THE SUPREME COURT OF BELIZE 2002

ACTION NO. 346 OF 2002

BETWEEN: RUDOLPH SANCHEZ CLAIMANTS

AND

PAUL BRADLEY JR DEFENDANTS

Mr. Oscar Sabido S.C., for the claimant.
Ms. Velda Flowers for the defendant.

AWICH J.

16.10.2009 J U D G E M E N T

1. *Notes: Sale of a quarry business and assets; purchase price payable by instalments. Performance or breach of contract; a small number of the instalments of the purchase prices paid; whether there has been performance or breach of the agreements; whether there has been substantial performance; whether there has been a breach of a fundamental term, a condition of the agreements; whether the vendor was entitled to take back possession of the business.*
Civil Case Procedure; whether the terms of an order made on an application for an interim order are in effect those of a final order; what is the effect?

2. The claimant, Rodolfo Sanchez, and the defendant, Paul Bradley signed an agreement on unspecified day in March, 2002. The heading

of the agreement was, “Agreement to purchase Sand and Gravel Enterprise”. The purchaser is now the claimant, the vendor is the defendant. The purchase price was stated in the agreement as $700,000.00, payable by instalments of, $30,000.00 in March 2002, $20,000.00 in April, and equal instalments thereafter, the last to be $30,000.00 on 30.9.2002. The agreement also stated that the vendor would sell to the purchaser a lease or title to ten acres of land on which the quarry business was operated.

3. Later on 19 April, 2002, the parties signed a supplementary agreement. It provided for the claimant taking over a bank loan to the defendant in the sum of $471,000.00 in respect of the business, and for the claimant acquiring an equipment known as, “320 Excavator 1999 Cat”, which may have belonged to one Ms. Hart, but was in the possession of the defendant. The agreement further provided that the claimant would take over payment of the monthly instalment of $9,050.00 for the business loan, and another monthly payment of instalment of $8,500.00 in respect of the loan for the excavator. The claimant would make the payments until the loans were paid up.

4. In the course of finalizing the agreements the claimant took possession of the business and equipment, including the 320 Excavator. He also made some payments pursuant to, but not strictly according to the agreements.

5. There was dissatisfaction on both sides regarding the carrying out of the terms of the agreements. The defendant was dissatisfied with payment of the instalments due. The claimant was dissatisfied with the mechanical conditions of some items of the equipment, the negotiation of an agreement that would permit the claimant to use the defendant's properties as securities for the loans, and with lack of progress in the transfer of title or lease of the ten acre land.

6. The claimant has claimed that the defendant breached the two agreements by wrongfully and forcibly ejecting the claimant from the quarry site and taking over the site, all items of equipment, stock of stones and gravels, and thus the business. In the writ of summons, the claimant indorsed the reliefs of specific performance of the agreements and a court declaration that he was entitled to, "a mandatory injunction order", requiring the defendant to return the

business to the claimant. In the alternative, he indorsed damages for breach of contract. However, in the statement of claim the claimant claimed only the relief of, "damages for breach of contract in the sum of $6,112,269.00, interest and costs". He abandoned the reliefs of specific performance and an injunction order. The relief to be determined is therefore damages only.

7. The defendant admitted the two written agreements, but added that they formed one agreement, and that the complete agreement between them was partly written and partly oral. In particular, the defendant admitted that he had sold the business known as Sand and Gravel Enterprise, and he admitted the clause regarding taking over the equipment, 320 Excavator 1999 Cat, and the clause regarding the claimant taking over the defendant's loans. He also admitted having taken back the quarry business and equipment, but denied that he used or threatened force to do so. He denied that there was a final agreement to sell the ten acres of land, and denied most of the interpretations ascribed to the agreements by the claimant.

8. The defendant then proceeded to counterclaim that, the claimant had failed to make full payments of the instalments of the purchase price of the business, and failed to make full payments of the instalments for the loan regarding the 320 Excavator. He counterclaimed further that, the claimant had repudiated the two agreements, and the defendant was entitled to take back possession of the business; and Ms. Hart, was entitled to take back the 320 Excavator. He also contested the quantity of stock he took over, and the computation of loss claimed by the claimant. For reliefs the defendant claimed: damages for loss of profit from the quarry business in the months of May and June; damages for forfeiture of the 320 Excavator; and damages for breach of the two agreements.

