disposition of land and is bound by the Conveyancing Act 1983 (the "**Conveyancing Act**") which explicitly forbids an action being brought along the lines of the Plaintiff's case. The Conveyancing Act provides at section 3 as follows:

> ***Contracts for the disposition of land to be in writing***
> *(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized to act on his behalf.*

23. He relied on the extracts from *Formation and Variation of Contracts* 4th Ed at chapters 4-5, 4-11 and 5-22 along with the case of *Morris v Baron & Co* [1918] A.C. 1, 39.

24. Second, Mr. Williams submitted that even if the Plaintiff were to overcome the flaws under the Conveyancing Act, the purported amended SPA is unenforceable because with the altered payment terms, it lacks the necessary consideration and therefore is unenforceable. He relied on the case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* which referenced *Foakes v Beer* [1884] UKHL 1 for the proposition that a mere agreement to accept a lesser sum or alter payment terms without additional consideration is not enforceable as a modification of the original agreement. Thus, the absence of any new consideration from the Plaintiff to support the amended terms renders the amendment void. Further, the purported amended SPA offered no additional benefit or detriment conferred

to the defendant by the Plaintiff in consideration of the altered payment schedule, thus it was not supported by adequate consideration. He also submitted that any consideration advanced in the original SPA was not adequate as past consideration is no consideration. He relied on *Chitty on Contracts 35th Ed* at paragraph 6-029 and the case of *Hadley v Kemp* [1999] 2 E.M.L.R. 589 at 625-626.

25. Third, Mr. Williams submitted that the Plaintiff is unable to satisfy the requirement that the parties intended to create legal relations in respect of the email exchange between Ms. Smith and Mr. Trott on 10 January 2023. Mr Williams relied on the cases of *RTS Ltd v Molkerrei Alois Muller GmbH & Co KG* [2010], the *Formation and Variation of Contracts 4th Ed* Chapters 3-10 and 3-11 which sets out the test for intention being one that is both subjective and objective and the cases of *Pennyfeathes Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 (Ch); *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG* [2018] EWHC 2765 (Ch). Mr. Williams submitted that when examining the email exchanges, the objective test shows that the parties did not have an intention to create a legally binding relationship for several reasons, the result being that it was clear from the evidence that the parties did not intend for the email between Ms. Smith and Mr. Trott to be binding. He relied on the cases of *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1330 and *Rotam Agrochemical Co Ltd*.

26. Fourth, Mr. Williams submitted that the purported varied SPA is an agreement to agree which is not enforceable, relying on the cases of *RTS Ltd* and the Bermuda case of *PT Satria Tirtatama Energindo v East Asia Co Ltd and anor* [2016] Sc (Bda) 90. Also, he submitted that where the parties have left a fundamental matter undecided and subject to further negotiation, then there is no contract, relying on the cases of *Walford v Miles (H.L.(E.))* [1992] 2 A.C. 128 and *May and Butcher v R* [1934] 2 K.B. 17. He submitted that the parties may be bound by the more significant terms, leaving only an undecided particular provision unenforceable, relying on *Chitty* 35th Ed at paragraph 4-179.

27. Fifth, Mr. Williams submitted that the Plaintiff failed the implied term of "business necessity" as using the 30 to 60 day period as the meter to gauge reasonableness, the period 10 January 2023 to 18 May 2023, when the Plaintiff purported to be capable of paying the purchase price, is unreasonable as the period afforded to the Plaintiff would have been in excess of 120 days.

28. Sixth, Mr. Williams submitted that the Plaintiff failed to perform his contractual obligation under the SPA by failing to pay the full deposit as required, such failure constituting a fundamental breach of the SPA, which relieves the Defendant of its obligation to perform under the contract. Further, although the Plaintiff accessed the Property, it was not a waiver of the right to receive the full deposit. Thus, the non-payment of the full deposit is a breach which remains unrectified.

