IN THE COURT OF APPEAL BELIZE
A.D. 2000

CIVIL APPEAL NO. 18 OF 2000

BETWEEN:

SHU HSAI LEE
FENG SHUN CHIU et al **Appellants**

AND

JABBOUR AFFIF **Respondent**

BEFORE:

The Honourable Mr. Justice Nicholas Liverpool - Justice of Appeal
The Honourable Mr. Justice Elliott Mottley - Justice of Appeal
The Honourable Mr. Justice Manuel Sosa - Justice of Appeal

APPEARANCES:

Mr. Michael Young, S.C. and Mr. Leo Bradley Jr. for the Appellants.
Mr. Fred Lumor for the Respondent.

2000: October 16 and 2001: March 8.

REASONS FOR DECISION

MOTTLEY, J.A.

On 11 day April 1995, Jabbour Affif, the respondent, agreed with Ching Hsien Chiu to sell him a property situated at No. 22 Gabourel Lane, Belize City at a price of (US) $300,000.00. Pursuant to this agreement, Ching Hsien Chiu paid to Jabbour Affif the price of (US) $100,000 by way of deposit.

The balance of the purchase money was to be paid by 11 May 1995 at which time the sale would be completed. It was an express term of the agreement that, if the purchaser failed to perform or observe the stipulations contained in the agreement, the purchaser would forfeit his deposit to the vendor who would retain it as liquidated damages for breach of contract.

It was also an expressed term of the contract that Jabbour Affif would repair and paint the roof of the property and paint the entire house, interior and exterior, before the closing date of 11 May 1995.

Ching Hsien Chiu had been let into possession of a portion of the upper flat of the premises. Mr. Jabbour Affif alone had access to the ground floor of the premises which he used as a warehouse.

On 17 September 1995, Ching Hsien Chiu died.

Letters of Administration to the Estate of Ching Hsien Chiu were issued on 21 January 1997 to Shu Hsai Lee and Feng Shun Chiu as administrators of his estate.

On 7 December 1995, Musa & Balderamos, attorneys-at-law for Jabbour Affif, wrote to the wife of Ching Hsien Chiu pointing out, inter alia, that her husband had agreed to purchase the property situated at 22 Gabourel Lane, Belize City for the price of (US) $300,000. They also pointed out that he paid a deposit of (US) $100,000 and

should have paid the balance of the purchase price of (US) $200,000 by 11 May, 1995.

The attorneys-at-law informed the wife that unless the balance of the purchase price was paid by 30 December 1995, their client would forfeit the deposit as liquidated damages for breach of contract. She was further advised that, should she remain in possession of the premises, she would be required to pay $2,500 rent per month for the upper floor of the premises.

By letter dated 10 January 1996, Barrow & Williams, attorneys-at-law for the wife, replied to the letter from Musa & Balderamos. They pointed out that “it was a condition of the contract that Mr. Affif repair the roof of the house and paint both the interior and exterior of the entire house by 11 May 1995”. The letter went on to indicate that Mr. Affif never repaired and painted the interior or exterior of the house and, as a result their client considered that Mr. Affif failed to perform his part of the contract and this amounted to a repudiation of the contract. They stated that their client accepted the repudiation and considered the contract at an end. The attorneys demanded that the deposit of (US) $100,000 that was paid to Mr. Affif as the deposit be returned no later than 31 January 1996.

By letter dated 19 January 1996 Musa & Balderamos informed Barrow & Williams that Mr. Affif had not only repaired and painted the roof of the building but had painted the entire house, interior and exterior. This letter pointed out that Mr. Affif also undertook and

carried out the tiling of the floors, and installed steel security doors and also new screens for all the windows. The costs of this extra work was (Belize) $13,941.34.

On 13 May 1997 Barrow & Williams, now acting as attorneys-at-law for the plaintiffs, Shu Hsai Lee and Feng Shun Chiu who had by this time qualified as the administrators of the Estate of Ching Hsien Chiu, wrote to Mr. Affif concerning the purported forfeiture of the deposit of (US) $100,000. They stated that:

> "…notwithstanding the claim that the (US) $100,000 was forfeited as liquidated damages, it is in fact a penalty given its disproportionate nature in relation to the loss you may have suffered from the alleged breach…".

Another demand was made for the return of the (US) $100,000. The attorneys pointed out that their clients would be prepared to pay the sum of (US) $10,000 as liquidated damages if it was determined that Ching Hsien Chiu was in breach of contract.

