THE SUPREME COURT OF BELIZE 2003

ACTION NO. 311 OF 2003

BETWEEN:	CLIFFORD WHITING EMILY WHITING	CLAIMANTS
	AND	
	GRANTWELL LIMITED D.B.A. COLDWELL BANKERS	DEFENDANTS

Ms. N. Badillo for the claimants
Mr. L. Welch, for the defendant

AWICH J.

29.10.2009 J U D G E M E N T

1. *Notes: Contract; whether there has been a breach of a contract for the sale and purchase of land, a unit in a condominium building; whether the purchasers repudiated the contract and therefore there was a breach of the contract; whether according to a clause in the contract two down payments, one described as 'earnest money deposit' the other simply as 'down payment' should be forfeited – whether intervention by equity applies.*

2. On 18.4.2003, the two claimants, Clifford Whiting and Emily Whiting, signed an agreement for the sale and purchase of one strata

unit, No. 15, in a condominium building in San Pedro, a popular tourist destination in Belize. They were the purchasers. The first defendant, Grantwell Ltd, was the vendor. The second defendant, Crystal Properties Ltd, (d.b.a Coldwell Banker), was the agent of the first defendant. One Mr. Don J. Embry, signed the agreement for Grantwell Banker Ltd.

3. The purchase price was US $179,500.00 (one hundred seventy nine thousand and five hundred). The agreement provided at paragraph B. 4 for, "down payment", in two parts. The first part, was 1% of the purchase price; it was described as, "earnest money deposit", or simply "earnest deposit". It was payable, "at the time of this agreement". The second part was 19%, described as, "the remaining 19% of the down payment"; it was payable, "at the time of the acceptance of this agreement." There was also a provision that: "the unpaid principal balance in the amount of $143,600 USD, shall be paid in equal monthly instalments of $1,543.13 USD…"

4. On 18.4.2003, the same day the agreement was signed, the purchasers paid US $1,795.00. (one thousand seven hundred and ninety five)

which was 1%. Twelve days later on 1.5.2003, they paid US $34,105.00, (thirty four thousand one hundred and five), which was 19%, thus completing the down payment. The two payments were made through the second defendant.

5. Then in a letter dated 20.5.2003, the purchasers informed the vendors that they did not wish to proceed with the agreement. They offered to forfeit furniture in the unit, that they said had been purchased with the first payment of US $1,795.00. They also, "offered to pay a fair amount for the time and efforts", of the defendants-vendors. The communication was rejected by the defendants in an email dated 31.5.2003, on the ground that the agreement of 18.4.2003 was, "legal and binding", and so the first defendant was entitled to keep both down payment sums.

6. ***Determination.***

Uncertainty.

The first submission by learned counsel Ms. N. Badillo for the claimants- purchasers is that the agreement between the parties is, "void for uncertainty", because the intention of the parties cannot be

ascertained from it. She argues that, the "provisions" in the agreement, "are so vague and indefinite". Counsel points in particular to paragraph B.10 of the agreement as the paragraph that introduces uncertainty. She urges that the agreement be declared void for uncertainty, and moneys paid under it by the claimants be returned by the defendants.

7. I suppose, by pointing to paragraph B.10 as the offending paragraph, counsel acknowledges that if that paragraph was excluded, the intentions of the parties as set out in the rest of the agreement, would be clear and certain.

8. In my view, the words in the rest of the paragraphs of the agreement do convey the intention that: the defendants intended to sell, that is, to transfer the estate in condominium unit, No. 15, and the claimants intended to buy it at a definite price of US$ 179,500.00. The intended manner of payment is stated, and responsibilities for taxes and costs are also stated. All those necessary points of the agreement are unambiguous and certain.

9. The crux of that first submission by counsel is that the provisions in paragraph B.10 introduce uncertainty by introducing into the agreement, the meaning that the entire agreement is a conditional agreement, subject to the conditions set out in clauses (a) to (e) of the paragraph.