<u>The Law on Variation of a Contract</u>

29. In *Chitty on Contracts* (Thirty-Fourth Edition) it states:

> *[at 25-034] "The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement."*
>
> *[at 25 – 035] "As in the case of a rescission of a contract, the terms of a deed or written instrument may be varied by a subsequent agreement, whether oral or written. This may be reconciled with the rule that extrinsic evidence is not admissible to vary or qualify the terms of a written instrument, for that rule only relates to the ascertainment of the original intention of the parties and not to a subsequent variation. A contract required by law to be made in or evidenced by writing can only be varied by writing."*

30. In *Chitty on Contracts* (Thirty-Fifth Edition) it states:

> *[at 6-029] "(2) If one person (A) makes a promise to another (B), and in return the other (B) promises that he will do something which he is already bound to A to do, B cannot rely on his own promise as the consideration which makes A's promise contractually binding. It is sometimes said in abbreviated terms that a promise to perform a pre-existing duty is not good consideration in law."*

31. In *Foakes v Beer (1884) 9 App Cas 605* Lord Selborne LC stated as follows:

"[at 612] The doctrine, as stated in Pinnel's Case (1), is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton, 212(b), it is, "where the condition is for payment of £20, the obliger or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding."

32. In *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1330 Carnwath LJ stated as follows:

"45. Obviously each case depends on its own facts but in my view where, as here, solicitors are involved on both sides, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until both of them sign the agreement. In a sense this case is an a fortori case in that on any view there are at least three agreements to be executed and the respective parties are not the same."

33. In *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* [2019] AC 119, Lord Sumption of the United Kingdom Supreme Court stated as follows:

"7. At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other exceptions are all statutory, and none of them applies to the variation in issue here. The reasons which are almost invariably given for treating No Oral Modification clauses as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing. All of these points were made by Cardozo J in a well-known passage from his judgment in the New York Court of Appeals in Beatty v Guggenheim Exploration Co (1919) 225 NY 380, 387-388:

> *"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it (Westchester Fire Insurance Co v Earle 33 Mich 143, 153). What is excluded by one act, is*

restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again...""

34. In *Formation and Variation of Contracts 4th Ed* Chapter 3-10 and 3-11 the test for intention being one that is both subjective and objective was set out as follows:

    "3-10 An agreement (performed through the acceptance of an offer) supported by consideration will still not be a contract unless there was also an intention to create legal relations. The test of "intention to create legal relations" is objective; and the way in which it is used in practice depends on the context in which the agreement is formed - a commercial agreement is in this sense viewed very differently from a non-commercial agreement.

    3-11 Since the interpretation of the parties' communications to each other, which formed the basis of the agreement, is tested objectively, it should not be surprising that the test of whether those communications evince an intention to be legally bound should also be tested objectively. The question should be how a reasonable person in each party's position would have interpreted the other party's intention based on his interpretation of the communications, as well as how the party receiving the communications in fact interpreted them. One party should not be able to hold the other to a contractual agreement unless he could reasonably, and did in fact, believe that the other was making a contractual commitment.

35. In *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 (Ch) Rose J stated as follows:

    "In order to establish that there was a binding contract, the defendants must show both that the parties had the subjective intention of forming a binding contract and that what occurred between them would lead objectively to the conclusion that they intended to create legal relations".

36. In *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG* [2018] EWHC 2765 (Ch) Butcher J stated as follows:

    "146 ... The 30 August Meeting did not involve what, viewed objectively, was an intention on the part of the parties to create legal relations, or an agreement on all the terms which they regarded as essential for the formation of legally binding relations. I consider that the following five, overlapping, considerations support the conclusion that there was no binding contract concluded on 30 August 2010.

    147 In the first place it is, in my judgment, clear that the parties intended, and had demonstrated to each other that they intended, that any binding agreement relating to

the commercial exploitation of CS-CLO should be the subject of a formal written contract. ...”

