Elements of a contract of sale – Part 5

Over the last few weeks we have been discussing elements of a contract of sale. This week, we continue our discussion of the various elements of a contract of sale.

I have previously mentioned that one of the common clauses that we find in an agreement of sale (OTP signed by both the seller and the buyer) is a non-variation clause. I made brief mention of this in blog no 53. A non-variation clause usually says:

1. Any variation to the agreement must be reduced to writing; and
2. It must be signed by the parties.

We already know that an agreement of sale of immovable property must be in writing and signed. Hence it makes sense that any changes to that agreement also need to be in writing and signed.

What happens when one of the parties indicates verbally that they are making a change to such an agreement? Let us take the very common example of an agreement of sale of immovable property that is subject to a suspensive condition that the buyer needs to obtain finance from a financial institution on security of a mortgage bond. The buyer changes their mind and decides to rather pay cash for the whole purchase price.

In the recent case (12 April 2024) of Christopher Charles Hughes v Nicolas Gargassoulas and Others, the Supreme Court of Appeal (SCA) dealt with the following:

1. The applicant being the seller of the property and the purchaser being the respondent, had entered into an agreement of sale of immovable property subject to a condition that the purchaser obtain approval for a mortgage bond by a particular date.
2. The relevant clause in the agreement also stated that the mortgage bond condition had been included in the agreement for the benefit of the purchaser and the purchaser was entitled to waive the condition by giving notice at any time prior to the fulfilment of the condition and that if the condition was not fulfilled or waived by that date, then the agreement would be null and void. In simple terms, the purchaser would obtain a mortgage loan or waive the suspensive condition relating to the loan and presumably pay cash for the full purchase price.
3. The agreement also contained a non-variation clause which said that no waiver of rights by any party shall be of any force and effect unless in writing and signed by the parties.
4. The purchaser did not personally waive the condition or obtain a mortgage loan by the relevant due date. However, prior to the due date, the conveyancer sent an email to the seller indicating that the purchaser had waived his right to obtain a mortgage loan.
5. The seller then granted the purchaser early occupation of the property, being prior to transfer.
6. Shortly after taking occupation, the purchaser was informed that there were no building plans for a part of the property. The purchaser then vacated the property.
7. The seller was of the view that the purchaser had repudiated his contractual obligations and that the deposit would retained as damages. Again, in simple terms, the seller's view was the conveyancer's secretary had sent an email regarding the waiver and so the agreement was valid. The purchaser repudiated their obligations and as damages, must therefore lose their deposit.
8. The purchaser was of the view that he had never applied for a waiver of the condition and as he had not done so and the mortgage loan had not been obtained by the relevant date, that the agreement was null and void.

The SCA agreed with the purchaser that there had been no valid waiver of the condition and that the agreement was in fact void. The seller had not proved that the purchaser had waived their right to obtain a mortgage loan and the conveyancer's office did not have the authority to waive the right on behalf of the purchaser.

What are the important lessons here for property practitioners (PPs)?

1. As a PP, read and understand your agreement of sale. As an example, if your agreement says that something must be done in writing, then it MUST BE DONE IN WRITING.
2. Be aware of the requirements of your agreement of sale and ensure that you follow these requirements.
3. Be careful about somebody doing something on someone's behalf, like in this case, the conveyancing secretary, if they do not have the right to do so.

Next week we will continue discussing various elements of the agreement of sale. Don't forget to read my Monday Contemplation each week. Previous blogs are available on various websites.