On 3 June 1997, Musa & Balderamos replied to the letter from Barrow & Williams. They pointed out that the sum of (US) $100,000 was paid by way of deposit as expressly stated in the agreement of 11 April 1995. They further stated that the balance of purchase price of (US) $200,000 was to be paid on or before 11 May 1995. After the signing of the agreement Ching Hsien Chiu was let into possession of the property. The attorneys indicated that, after his death, his wife

was allowed to remain in possession. She eventually gave up possession of the premises after receiving their letter of 7 December 1995 from Musa & Balderamos requesting the payment of the balance of purchase money by 30 December 1995 failing which the deposit of (US) $100,000 would be forfeited. The attorneys pointed out that since she did not pay the balance of the purchase money by 30 December and gave up possession of the premises Mr. Affif in accordance with the express provisions of the agreement for sale, clause 4, forfeited the deposit as liquidated damages. The attorney concluded that:

> "…in accordance with his undertaking under the agreement our client expended a considerable sum of money in repairing and painting the roof of the premises and painting the interior and the exterior of the building. In fact he went further at the request of Mr. & Mrs. Chiu he had also tiled the floor and installed new window and door screens and six steel doors for security.
>
> For you to now claim that the amount forfeited as liquidated damages was in fact a penalty does not do justice to the clear, express terms of the Agreement or to our client's more than reasonable forbearance in his treatment of Mrs. Chiu. Furthermore, it should be noted that our client was unable to rent these premises until very recently last month and suffered considerable loss

because of the failure of your client to complete the bargain".

On 11 September 1997 Shu Hsia Lee and Fen Shun Chiu as administrators of the estate of Chin Hsien Chiu deceased as plaintiffs filed an originating summons claiming against Jabbour Affif the following relief:

(i) A Declaration that the sum of (US) $100,000 paid by the Purchaser to the Vendor is a penalty.

(ii) A declaration that the Purchaser is entitled to relief from forfeiture.

(iii) An order that the Vendor return the sum of (US) $100,000 to the Purchaser with interest.

(iv) The cost of the application be paid to the Plaintiffs.

In their joint affidavit of 11 September 1997 the plaintiffs said that Ching Hsien Chiu did not pay the balance of the purchase price because the defendant had failed to paint the interior and exterior of the premises as expressly required by the agreement. As a result of this failure, the roof continued to leak.

They further alleged that at the time of his death on 17 September 1995, Ching Hsien Chiu was ready and willing to pay the balance of the purchase price if the defendant had performed his part of the

agreement to paint the interior and exterior of the premises and repair the leaking roof.

Mr. Lester Langdon, the Manager of the Belize Real Estate Ltd., W. Ford Young Real Estate Ltd. and Langdon Supply Ltd. filed an affidavit in support of the plaintiffs' claim. He stated that he was a real estate broker for more than fifteen years and as such he was familiar with the real estate practices in Belize. It was evidence that:

> "In contracts for the sale of land in Belize, it is an established and accepted practice for the purchaser to pay a 10% deposit on the purchase price to the seller."

The respondent filed an affidavit on 9 October 1997. He stated inter alia that Ching Hsien Chiu had been let into possession of the premises in accordance with his undertaking to repair and paint the roof of the premises and painted the entire building, interior and exterior. He produced and exhibited a bundle of receipts showing that he paid the sum of (BZ) $24,112.10 for repairs and painting of the roof of the building and painting the interior and exterior of the premises. He also produced and exhibited another bundle of receipts totaling (BZ) $11,909.35 which he paid for additional work such as tiling floors, installing new windows and door screens and security doors, which were installed on the request of the deceased.

An affidavit in support of the defendant was filed by Mr. Kenneth Llewellyn Munnings a retired public servant who had served as

Deputy Registrar in the Supreme Court Registry for more than twenty-nine years. He was aware of the real estate practices in Belize since, after his retirement, he had carried out various real estate transactions on his own behalf and on behalf of vendors and purchasers. As regards to the payment of 10% deposit he said:

> "There is no established or accepted practice in Belize for a purchaser to pay a 10% deposit on the purchase price to a seller. The amount or the percentage of deposits varies depending on the character of the parties as well as the quantum of the purchase price involved. It all depends on the agreement of the parties".

In delivering his judgment, Meerabux J found that the following facts were not a dispute: -

(a) The plaintiffs are the personal representatives of Ching Hsien Chiu, deceased.

