Privy Council Appeal No. 96 of 2001

Corozal Free Zone Development Ltd *Appellant*

v.

Flynagen Ltd *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 10th March 2003

Present at the hearing:-

Lord Bingham of Cornhill
Lord Steyn
Lord Hoffmann
Lord Millett
Lord Scott of Foscote

*[Delivered by **Lord Hoffmann**]*

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1. This is a vendor and purchaser dispute. On 21 February 1995 Flynagen Ltd ("the vendor") entered into a written agreement with Corozal Free Zone Development Ltd ("the purchaser") for the sale of 36 acres of land comprising part of parcel 314 of Block 1, Santa Elena, Belize, which was registered in the name of the vendor. Clause 2(1) said that the price was to be US$250,000, payable as to US$25,000 by way of deposit and the balance upon completion 120 days after the signing of the agreement. For some reason which is unexplained but immaterial, it seems to have been assumed that the date for completion was 21 April 1995.

2. Clause 4 provided that upon paying the deposit the purchaser should be entitled to enter upon the property to conduct surveys with a view to the land being registered as two parcels, one comprising the 36 acres agreed to be sold and the other the remainder

(amounting to 14 acres) to be retained by the vendor. Clause 7 provided:

> "(1) In case the Purchaser shall fail to pay any of the deposit or balance of the purchase price as set forth in clause 2(1) hereof within fourteen (14) days after the day upon which the same shall become due the whole of the balance of the purchase money then remaining unpaid shall become immediately payable and the title of the Vendor to the property shall become free from all equities in favour of the Purchaser the Vendor retaining by way of liquidated damages for such default the deposit paid by the Purchaser under the provisions thereof.
>
> (2) Should the purchaser have paid any portion of the balance of the purchase price it shall be refunded such sum."

3. Clause 8 dealt with the obligations of the vendor:

> "(1) Should the Vendor fail to perform any act or thing herein stipulated or provided the Purchaser may (without prejudice to any other right or remedy available to him) serve on the Vendor by registered mail a notice in writing requiring him to comply with the contract within seven (7) days after service of such notice.
>
> (2) Should the Vendor fail to comply with such notice the Agreement shall become null and void and all rights of the Vendor shall cease and determine but without prejudice to any right or remedy available to the Purchaser in respect of the Vendor's breach of contract."

4. In April 1995 Mr Burks, a director of the vendor, looked for the land certificate to parcel 314 with a view to completion but could not find it. In any case, the purchaser was unable to complete by 21 April and was negotiating to borrow some of the purchase price from two gentlemen from California named Wingler and Thompson, who were willing to lend US$125,000 on the security of a deposit of the title deed for 7 acres of the land comprised in the sale. To accommodate this transaction, the vendor and purchaser entered into a supplemental agreement dated 17 May 1995. The price was increased by US$30,000 and a timetable for payment by instalments was agreed. US$80,000 was to be paid on 17 May 1995 and then five monthly instalments of US$30,000 beginning at the end of July, with a final instalment of US$25,000 at the end of December. In

addition, the purchaser was to transfer to the vendor two parcels it owned in the same block numbered 325 and 326.

5. To allow the purchaser to provide the necessary security to Messrs Wingler and Thompson, the vendor agreed to transfer title to the purchaser upon the execution of the supplemental agreement. The purchaser in turn agreed that as soon as "title to the property shall be vested in it", it would deposit its land certificate with the vendor by way of equitable charge to secure payment of the rest of the purchase price and would, if called upon, execute a legal charge for the same purpose. But the vendor agreed that upon the purchaser obtaining approval for the subdivision of the 7 acres intended to be charged to Wingler and Thompson, it would release that parcel from the charge. It also agreed to allow Wingler and Thompson to start building a motel and restaurant on part of the 7 acres.

6. On 17th May 1995 there was a meeting at the offices of W.H. Courtenay & Co, solicitors, who appear to have acted for all parties. The supplemental agreement was executed; so was a loan agreement between the purchaser and Wingler and Thompson. They paid over the loan money of US$125,000 to the purchaser and the purchaser paid the US$80,000 instalment due that day to the vendor. The purchaser handed over the land certificates to parcels 325 and 326. The solicitors gave Mr Arnold, for the purchaser, a letter which read:

Registration Section	Block	Parcel
Santa Elena	1	353

> "We write to confirm that we hold executed transfer documents whereby Flynagen Ltd will transfer the above-captioned property to Corozal Free Zone Development Company Limited.
>
> We are to release the transfer documents upon completion of the following:
>
> (1) Sub-division approval has been granted and the Land Certificate to the property has been delivered to us; and
>
> (2) the agreed amounts have been paid to Flynagen Ltd on account of the purchase price.
>
> Yours faithfully,
>
> W.H. Courtenay & Co."

7. There has been some debate about the effect of this letter. Mr Dingemans QC, who appeared for the purchaser, said that it was a

repudiation by the vendor of its obligations under the contract. It had contracted to transfer title upon execution of the agreement and here it was saying that it would not do so until sub-division approval had been granted, the land certificate issued and the purchase price paid.