10. I do not accept the submission. The provisions in the paragraph are these:

> "10 All additional provision(s) are contingent upon this agreement.
>
> a) Subject to title opinion by Purchasers(s)' attorney.
>
> b) Subject to contract being recorded by Purchaser(s)'attorney.
>
> c) Subject to all arrears of property taxes being paid by seller(s) at time of close.
>
> d) Earnest money deposit will be fully refundable if contract is not accepted by both the Purchasers(s) and Sellers(s) Less 1%.

e) All facsimile signatures shall be binding to this agreement".

11. The plain and literal meaning of the words of the introductory sentence is that paragraph B.10 is concerned with, "additional provisions". That means it is concerned with terms that may be added to the agreement after signing. Those additional terms were not yet known and could not affect the agreement as proposed for signing. There is no need for the court to invoke other principles of interpretation where the plain literal meaning of a word, a sentence, a passage or entire document is clear, as it is in this case – see ***Britishmovietonews v London and District Cinemas Ltd; [1952] A.C. 166.***

12. Besides the plain literal meaning of the introductory sentence, there is another point. The provisions in paragraph B.10 are precautionary steps to ensure that a valid unencumbered title is passed, and that earnest money is returned if parties fail to conclude an agreement. The court has before it an agreement signed and concluded. The provisions in paragraph B.10 no longer apply to the present

agreement. They would sure apply to terms intended to vary the agreement.

13. The two explanations I have given do resolve any supposed uncertainty in the agreement, in my view. I shall add however that, it is a rule of interpretation that in cases of contract, will, statute, indeed of any written document, courts do not hold the terms therein void for uncertainty unless it is utterly impossible to put a meaning to them – see ***Fawcett Properties Ltd v Buckingham County Council [1961] A.C. 636 H.L.*** In this claim, I am able to put meanings to the individual paragraphs of the agreement of 18.4.2003, and to the entire agreement read as a whole. My decision is that the provisions in paragraph B.10 of the agreement do not introduce uncertainty about what the parties agreed to, including their obligations. The agreement of 18.4.2003, between the parties is not vague and void for uncertainty.

14. *Whether there was breach of the agreement.*

According to the evidence, what happened in the transaction between

the parties is this. The parties agreed the terms of the agreement and signed it on 18.4.2003. On the same day, the claimants started to carry out their obligations under the agreement; they paid a down payment described variously as, “earnest money deposit”, or “earnest deposit”, which was 1% of the purchase price. Twelve days later on 1.5.2003, they paid another “down payment”, it was 19% of the purchase price. Then the claimants believing that they may lose their job and not be able to pay the instalments of the purchase price, decided not to continue with the purchase of the property. On 20.5.2003, nineteen days after the second payment, they informed the first defendant that they would not continue with the purchase. They offered to forfeit the first down payment and, “to pay a fair amount for time and efforts”, of the defendants. They had not taken possession of the property.

15. The above facts show that there has been an express repudiation of the agreement by the claimants. The repudiation was an anticipatory one in respect of their remaining obligations. The general rule is that the injured party, the defendants in this claim, may accept the repudiation and treat it as a breach of the agreement right away, stop carrying out

their own obligations under the agreement, and right away claim damages that they may have suffered; or they may regard the agreement as still subsisting, in which case the injured party must carry out their own obligations under it, and finally claim damages for breach – see ***Mersey Steel and Iron Co. v Naylor Benzon & Co. (1884) 9 App. Cas. 434; Bradley v Newson [1919] AC. 16,*** and also, ***Hayman v Darwin Ltd [1942] A.C. 356; [1942] 1All E.R. 350.***

16. The defendants in this claim did not accept the anticipatory breach. They wrote to the claimants contending that the agreement between the claimants and them was, "legal and binding". They did not proceed to make claims for damages. They were entitled to reject the offer of anticipatory breach. That meant that the defendants elected to proceed with the agreement, and wait to see whether the claimants would fail to carry out their obligations next due, such as accepting tender of possession of the condominium unit and paying purchase price instalments. In that event, The defendants would then treat the failure of the claimants as the breach of agreement and would sue for damages – see ***Hurbutt's Plasticine Production Ltd v Wayne Tank***

and Pump Co. Ltd [1970] 2All E.R. 513 and also ***R.V. Ward Ltd v Bignall [1967] 2 All E.R. 449.***

17. The evidence does not show that the defendants carried out their own obligations under the agreement. There has been no evidence, for instance, to prove that the defendants tendered possession of the property and memorandum of transfer of title to the claimants. Technically the defendants themselves breached the agreement which they elected to regard as subsisting despite the anticipatory breach. The case, ***R. V. Ward Ltd v Bignall,*** illustrates the point.