(b) By an agreement in writing dated April 11, 1995 between Jabbour Affif and the deceased, the deceased agreed to purchase premises at No. 22 Gabourel Lane, Belize City for (US) $300,000.

(c) It was a term of the agreement that a deposit of (US) $100,000 be paid on signing the agreement and the balance of (US)$200,000 be paid on or before May 11, 1995. The deposit was duly paid to the defendant.

(d) It was also a term of the agreement that, should the deceased fail - to perform or observe the stipulations on his part in the agreement, his deposit shall be forfeited to the defendant as liquidated damages for breach of contract.

(e) The deceased did not pay the balance of (US) $200,000 and the defendant forfeited the deposit of (US)$100,000.

(f) The deceased was let into possession of a portion of the premises.

(g) It was a term of agreement that the defendant was to repair and paint the roof of the premises and paint the interior and exterior before May 11, 1995. There is dispute as to whether this was done in time or at all.

The judge summarized the written submissions of the attorney-at-law for the plaintiff in this way: -

(1) The sum of (US) $100,000 is a penalty which should not be forfeited but returned to the deceased with interest.

(2) At Common Law the general rule is that a sum deposited for breach of contract is to be forfeited. In Equity, the agreed sum is recoverable only if it constitutes liquidated damages – a genuine pre-estimate of the damage which arise from the breach of contract, but not if it is a penalty which is in the

nature of a threat fixed in terrorem of the other party.

He summarized the defendants' written submissions as follows:

(1) the plaintiff was let into full possession of the premises;

(2) the defendant complied fully with his undertaking to repair the roof, the interior and exterior of the premises and further installed security grills to the premises at the plaintiff's request;

(3) the plaintiff's family remained in possession of the premises after default in the payment of the balance of the purchase price vacating the premises in January, 1996;

(4) at the request of the deceased plaintiff's widow, the defendant agreed to an extension of seven months after the balance of the purchase price was due;

(5) due to the depressed state of the real estate business in Belize the defendant was-

(a) unable to sell the property, and

(b) unable to rent the premises until May 1997, for only six months, and the property has since remained vacant. The rental value for the upper floor is $2,500.00 and $1,500.00 for the lower floor;

(6) by the plaintiff's failure to complete the sale, the defendant has incurred $48,000.00 expenses and at least $96,000.00 in lost rental;

The issue with which the learned trial judge had to deal was whether or not the deposit of 30% was reasonable or was in the nature of a penalty intended to act in terrorem.

He referred to ***Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. Ltd. (1915) AC 79*** and cited a portion of the judgment by Lord Dunedin where he said (at page 86):

> "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage…
>
> The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract".

It is of interest to note at this stage that the judge omitted the concluding words of that sentence in the judgment "not as at the time of the breach."

The judge found that “the position at common law is that a party who has agreed that money paid as a deposit shall not be returnable on default even if that amount is penal in nature has no redress in law. He however went on to consider what was the equity restitution.”

After reviewing of a number of cases the judge concluded that “on the facts before me the deposit of (US) $100,000 was 33% of the purchase price.” He stated that he accepted “the argument that while the customary deposit may be 10% there was no rule or law which preclude a higher percentage of deposit depending on the circumstances of each case.”

He adopted what was said by Lord Browne-Wilkinson in ***Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd.*** **[1993] 2 ALL ER 370, 42 W.I.R. 253 (at page 257)**:

> “A Vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit.”

The learned judge referred to the following circumstances which he considered justified the forfeiture of the deposit:

(i) the plaintiff was let into possession of the premises after payment of the deposit. In *Stockloser v Johnson Romer, L.J.* in his dissenting judgment held the view that a party let into possession would

not be able to secure installments already paid and that the only relief should be to allow a late date for completion;

(ii) at the request of the plaintiff's widow, the defendant agreed to an extension of seven months for the payment of the balance of the purchase price;

(iii) the plaintiff's family remained in possession of the premises after default in payment of the balance of the purchase price until January 1996. I find that as a consequence of this, there was a loss of monthly rental of an income producing asset of approximately $2,500.00 to $4,000.00;

(iv) at the request of the deceased plaintiff, the defendant carried out additional expenditure totaling $11,909.35 and incurred expenses of $24,112.10 pursuant to the purchase agreement;

(v) the subsequent depressed state of the property market has led to the further loss of the income producing asset both on a rental and sale basis.