8. Their Lordships do not accept this submission. It seems clear that on 17 May 1995 the solicitors were acting for all parties and therefore the letter should be construed as reflecting what they all understood to be the position. It shows that, to the knowledge of both parties to the sale, the solicitors had not yet received the land certificate of parcel 353 from the vendor. We now know that this was because the vendor could not find the certificate to parcel 314, which it needed to hand in to the registry in exchange for the new certificates to 353 and the parcel it was retaining. Mr Arnold says that the purchaser did not know this at the time. Once the solicitors had received the land certificate, they would be in a position to obtain registration. But they would not be obliged to release the certificate to the purchaser because the vendor would be entitled to retain possession by way of equitable charge until the price had been paid. So it was quite in accordance with the terms of the transaction for the solicitors to say that until then the transfer documents would not be released. And the sub-division was necessary in order that Wingler and Thompson (for whom the same solicitors were also acting) should be able to get their equitable charge over the 7 acres. Until then, the title documents also could not be released to the purchaser.

9. There is no doubt that the supplementary contract obliged the vendor to produce the land certificate so that title could be vested in the purchaser. But the contract did not make time of the essence; the obligation remained subject to the service of a notice under clause 8 of the first contract. On 25 July 1995 Mr Burks applied to the land registry for a new land certificate in respect of parcel 314 in place of the one which had been lost. This enabled application to be made for a certificate for parcel 353, pursuant to the authorised sub-division, which was issued on 31 August 1995.

10. By that time, the purchaser had defaulted in payment of the first US$30,000 monthly instalment. On 23 August 1995 Messrs Courtenay & Co wrote to the purchaser, on behalf of the vendor, demanding payment of the overdue instalment and prompt payment of the instalment due on 31st August, making time of the essence and threatening to rescind the contract and forfeit the deposit. There was no response. On 17 June 1996 they wrote again, demanding the

whole balance of the purchase price and saying that unless payment was made by 24 June 1996 the vendor would exercise its legal remedies. There was still no response. On 28th June 1996 they wrote rescinding the contract. The purchaser afterwards lodged a caution against the title and the vendor commenced proceedings for a declaration that the contract had been terminated and the deposit forfeited and for an order removing the caution. Shanks J. granted the application and his decision was affirmed by the Court of Appeal.

11. Their Lordships consider that the first question is whether the vendor did in fact complete the contract by putting the purchaser in a position to obtain a registered title. Once a vendor has completed, he can no longer rescind the contract for non-payment of the price: see *Williams on A Treatise on the Law of Vendor and Purchaser* (4th ed) (1936) p 988. If he has made no express provision for security, he is entitled to rely upon his unpaid vendor's lien and apply for an order of sale to enforce it. In the present case, in which he had expressly provided for an equitable or legal charge, he would have been able to rely upon the remedies which it gave him.

12. Completion by the vendor would have involved its handing over the land certificate and an executed transfer to the purchaser or his agent. In the present case, the letter of 17 May 1995 shows that the vendor handed over an executed transfer to the solicitor to hold (subject to the arrangements for security) on behalf of the purchaser. The land certificate was not received by the solicitor until 31 August and there may have been a question as to whether he received it on behalf of the purchaser or the vendor. If he received it on behalf of the purchaser, completion would have taken place. The purchaser would have been entitled to registration on paying the appropriate fees and lodging the necessary documents, without further intervention by the vendor. And, as their Lordships have said, the vendor would not have been entitled to claim a reconveyance by rescinding the contract for non-payment of the price.

13. It would have therefore been open to the purchaser, if so advised, to claim against the solicitor that he held the documents of title on its behalf, subject only to the equitable charge in favour of the vendor and the charge to Messrs Wingler and Thompson over the 7 acres. This would have raised a question of fact about which party the solicitors were acting for when the land certificate was received. But no such submission has been advanced on the pleadings or in evidence. The evidence of the capacity in which the

solicitors received the land certificate is inconclusive. It may be that after the July default, the vendor withdrew its consent to the solicitors receiving it on behalf of the purchaser. But the matter has never been investigated. On the contrary, the purchaser counterclaimed for specific performance of the contract. In the Court of Appeal, counsel advanced an alternative submission that the effect of the supplemental agreement was to create a mortgage in the vendor's favour. This argument was briefly dismissed and has not been renewed before the Board. The supplemental agreement certainly contemplated the creation of a mortgage and if the vendor had completed, would have created one. But the existence of a mortgage is inconsistent with the purchaser's primary submission that the vendor had failed to complete.

14. The supplementary agreement required the vendor to transfer title but, as their Lordships have said, did not make time of the essence. As the parties knew that the solicitors did not yet have a land certificate in respect of parcel 353, they must have contemplated that some time would have to elapse before one could be obtained. But the purchaser says that transfer of title was a condition precedent with which the vendor had to comply before it was entitled to payment of any of the instalments falling due after 17 May 1995. It should at least have performed its obligations in relation to the transfer before the first monthly instalment fell due on 31 July 1995.

15. The agreement does not say that transfer of title is to be a condition precedent and their Lordships do not find it possible to imply such a term. It seems to their Lordships thoroughly unreasonable to construe the contract in such a way that the purchaser is entitled to ignore demands for payment for a year and then claim in proceedings a year later that the reason why no payment had been made was that title had not been transferred. The most that can be implied is that transfer of title and the payment of any instalment which had fallen due were concurrent obligations; that is to say, the purchaser could have required that title be transferred as a condition of making any payment that had fallen due and that the vendor was not entitled to demand payment unless it was ready, willing and able to complete. But this does not help the purchaser: at no time did it ask for a transfer of title and from 31 August 1995, when the vendor obtained the land certificate, it was clearly ready, willing and able to perform its side of the contract. It was likewise ready, willing and able to do so when it served the notice making time of the essence in June 1996. Accordingly their Lordships consider that the notice was valid and the contract

properly rescinded. They will humbly advise Her Majesty that the appeal should be dismissed. As the respondent was not represented, there will be no order as to costs.