18. But the claimants did not plead breach by the defendants following the rejection by the defendants of the anticipatory breach, and the claimants did not advance it in the conduct of their case. The evidence shows that the claimants would not have accepted possession of the property and of memorandum of transfer of title anyway. Their desire was to end the purchase of the property because they expected a supervening event that would cause them to be unable to meet payment of instalments of the purchase price.

19. In view of the above, I consider that failure of the defendants to proceed to carry out their own obligations under the agreement after they had rejected the anticipatory breach, did not have any effect on the claim of the claimants. Not surprising, the claimants did not claim any loss as the result of the failure by the defendants to carry out their obligations. On the other hand, the defendants did not suffer loss beyond what can be compensated for with the offer made by the claimants. That must be the reason for the defendants not making a counterclaim for damages against the claimants; the defendants simply resist the claim for the return of the two payments made by the claimants.

20. *Whether forfeiture of the two down payments is justified.*

The main issue in this claim is whether the claimants are entitled to the return of all or part of the down payments totalling US$35,900.00, which was agreed would become 20% of the purchase price. Counsel for the claimants submits that the claimants are entitled to the return of the sum, but would accept a deduction which represents a fair sum for the time and efforts of the defendants. Counsel bases her

submission on the case law in, ***Dunlop Pneumatic Tyre Co. Ltd v New Georgia and Motor Co. Ltd. [1915] A.C. 79.***

21. The facts of ***Dunlop Pneumatic Tyre Co.*** case, are quite dissimilar to the facts of this case, and the point of law is somewhat different from the point here. In that case, the parties in a sale of goods contract agreed that the purchaser would not undercut, that is, sell the seller's products at prices lower than those on the price list provided by the seller. In the event of breach the purchaser was to pay £5 as liquidated damages for each breach. The purchaser, upon breach by it, claimed that the sum was penalty, not liquidated damages and so, it was not liable to pay. In the House of Lords it was held that the sum was a *fair pre-estimate of probable damages* and not unconscionable; it was not a penalty, the buyer was liable to pay it under the contract.

22. In the case, the question of law was whether a sum to be paid as *liquidated damges* under the contract in the event of breach, was actually *a penalty* and therefore not payable. In this claim, the question is, whether sums already paid in pursuance of the agreement may be retained by the vendors upon breach by the purchasers. The

difficulty about forfeiture of sums already paid arise because of these points. The sum is paid as part of a purchase price. As soon as the vendor receives it the sum belongs to him absolutely. And there is usually a forfeiture clause in the contract, allowing the vendor to keep the payment. The contract is a free bargain.

23. The approach of court in deciding whether the sum paid may be forfeited or returned, is to first look at the agreement in order to determine the nature of the payment in question, and whether there is any provision for forfeiture of the sum. Then court applies the rule applicable to such a sum.

24. Generally a sum of money paid as a deposit, which is earnest money, in pursuance of a contract of sale, to hold the purchaser to performance of the contract, is not refundable when the purchaser has repudiated the contract or otherwise breached the contract and the vendor has rescinded it. A clear statement of that law is in ***Howe v Smith (1884) 27 Ch. D.89.*** On the other hand, a sum paid as part of the purchase price is returnable unless the contract provides for its forfeiture; and even when forfeiture is provided for, the sum may be

returnable in circumstances of fraud, sharp practice and other unconscionable circumstances. ***Mayson v Clouet and Another, [1924] AC 980,*** and ***Stockloser v Johnson [1954] 2WLR 439,*** are the authorities. In the latter case, their Lordships said that the relief from forfeiture clause, or strict time of performance is a jurisdiction in equity.