9. ***Determination.***

This claim and counterclaim have been complicated by an order of court made by a judge on 17.7.2002, and amended on 30.7.2002. The order was made on an application by the claimant, for an interim injunction order restraining the defendant from taking possession of the quarry and business. In my view, the terms of the order were of a final order, not of an interim one. Whether it was the correct or

erroneous order is not for me to say, because it was an order made by another trial judge.

10. The terms of the order as originally made on 17.7.2002, are the following:

> **"BEFORE** The Honourable ….. **IN CHAMBERS**
>
> The 17th day of July, 2002
>
> The Plaintiff having applied by Summons in Chambers for an Order that the Defendant forthwith handover and further desist from occupying **ALL THAT** piece of parcel of land comprising 10 acres situate near mile 34 on the Western Highway along a feeder road 2 miles in and that the Defendant forthwith hand over all equipment and machinery (chattels) situate thereon as described in the Agreement between the Plaintiff and Defendant
>
> **AND UPON** reading the affidavit and exhibits of the Plaintiff dated the 5th day of July, 2002 and filed herein and the affidavit and the exhibits of the Defendant in response dated July 16th 2002, and filed herein

IT IS ORDERED THAT: The plaintiff pay the defendant the sum of $29,150.00 by 26th July 2002, failing to do so, the matter will stand dismissed. Payment must be by way of certified check or cash. Upon payment, defendant should hand over the property to plaintiff, with machinery. If the claimant does not comply the defendant is at liberty to obtain the property".

11. The alterations made by the order made on 30.7.2002, are the following:

"The 30th day of July, 2002.

…

The plaintiff having applied by summons for further directions in the implementation of the order of the court made on 17th day of July, 2002

AND UPON hearing counsel for the plaintiff and counsel for the defendant

…

IT IS ORDERED that the order of this court made on July 17th 2002, be varied in paragraph 3 thereof to require payment of $29,150.00 by 4:00 pm on July 30th, 2002 instead of by noon July 26th, 2002.

IT IS FURTEHR ORDERED that the 10 acres of land situate near mile 34 on the Western Highway, listed in the schedule consisting of 16 items attached to the order made on July 17th 2002 be deleted therefrom leaving only 15 items on the revised schedule.

IT IS FURTHER ORDERED that if the defendant is unable to deliver possession of item No. 16 on the schedule being 1- 350 caterpillar Excavator (1999 model) upon payment to the defendant of the sum of $29,150.00, the plaintiff shall not be required to make any further payments of $8,500.00 per month in accordance with the written agreement of April 19th 2002 in payment for the said caterpillar.

Liberty to apply".

12. The order as amended commanded that the claimant pay $29,150.00 and that his claim would be dismissed if he did not pay, and defendant would "obtain" the quarry business and equipment. There was no clause in the order, limiting the order to the point of time when the claim and counterclaim would have been determined, or to any point in time at all. The order has not been set aside or discharged or appealed. It is in force, in my view. Based on the order made on 17.7.2002, as amended on 30.7.2002, I dismiss the claim and counterclaim. Because of the way the claim and counterclaim were conducted and ended, I order that each party shall bear own costs.

13. *The claim and reliefs based on evidence.*

On the evidence adduced I would have dismissed the claim and counterclaim anyway. I give the reasons hereinafter.

14. The evidence has proved that, the claimant did not make payments for March and April 2002, in accordance with the precise and exact terms of the agreements. By his own testimony, the claimant had paid a total of $45,000.00 instead of $50,000.00 by the end of April. The general rule from the old case of ***Re Moore & Co and Landauer &***

Co [1921] 2 KB.519, is that performance of a contract must be *'precise and exact'*. Over a few years later, courts confirmed that the dictum, '*de minimis non curat lex'- 'the law does not take account of trifles',* applied to performance of contracts, so that courts would excuse *"microscopic deviation",* in the performance of contracts, - see ***Green v Arcos (1931) 39 L&LR229 and Arcos Ltd v E. A. Ronaasen & Son [1933] A.C. 470.*** Note that courts will nevertheless award relief for the microscopic deviation or deficiency in performance.