He found that special circumstances existed which justified the forfeiture of the deposit of US$100,000. He went on to state that the vendor's conduct was not open to criticism and his retention of the said deposit already paid does not in itself constitute unconscionable conduct.

Counsel for the appellant sought and obtained leave to amend his ground of appeal.

The amended grounds of appeal read as follows:

(1) The Learned Trial Judge erred in finding that in consequence of the default in payment of the balance of the purchase price, there was a loss of monthly rental of approximately $2,500.00 to $4,000.00. There was no or inadequate evidence to support that finding.

(2) The Learned Trial Judge erred in finding that “the subsequent depressed state of the property market has led to the further loss of the income producing asset both on a rental and sale basis”. There was no evidence to support that finding.

(3) The Learned Trial Judge erred in not finding that the provision for the forfeiture of the US$100,000 being 33% of the purchase price was in the nature of a penalty and not a genuine liquidated pre-estimate of damages.

(4) The Learned Trial Judge erroneously took into consideration the factors of:

(i) the plaintiff being let into possession

(ii) extension of seven months for the payment of the balance of the purchase price

(iii) the plaintiff's family remaining in possession after default in paying the purchase price

(iv) the expenditure of $11,909.35 and $23,112.10

since these were irrelevant in determining whether the forfeiture clause was a penalty. The relevant factors would be those existing at the time of the Agreement.

(5) The Learned Judge erred in finding that the forfeiture of the Plaintiffs' deposit was justified in the circumstances.

As previously stated, the issue to be determined is whether the sum of (US) $100,000 is to be regarded as a genuine deposit and should be forfeited as liquidated damages as being a genuine pre-estimate of the damages suffered by the vendor or a penalty intended to act in terrorem. Guidance on the approach to this matter is to be found in Lord Dunedin in ***Dunlop Pneumatic Tyre Co., Ltd. v New Garage & Motor Co. Ltd.*** **(1915) AC 79** where he said (***at page 86***):

(1) "Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

(2) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the

essence of liquidated damages is a genuine covenanted pre-estimate of damage.

(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract and not as the time of the breach."

At page 87 Lord Dunedin gave examples of the various tests which he suggested might be helpful in constructing the contract. He said:

(a) "It will be held to be a penalty if the sum stipulated for is so extravagant and unconscionable an amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach".

It should be noted that the contract is to be construed in the light of the circumstances that existed at the date of the making of the contract and not at the time of the breach.

The question whether a deposit in excess of 10% paid under a contract for sale of land can be lawfully forfeited by a vendor where the purchaser failed to complete the purchase on the date fixed by the contract came before the Privy Council in ***Workers Trust & Merchant Bank Ltd V Dojap Investment Ltd*****. [1993] 2 ALL ER**

370,42 W.I.R. 253, by way of an appeal from the Court of Appeal Jamaica.

On 5 October 1989 Workers Trust and Merchant Bank Ltd (the bank) as second mortgagee sold certain premises at auction for $11,500,000.00. A deposit of $2,875,000.00, being 25% of the purchase price, was paid by Dojap Investment Ltd, (Dojap). The remainder of the purchase price was to be paid within 14 days of the date of the auction when the sale would be completed. Time was made of essence of the contract. The contract provided for forfeiture of the deposit if Dojap failed to observe or comply with any of its contractual obligations. Dojap did not pay the balance of the purchase on the date fixed for completion. Four days after the date fixed for completion the bank sent a letter to Dojap rescinding the "contract and purporting to forfeit the deposit". Dojap commenced proceedings against the bank claiming inter alia relief from forfeiture of the deposit.

Lord Browne-Wilkinson in giving judgment of the Board said (at page 373):

> "In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur

by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10 percent of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract…..The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money. The history of law of deposits can be traced to the Roman law of *arra*, and possibly further back still: see *Howe v Smith* [1884] 27 Ch 89, at 101-102 per Fry LJ. Ever since the decision in *Howe v Smith,* the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price: in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture."

Lord Browne-Wilkinson recognized that the special treatment afforded to deposit was open to abuse by parties to a contract who by attaching the label “deposit” to any penalty, could escape the general rule that a penalty is unenforceable. He referred to the cases ***Stockloser v Johnson*** **[1954] 1 ALL ER 630**, and ***Linggi Plantation Ltd v Jagatheesan*** **[1972] 1 MLJ 89.**

In ***Stockloser v Johnson***, Denning, LJ in discussing the power of the court to relieve against forfeiture said obiter (at page 638):

> “Again suppose that a vendor of property, in lieu of the usual 10 percent deposit, stipulates for an initial payment of fifty per cent of the price as a deposit and part payment and later when the purchaser fails to complete, the vendor re-sell the property at a profit and in addition claims to forfeit the fifty per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages”.

Lord Hailsham delivering the opinion of the Board in ***Linggi Plantations Ltd v Jagatheesan*** (supra) said (at page 94):

> “It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so called and even to forfeiture which

> turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage".

Their Lordships made it absolutely clear that parties were not permitted to attach the incidents of a deposit to the payment of a sum of money unless the sum is reasonable as earnest money. It is only if the deposit operates as earnest money and not as a penalty can it be paid that the sum paid was reasonable and therefore a true deposit.

The correct test therefore to be applied by the trial judge was whether or not the payment of (US) $100,000 (or approximate 33%) of the purchase price was 'reasonable as being in line with the traditional concept of earnest money or was in truth a penalty intended to act in terrorem."

Meerabux J. accepted that the customary practice in dealing with sale of land was the payment of a deposit of 10%. There was

adequate evidence on which he could base this finding. In his affidavit, Lester Langdon stated that "in contracts for the sale of land in Belize, it is an established and accepted practice for the purchaser to pay a 10% deposit on the purchase price."

The learned trial judge referred to the statement by Lord Browne-Wilkinson that "a vendor who seeks to obtain a larger amount by way of a forfeitable deposit must show special circumstances which justify such a deposit. He pointed out what he considered were the special circumstances existed which justified the forfeiture of the deposit of one hundred thousand dollars United States currency and allow the vendor to retain the money.

These special circumstances were:

(i) the plaintiff was let into possession of the premises after payment of the deposit.

(ii) at the request of the plaintiff's widow, the defendant agreed to an extension of seven months for the payment of the balance of the purchase price;

(iii) the plaintiff's family remained in possession of the premises after default in payment of the balance of the purchase price until January 1996. I find that as a consequence of this, there was a loss of monthly rental of an income producing asset of approximately $2,500.00 to $4,000.00;

(iv) at the request of the deceased plaintiff, the defendant

carried out additional expenditure totaling $11,909.35 and incurred expenses of $24,112.10 pursuant to the purchase agreement;

(v) the subsequent depressed state of the property market has led to the further loss of the income producing asset both on a rental and sale basis.

These factors which the judge took into consideration all occurred after the making of the contract.

Having accepted the argument that 10% was the customary deposit in contracts for the sale of land, the test which the judge ought to have applied was, whether or not the deposit of approximately 33% in this case “was reasonable as being in line with the traditional concept of earnest money or was a true penalty intended to act in terrorem.”

The judge fell into error in taking into consideration the circumstances, all of which came into existence after the making of the contract. In so doing he acted contrary to what Lord Dunedin said in ***Dunlop Pneumatic Tyre Co., Ltd v New Garage & Motor Co., Ltd*. (at page 86)**:

> “The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of

each particular contract, judged of as at the time of the making of the contract".

In this case there is ample evidence to show that the usual practice in the purchase of land in Belize is to pay a deposit of 10% of the purchase price. The payment of (US) $100,000 or approximately 33% of purchase price by way of deposit was in our opinion not in line with the accepted practice in Belize and "was in truth a penalty intended to act in terrorem."

It is for these reasons that at the conclusion of the appeal we allowed the appeal and made the following orders:

(I) A declaration that the sum of (US) $100,000 paid by the purchaser to the vendor is a penalty;

(II) A declaration that the purchaser is entitled to relief from forfeiture;

(III) An order that the respondent forthwith repay to the appellant the sum of (US) $73,000 (being part of the deposit) together with interest at 8% per annum from 15 January 1996 down to the date of actual payment;

(IV) An inquiry as to the damage, if any, suffered by the respondent by reason of the appellants' failure to complete the contract;

(V) The sum (if any) found due under the inquiry as to damages be deducted from the remainder of the

deposit (being US$27,000) and that the balance of the sum of $27,000 be paid to the appellants with interest as above;

(VI) An order that the respondent pay the appellants' costs here and in the court below;

I have read the judgment to be delivered by Mottley J.A. I agree with the reasons which he gives for allowing the appeal.

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LIVERPOOL, J.A.

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MOTTLEY, J.A.

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SOSA, J.A.