37. In the extract *Formation and Variation of Contracts 4th Ed* Chapter 4-5 and 4-11 are set out below, and in addressing the requirements under the UK section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 set out at 5-22 as follows:

> *“4-5 For some purposes, it may be sufficient to set as the formality that the parties use writing, or at least that the party against whom the transaction is to be enforced does so (either in effecting the transaction or in acknowledging it). It is perhaps natural also to require the party or parties to sign the written document: a signature can be seen as adding an element of seriousness to the transaction, giving clearer evidence of the individual's intention to be bound by the writing and in that sense authenticating it.*
>
> *4-11 Where a formality is set not merely as an evidential condition for the enforceability of a transaction, but as a substantive condition of the existence or validity of a transaction, it appears to be a more serious formality, designed to further also the other functions of formality such as the cautionary function, or a broader public function in ensuring that there is a document, or the entry on a register, before the transaction has its full legal effect. This is not to say that the law might not in the case of such formalities still sometimes admit exceptions, or allow a transaction which has not been properly formalised to have some legal effect, or even the full legal effect for which the transaction was required by law to be formalised. But a formality set as a substantive condition is generally designed to provide a higher level of protection of the transaction and of the parties (and, where appropriate, third parties). For example, when the Law Commission proposed to replace the evidential formality required for land contracts by a substantive formality, it did so consciously intending to affirm not only the evidential function, but also the cautionary and channelling function of written formalities in the case of land, and the need to provide a simple rule which provides greater clarity and certainty.*
>
> *5-22 Without the signature by or on behalf of each party on the same document, or on separate documents which are then exchanged, the contract does not come into existence.”*

38. In *Morris v Baron & Co* [1918] A.C. 1, 39 Lord Parmoor referred with approval to the passage in the judgment of Shearman J in *Williams v Moss' Empires Ltd* [1915] 3 K.B. 242 [246-247]

> *“The principle ... is where there is alleged to have been a variation of a written contract by a new parol contract, which incorporates some of the terms in the old contract, the new contract must be looked at in its entirety, and if the terms of the new*

contract when thus considered are such that by reason of the Statute of Frauds it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract … whenever parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing but is not in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract."

39. In *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* [2019] AC 119, Lord Sumption affirmed that *Foakes and Beer* remains good authority, stating [at paragraph 18] as follows:

> *18. That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in Foakes v Beer (1884) 9 App Cas 605: see in particular p 622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in In re Selectmove Ltd [1995] 1 WLR 474, and declined to follow Williams v Roffey. The reality is that any decision on this point is likely to involve a re-examination of the decision in Foakes v Beer. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum. [emphasis added]*

40. In *RTS Flexible Systems Ltd v Molkerrei Alois Muller GmbH & Co KG* [2010] 1 WLR 753, the UK Supreme Court stated as follows:

> *"Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they*

did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

Analysis

41. In my view, the Plaintiff's application should be granted for several reasons.

42. First, in respect of the downpayment, I am satisfied that the full $40,000 was paid to the Defendant as set out in Shawki3. I find merit in Mr. Harshaw's submissions that the Shawki3 Exhibit shows an email dated 8 December 2022 from Mr. Trott to Ms. Smith wherein Mr. Trott stated that the Plaintiff had paid the $40,0000 deposit and commenced work on the Property. Further, an email from Ms. Jones to Mr. Trott makes reference to the remaining balance of $150,000. Thus, I accept Mr. Harshaw's argument that if the full deposit of $40,000 was not paid, then it is likely that the Defendant or her counsel would have been seeking the amount that was due. Further, I accept that it is not contradicted that the full $40,000 was paid. In light of this reasoning, any argument that the contract is void or otherwise fails because the full amount of the downpayment was not paid falls away.

43. Second, it is not in dispute that the SPA was in writing. Mr. Williams' argument is that the purported variation, set out in emails, was not in writing and thus did not meet the requirements of section 3 of the Conveyancing Act. I disagree. To my mind, this is not a *Morris v Baron* case which concerned the replacing of an original contract required to be in writing with a new contract also required to be in writing – this was a variation. Section 3(1) of the Conveyancing Act requires that the agreement, or 'some memorandum or note thereof' be in writing and signed by the party to be charged or an authorized person. In my view, in the modern world of wide email use, the variation as set out in the emails between the lawyers was 'in writing' and the lawyers' signature blocks on the emails constituted signatures. Further, I accept that those lawyers were authorized to act on behalf of their clients. To that point there is no evidence that they were not so authorised to act for their clients. Thus, I find that the requirements of section 3(1) of the Conveyancing Act were met.