15. The current most useful and practical exception that has been developed to the rule of, 'precise and exact performance', is the exception that recognizes substantial performance of a contract as somewhat acceptable performance of the contract, but subject to award of damages where appropriate– see for example, ***Dakin (H) & Co. Ltd. v Lee [1916] 1K.B.566***, and also, ***Hoenig v Isaacs [1952] 2All E.R. 176 (CA).*** Substantial performance is accomplished when the contract has been honestly performed in its material and important particulars, and the only variance from strict and literal performance

consists of unimportant omissions or defects, and the benefit of the inexact performance has been accepted or retained by the other party.

16. In the present claim and counterclaim, payment of $45,000.00 out of $50,000.00 for the months of March and April, which payment the defendant accepted, would be regarded as substantial performance. For redress, the defendant would be limited to claiming damages to the extent of the balance of $5,000.00 and for loss arising therefrom.

17. The claimant made further payments in May and June, but the payments were not precisely and exactly according to the terms of the agreements. There were shortfalls in the payments. The claimant breached the agreements again, but the defendant again accepted the payments. Again I would regard those payments as substantial performance of the agreements. The defendant could not cancel the agreements based on the shortfalls in the payments which he took benefit of.

18. The more serious breach of the two agreements, by the claimants occurred later in June 2002, when the defendant demanded that the

claimant pay arrears of the purchase prices of the business and of the 230 Excavator. The claimant in response demanded that the defendant pay to the claimant $37,000.00, money owed to the claimant for stones and gravels sold to the defendant when the claimant carried on the business. That is evidence that the claimant took a confrontational stance that he would not pay any further, what he owed on the two agreements, unless the defendant paid to the claimant a sum owed as the purchase price for goods he had sold to the defendant. That was a flat refusal to pay the purchase prices for the business and the 320 Excavator.

19. The sale of stones and gravels was a completely separate transaction on which the claimant could, and can still bring a court claim against the defendant. It did not arise from the two agreements, the subjects of this claim and counterclaim. In my view, the refusal by the claimant to pay the arrears and further instalments due on the two agreements was a refusal to perform a fundamental term, a condition in the two agreements. It was a breach that went to the root or essence of the two agreements. My view is that the defendant was entitled to treat the two agreements as at an end, and claim damages. He was

justified in demanding that he take back the quarry and business, as a measure to minimize his loss, provided he did not use force. I would dismiss the claimant's claim for breach of the agreements and damages.

20. I would decline to decide the question of the sale of stones and gravels, said to have been accumulated on the site when the claimant carried on the quarry business. The questions were raised in evidence and submission, but they were not pleaded in the statement of claim. They were not before court for determination. I would grant liberty to the claimant that he may make claims regarding them.

21. *The reliefs counterclaimed.*

All the reliefs counterclaimed by the defendants have not been proved. There has been no evidence to prove that the defendant was entitled to take back the business in the month of May, and so he could have made profit in the months of May and June. It cannot be said that the defendant was entitled to profit for those two months, let alone to the extent of $80,000.00.

22. In regard to the 320 Excavator 1999 Cat, my answer would be that the defendant accepted payments of instalments for its hire or purchase, despite shortfalls in the payments. He has not proved by evidence, loss occasioned as the result of the shortfalls. In any case, the defendant has not proved loss occasioned as the result of the breach of the two agreements. He has not even proved the basis of his claim of right to the 320 Excavator.

23. I would also dismiss the counterclaim. In view of the fact that the defendant has taken back possession of the business and equipment, each party shall bear own costs.

24. Delivered this Friday the 16th day of October 2009
At the Supreme Court
Belize City

Sam L. Awich
Judge
Supreme Court