25. In, ***Mayson v Clouet and Another,*** a contract of sale of land provided for payment of a deposit immediately, then two instalments of 10% each of the purchase price, and the final balance upon the vendor producing certificate of completion of a building on the land. If the purchaser defaulted the vendor would rescind the contract, and the purchaser would forfeit payments made. The purchaser failed to pay the last instalment and the vendor rescinded the contract and retained the sums paid. The purchaser sued for return of the instalments. The Privy Council held that, although the purchaser defaulted, the two instalments were recoverable since the contract distinguished between the deposit and the instalments, and provided for forfeiture of the deposit.

26. ***Howe v Smith,*** was a similar case. The purchaser paid £500 "as a deposit and in part payment of the purchase money". He failed to pay the remainder of the purchase price despite extensions of time. He brought a claim for specific performance of the contract. His claim failed. On appeal, he lost the claim for specific performance, but the Court of Appeal granted leave and considered the question as to whether the purchaser was entitled to the return of the deposit. The Court decided that although the deposit was to be taken as part payment of the purchase price when the contract was completed, it was also paid as a guarantee for the performance of the contract, and the purchaser having failed to perform his contract within a reasonable time, had no right to the return of the deposit. Cotton L.J. in his judgment quoted with approval the statement of Barron Pollock in, ***Collins v Stemson 11Q.b.D 142,*** that: *"According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit".* The case of, ***Ex parte Barrell, Law Rep. 10 Ch. 512,*** was also cited to support that law.

27. The crucial provisions in the agreement of 18.4.2003, which will identify the nature of the down payments, are the following:

> "B …
>
> "4. The purchaser(s) agrees to pay a down payment of 1% at the time of the acceptance of this agreement. This payment is divided into two parts as follows:
>
> 1) At the time of this agreement, an earnest money deposit of 1% of the offered purchase price, is to be paid to Coldwell Banker Crystal Properties Ltd escrow account, in the amount of $1,795.00 USD one thousand seven hundred ninety five 00/100. This earnest deposit is to be paid by credit card, wire transfer or cash and is refundable if this agreement is not accepted by Seller(s). This earnest deposit will not be refundable if for any reason the purchaser(s) decides to cancel this contract to purchase.
>
> 2) At the time of the acceptance of this agreement, the remaining 19% of the down payment is to be paid to Coldwell Banker Crystal Properties Ltd's escrow

account, in the amount of $34,105.00 USD, (thirty four thousand one hundred and five 00/100.

5. The balance of the purchase price is to be paid according to the following schedule:

   The unpaid balance in the amount of $143, 600 USD shall be paid in equal monthly instalment payments of $1,543.13 USD, including interest at the rate of 10%..."

28. The meaning of paragraph B.4 read as a whole, is that the whole down payment is 20%, despite it being stated as 1% in the first line. It must be 20% in order for it to be payable in two parts of 1% and 19%. The first part, namely, 1% (US$1,795.00) was payable "at the time of this agreement", that is, in the course of agreeing the terms of the agreement. It was described as, "an earnest money deposit". That means it was a deposit paid as a guarantee that the purchasers would perform the agreement between the parties.

29. The purchasers repudiated the agreement, albeit for prudent reason. The law is that they lose the deposit sum of US$1,795.00, the so

called ‘earnest money deposit’, eventhough had the agreement been carried out the earnest deposit would have converted to part of the purchase price. The purchasers have offered to lose the deposit which they say was used to purchase furniture for the condominium unit. Their decision conforms to the law. This judgment confirms their decision to forfeit the money paid as earnest money deposit, whatever use the defendants may have put the money to.

30. The second payment of US$ 34, 105.00 which was payable, “at the time of the acceptance of this agreement”, was described as, “the remaining 19% of the down payment”. Unlike the first, the second payment was not described as earnest money or as deposit; and the provision for it was not followed immediately with a provision for its forfeiture in the event the purchasers cancelled the agreement. From the context of the agreement, the second payment of US$34,105.00 was not an earnest money deposit; it was not paid as a guarantee that the purchasers would perform the agreement. It was a down payment made purely as part of the purchase price. It cannot be forfeited merely for the same reason for the forfeiture of the first payment.

Forfeiture of the second payment must depend on other provisions for forfeiture in the agreement.

31. Paragraph B.8 does provide for forfeiture generally. It states:

> "B. …
>
> 8. In the event that the Purchaser(s) failed to make the aforesaid payments, either principal or interest, or any part thereof, within 30 days of due, or fails to perform any of the provisions contained herein, the Seller(s) has the right to serve the Purchaser(s) with notice of failure to pay. At that time, all rights and interest hereby acquired by the Purchaser(s) shall be forfeited and shall utterly cease and terminate. All moneys, (payments or deposits), that have been paid to the Seller(s) and/or their Broker shall be forfeited and belong to the Seller(s) and/or Broker as liquidated damages. The aforementioned property shall immediately revert to the Seller(s) as absolutely, fully and perfectly as if this agreement had never

been made without any right of the Purchaser(s) for reclamation or compensation for monies or property paid or improvements made".

32. According to the paragraph, "all monies (payments or deposits) that have been paid to the seller… shall be forfeited… as liquidated damages". It may be said that the provision is a result of a free bargain between contracting parties, and it is a principle in the law of contract that courts must not interfere with the result of a free bargain between parties who have capacity. On the other hand, I would like to note that, it is also a principle in the law of contract that, the usual relief for breach of a contract is an award for damages for losses that are not remote, occasioned by the breach. So, none of the two statements of law is an absolute statement.

33. The paragraph makes it clear that, all monies forfeited are to be regarded as liquidated damages. It is the law that, it is not enough to label a payment, 'liquidated damages'; the payment must be in the true nature of damages in the circumstances of the subject matter of the contract and breach thereof. The provision in paragraph B.8 can

cover liquidated damages and penalty, depending on the proportion of the sum of money paid in relation to the damages actually occasioned. Given the evidence here, the sum that the defendant would like to retain would be regarded as a penalty.

34. In this claim, the question however, is not so much as to whether the payments made and said to be forfeited are penalty payments; rather whether despite the forfeiture clause in the agreement, the payments are returnable.

35. The evidence shows that the claimants have paid a total of US$35,900.00 to the defendants. The only benefit they derived from the agreement was that Unit 15 in the condominium may have been available for them to take possession of since 1.5.2003, eventhough they did not take possession of it in the 19 days before they repudiated the agreement. The defendants have not adduced evidence of any other offer to buy the condominium unit, that they let go because of their agreement with the claimants. They have not even led evidence of details of expenses attending to the sale to the claimants. I shall however, assume that the usual expenses of sale of real property were

incurred, and that the agent, the second defendant, would have been entitled to commission of an agent. I would fix the commission at no more than 5% that is, US$8,975.00.

36. So, based on the evidence, especially that, the agreement differentiated between 'earnest money deposit' and the 'other part payment'; and bearing in mind the provision in the agreement for forfeiture of moneys paid, and further, taking into consideration the extent of probable loss to the defendants resulting from the breach by the claimants of the agreement, and that the claimants took no benefit, I hold that it would be unconscionable and permissive of sharp practice to allow the defendants to retain all the moneys paid, which sum is large. This court invokes equity and equity relieves the purchasers from forfeiture of the second payment, despite express stipulation of forfeiture in the agreement.

37. The defendants are entitled to retain the 'earnest money deposit' of US$1,795.00, and US$8,975.00 representing 5% commission that is usually paid to an agent in this type of transaction. In all, the defendants are entitled to retain a total of US$10,770.00.

38. Accordingly, the claimants are entitled to the return from the first defendant, of US $25,130.00. Interest is payable on the sum at 6% per annum from 27.6.2003, until full payment. The second defendant was an agent; and the claimants knew.

39. Costs to be agreed or taxed are awarded to the claimants against the first defendant. No costs are awarded against or in favour of the second defendant.

40. Delivered this Thursday 29th October 2009
At the Supreme Court
Belize City

Sam Lungole Awich
Judge
Supreme Court