44. Third, it is clear by the evidence that the parties agreed to vary the SPA. In Ms. Smith's email dated 10 January 2023, she used the actual term "vary" when she stated "*I have spoken with our client and she has agreed to accept Mr. Shawki's offer to vary the Sales and Purchase Agreement* …". Thus, I rely on *Chitty on Contracts* (Thirty-Fourth Edition) at 25-034 in that the parties may effect a variation of the SPA by modifying or altering the terms by mutual agreement. I also rely on *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* and to Lord Sumption's reference to the judgment of Cardozo J in the Court of Appeal for the State of New York, which in essence set out that when parties do contract, they maintain their liberty to contract again. Thus, I agree with Mr. Harshaw's submission that there was nothing inhibiting the parties, through their lawyers, from agreeing to vary the SPA.

45. Fourth, in my view, the variation agreed between the parties was to amend the SPA so that the time limit of two years was no longer a term of the SPA and that the balance of $150,000 was to be paid once the Plaintiff obtained satisfactory financing. I reject Mr. William's submission that the SPA was unenforceable because it lacked the necessary consideration. In my view, this is not a *Foakes v Beer* context where there is a promise to accept part-payment in satisfaction of the whole or a promise to perform an existing obligation. To that point, I agree with Mr. Harshaw that pursuant to the SPA the Defendant was going to be paid the balance of $150,000 from any pre-construction funds and/or the sale of the first unit. As noted, the Covid pandemic restrictions impacted that term and thus the sale of the first unit did not occur. However, the variation would allow the Defendant to receive the balance of the $150,000 independent of any such sale of the first unit. Thus, in my view, the guaranteed receipt of the $150,000 in those circumstances was fresh consideration of the variation. I note here that there is an issue about the meaning of the term "30 to 60 days to complete", but I need not address that here in respect of the issue of consideration. Further, in my view, relying on *Williams v Roffey*, there were practical benefits capable of amounting to consideration although I do note that *MWB Business Exchange Centres Ltd* in essence left that issue open.

46. Fifth, Mr. Williams has urged the Court to consider all the correspondence between the parties, in particular, that the parties agreed to drafting a new form of replacement

agreement, which eventually never happened. Ms. Smith in her 10 January 2023 email proposed it and on 11 January 2023 Mr. Trott stated that his client was in agreement to the proposal, further indicating that he looked forward to receiving the draft replacement SPA. Thereafter, there were several chaser emails between the parties. Mr. Harshaw seeks to separate the proposal for drafting a new form of replacement agreement from the original agreement to vary the SPA, on the basis that it was 19 minutes later thus not a part of the original variation, that it was unilateral and it was not agreed. He also submits that there was no further agreement that varied or impacted upon the SPA. To those points, I do not agree with Mr. Harshaw that the events were separate as a result of time. It is clear that the parties did agree, in the correspondence, for a replacement SPA to be drafted. The evidence shows that a draft new agreement was exchanged and there were comments made and a reply pending before signature. However, in my view, I am bound to agree with Mr. Harshaw that in the full correspondence that flowed after the agreement to vary, there was no further agreement that varied the SPA or impacted upon it. Thus, the email of 10 January 2023 at 3:21pm was the clear acceptance of a variation. In my view, in relying on the cases of *Pennyfeathers Ltd* and *Rotam Agrochemical Co Ltd*, it is clear that the parties had the subjective intention of forming a binding contract and what had occurred between them would lead objectively to the conclusion that they intended to create legal relations.

47. In light of the above reasons, in respect of the Preliminary Issue, I find that there was at the date of the issue of the Writ of Summons in this matter a valid and subsisting SPA between the parties relating to the sale of the Property.

Conclusion

48. For the reasons above, I allow the Plaintiff's application.

49. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 18 June 2026

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HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE