IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CIVIL APPEAL NO. 5 OF 2011

BETWEEN:

ERROL C PRATT doing business as
TOUCAN HELICOPTER COMPANY
TOUCAN HELICOPTER COMPANY LIMITED **Appellant**

AND

KARL R RENZ III
CONTINENTAL HELICOPTER, INC
WAYNE MACAULAY
ATLANTIS HELICOPTERS DE MEXICO
S.A. DE C.V. **Respondents**

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BEFORE:

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Alleyne	**-**	**Justice of Appeal**

Hubert Elrington SC for the appellant.
Fred Lumor SC for the respondents.

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22 and 25 March 2011 and 23 March 2012.

SOSA P

[1] On 25 March 2011, I was in agreement with the other members of the Court that the appeal should be dismissed, the order of Muria J confirmed and costs in this Court (to be taxed, if not agreed) awarded to the respondents. I concur, and am authorised by Alleyne JA to say that he concurs, in the

reasons for judgment given by Morrison JA in his judgment, which I have, and Alleyne JA authorises me to say he has, read in draft. I consider it important to note that Morrison JA prepared his judgment before the end of the October 2011 sitting and that it was only as a result of a regretted administrative oversight that judgment in this appeal could not be delivered at the end of such sitting.

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SOSA P

MORRISON JA

[2] This is an appeal from a judgment of Muria J given on 22 December 2010.

[3] The subject matter of this appeal is a 1973 Bell helicopter 206 B-III Jet Reager ('the helicopter'). The helicopter was, under the terms of an 'Helicopter Lease/Purchase Agreement' ('the Agreement') dated 30 April 2005, between the appellant, as lessee, and the first named respondent, as lessor, delivered to the appellant shortly after the execution of the agreement. A dispute having arisen between the parties as to the due performance of the agreement, the respondents filed action against the appellant claiming re-delivery of the helicopter, its value, and damages. On 22 December 2010, Muria J gave judgment in the matter as follows:

1) Judgment is entered for the Claimants.

2) The 1973 Bell 206B Helicopter Registration N73AJ Serial No. 922 shall be delivered by the Defendants to the Claimants.

3) Damages by way of arrears of rent shall be assessed and to be paid to the Claimants by the Defendants.

4) The Deposit of US$100,000.00 paid by the Defendants is forfeited to the Claimants.

5) The amount of damages as assessed is to carry interest at the rate of 6% per annum from the date of the issue of the claim to the date of the judgment.

6) The Defendants are to pay to the Claimants the costs of the claim including the costs of repossession of the helicopter.

[4] On 22 March 2011, this court heard the appellant's appeal from this judgment and on 25 March 2011 made an order dismissing the appeal and confirming the order of Muria J. It was further ordered that the respondents should have the costs of the appeal, to be taxed if not agreed. These are my reasons for concurring in this decision.

[5] The Agreement provided for the lease of the helicopter to the appellant for the period of one year, commencing on 30 April 2005 and terminating on 30 April 2006. By virtue of clause 3.A.1 of the Agreement, the appellant agreed to pay the expenses of the delivery of the helicopter from the first respondent's hangar located in Mesa, Arizona and to make payments (expressed in United States dollars) to the respondents for the use of the helicopter as follows:

4. <u>Payment</u>

1. Lessee promises and agrees to pay Lessor for the rental of the Helicopter in the amount of $300.00 per flight hour with a minimum of 20 flight hours per 1-month period. Lessee shall promptly report to Lessor the first day of each month the total flight hours flown the previous

> month. These hours will be taken from the collective Hobbs Meter located in the Battery nose compartment of the Helicopter.
>
> 2. Lessor will credit Lessee 100% of all monthly payments toward the remaining purchase price of the Helicopter that being $140,000.00.
> 3. Payments for a portion of a month or hour will be prorated according. Payment shall be sent to the below Bank
>
> Karl B Renz III
> 15827 N 41st Place
> Phoenix, Arizona 85032
> Wells Fargo Bank
> ABA #122105278
> Acct # 3214956777

[6] The Agreement also provided for the payment of a deposit "for the sum of $100,000.00 of the purchase price of $240,000.00" (clause 5), and that the return of the helicopter, presumably at the termination of the lease, would be at the lessee's expense (clause 6). Provision was made (in clause 8) for "Mandatory modifications", required by either "FAA or Bell Helicopter to insure the safety and airworthiness of the helicopter…[to be] "performed by the Lessee and charged back to the Lessor". It was further provided (under the sub-heading 'Risk of Loss') that in the event of partial damage to the helicopter, "Lessee shall restore the Helicopter to the same condition as it was prior to the loss"; and that, "in the event of a total loss of the Helicopter, payment should be made to Lessor for the remaining balance of the cost of the helicopter and the remaining sent to the lessee" (clause 10).

[7] In the event of default in performance of the Agreement, clause 12 provided as follows:

> "If the Lessee defaults in the Lease payments or defaults in the performance or observance shall not be remedied within (10) days following written notice thereof given by the Lessor to the lessee, the Lessor may at his options terminate this lease by written notice and take possession of the Helicopter. All rents due at that time be due and payable immediately."

[8] Provision was made in the Agreement for the giving of notices (clause 13); that the Agreement should be "governed by and construed in accordance with the Laws of the State of Arizona" (clause 14); and that the Agreement "sets forth the complete and entire understanding of the parties…superseding any and all prior negotiations, representations, warranties; or agreement" (clause 15).

[9] The first named respondent claimed that, in breach of the terms of the Agreement, the appellant (a) failed or refused to report the total hours flown by the helicopter for the months of March and April 2006 and also failed to pay for these unreported hours; and (b) failed or refused to pay the minimum lease payment of $6,000.00 per month for the months of March and April 2006. Accordingly, by notice dated 1 May 2006, the appellant was formally notified of his default and given 20 days (to 20 May 2006) to remedy the default, failing which the first named respondent would terminate the lease and take possession of the helicopter, and "will be entitled to any unpaid rent and the cost of recovering the helicopter".

[10] It was the respondents' case that, the appellant not having remedied the default pursuant to the previous notice, notice of termination dated 1 June 2006 was therefore served on the appellant, purporting to terminate the Agreement by reason of the default. Both notices were addressed and sent to the appellant's address for service of notices in the Agreement. However, the respondents' claimed that the appellant refused to deliver possession of the helicopter to them (or at their direction) as at the date of trial the helicopter remained in a hangar at the Philip S W Goldson International Airport at Ladyville in Belize.

[11] The appellant's position was that on or around 14 April 2006, he had been advised by an officer of the First Source Bank of Indiana, South Bend, Indiana ('the bank'), that thereafter his payments should be made directly to the bank for the purpose of paying off the first named respondent's loan account, the balance on which then stood at $140,000.00. The appellant stated further that, immediately upon receipt of this information, he had

contacted the first named respondent by telephone and was instructed by him to make all future payments to the bank. As a result, payment for the month of March was duly made, in accordance with these instructions, and arrangements were also made for future payments to be made in the same way, but that the bank refused to accept payments remitted for April and May 2006, (totalling $12,000.00), which were returned to the appellant's bank account. On the evidence which the trial judge accepted, the appellant in fact made only one payment to the bank for the first respondent's account which was a payment of $6,000.00 made on 2 February 2006. The judge also found that "After the notice of termination was given, [the appellant] attempted to wire $6,000.00 to the [first named respondent] on 17 July 2006 and again on 18 July 2006 … [and that] both payments were returned by 1st Source Bank to the [appellant]".

[12] The appellant in his pleaded defence denied receiving both the notice of default dated 1 May 2006 and the notice of termination dated 1 June 2006. He also denied that he was under any obligation to deliver the helicopter to the respondents and admitted that he was still in possession of it as alleged. He averred further that "it was a term of the agreement that any disputes arising from same would invoke a jurisdiction outside of Belize, namely Arizona, [USA]". The appellant also counterclaimed against the respondents "for trying to illegally repossess the helicopter", as a result of which "approximately US$12,000.00 worth of damages" had been caused to the helicopter. The appellant also claimed consequential losses, including travel and security expenses and loss of business, totalling in all US$928,800.00, and "Damages for wrongful suit".

[13] Among the issues canvassed at the trial were (a) the true nature of the Agreement (viz, was it a contract of sale, a lease simpliciter or a hire-purchase agreement); and (b) what was the applicable law of the Agreement.

[14] Muria J found (at para. 14) that the Agreement was "basically a hire-purchase arrangement with an option to purchase given to the Lessee". He therefore concluded as follows (at para. 16):

> "… as in common in the nature of this type of arrangement, only after the lessee completes the payment of the purchase price in full that the ownership of the helicopter will be transferred to the lessee. So the defendant does not own the helicopter until the last payment is made. Should the lessee defaults [sic], all monies previously paid are forfeited and the lessor is entitled to take back the helicopter."

[15] Muria J then stated his conclusion on the evidence, which was that the appellant had been in default of clause 4 of the Agreement, that he had been given notice of default, that the default had not been cured, and that notice of termination has been duly given. Basing himself on an extract from Halsbury's Laws of England (4th edn (Reissue)), para. 1858.1 and the case of **North Central Wagon & Finance Co Ltd v Grahann** [1950] 2 KB 7, the judge accordingly gave judgment for the respondents as claimed and made the orders set out in paragraph [3] of this judgment.

[16] By notice of appeal dated 4 February 2011, the appellant challenged the judge's decision on the following grounds:

> "1. The Learned Trial Judge erred and was wrong in law in applying Belize Law in arriving at his decision when the governing Law was the Law of Arizona one of the United States of America under the Contract.
>
> 2. The Learned Trial Judge erred and was wrong in Law in holding that the Appellant Defendant was in breach of the terms and conditions of the Contract and that the breach entitled the Respondent Claimant to:
>
> (1) Rescind the Contract
>
> (2) Forfeit the Appellant Defendant deposit U.S. $100,000.00
>
> (3) Forfeit the Appellant Defendant instalment payments made under the Contract
>
> (4) Recover damages against the Appellant Defendant for breach of Contract

(5) Entitled Appellant Defendant to seize and take ownership of the new propellers bought by Appellant Defendant for U.S. $60,000.00, and affixed to the Helicopter with the consent of Appellant Defendant.

3. The Decision of the Learned Trial Judge was against the weight of the evidence."

[17] When the appeal came on for hearing, Mr Elrington SC advised the court that ground 1 was abandoned. The grounds of appeal were renumbered accordingly and were argued by Mr Elrington as grounds 1, 2 and 3.

[18] On the renumbered ground 1, Mr Elrington submitted that there was no evidence of when the notices would have come to the appellant's attention and that it was therefore impossible for the court to decide when time began to run under the notice of default. This being the case, time was never made of the essence of the contract and the defendant's obligation in these circumstances was to complete the contract within a reasonable time. Further, Mr Elrington submitted, in cases where the purchase price is payable by instalments, a court of equity has power to grant an extension of time within which to make outstanding payments, even where time was made of the essence of the contract. In support of this submission, Mr Elrington referred to the Privy Council decision of **Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573.**

[19] On the renumbered ground 2, Mr Elrington challenged the judge's finding that the Agreement was a hire-purchase agreement and maintained that it was in fact a contract for sale of the helicopter, with the purchase price payable by instalments. By the time the first named respondent purported to terminate the Agreement, it was submitted, property in the helicopter had already passed to the appellant.

[20] And finally, on the renumbered ground 3, by which it was contended that the decision of the trial judge was against the weight of the evidence, Mr Elrington was content to rely on his submissions on the other two grounds.

[21] Taking the appellant's renumbered grounds together, Mr Lumor SC observed that the grounds as framed appeared "oblivious to the orders made by the Learned Trial Judge", pointing out that the judge did not order that the first named respondent was entitled to rescind the Agreement, as the grounds appeared to assume. The judge had found against the appellant on the factual issue of whether he was in breach of the Agreement as claimed or not.

[22] As far as the judge's order that the deposit of $100,000.00 should be forfeited to the first named respondent was concerned, Mr Lumor submitted that, despite the termination of the Agreement on 1 June 2006, the appellant had continued to detain the helicopter in Belize and that, by the date of the judge's decision (22 December 2010), the helicopter had remained grounded in the appellant's possession for over three years. Thus, applying the minimum rate of $6,000.00 per month ($72,000.00 per year), the first named respondent had lost over $216,000.00 over the three year period. In these circumstances, Mr Lumor submitted, the judge having ordered that damages by way of rent arrears should be assessed, the order for forfeiture ought not to be disturbed, as the assessment court will in due course take into account the $100,000.00 already received by the first named respondent by virtue of the order.

[23] Further, as regards the statement in the grounds with respect to new propellers for the helicopter purchased by the appellant, Mr Lumor pointed out that this was not an issue before the Supreme Court and that it had not even been included in the counterclaim, in respect of which in any event the appellant had called no evidence.

[24] We were very helpfully referred by Mr Elrington to **Helby v Matthews [1895] AC 471**, which is one of the foundations of modern hire purchase law. In that case, the House of Lords decided that an agreement which merely

conferred an option to purchase on the hirer was not an agreement to buy (within the Factors Act 1885), and that the hirer could therefore not, before he exercised the option, pass a good title to a pledgee of the hired goods. It was of the essence of such a contract that until the conditions have been fulfilled by the hirer, the property in the goods will remain with the owner (see **Cramer v Giles (1883) Cab. & El 151).** Such an agreement is to be compared and contrasted with a contract in which there is a binding obligation to buy, albeit that the purchase price will be payable in instalments (cf. **Lee v Butler [1893] 2 QB 318**). The true meaning and effect of an agreement falls to be determined by the court, by looking at "the substance of the agreement and not at the mere words used to described it" (see Halsbury's Laws of England, 3rd edn, volume 19, para. 824).

[25] The Agreement in the instant case does describe itself, on the face, as a "Helicopter Lease/Purchase Agreement", but that is clearly not decisive and Muria J did not treat it as such. In its actual terms, the Agreement does have some contradictory elements, one of which as Mr Elrington pointed out, is that, in the event of a total loss of the helicopter, payment of the insurance proceeds should be made to the lessor "for the remaining balance of the cost of the helicopter and the remaining [sic] rest to the lessee". This clearly suggests that the parties contemplated that property in the helicopter would have passed to the appellant at some point before payment of the final instalment.

[26] But, on the other hand, it seems to me that there are at least two pointers (and there may be others) in the opposite direction, in the Agreement itself. Firstly, either the lessor or lessee was entitled to terminate the Agreement with a 30 day notice (clause 7.2), which is wholly inconsistent with the lessee being under an obligation to buy. Secondly, it is clear that, if the lessee having paid the deposit of $100,000.00 and no more than the minimum payment under the Agreement of $6,000.00 over the 12 month period of the agreement, he would still be short of the total purchase price by $68,000.00 (purchase price $240,000.00, less deposit of $100,000.00, less $72,000.00 = $68,000.00). The lessee would therefore be obliged to make arrangements to

pay this difference before he would be entitled to claim ownership of the helicopter.

[27] Both of the matters to which I have referred are clear indicia that the appellant was not thereby placed under an obligation to purchase the helicopter. It is true that the Agreement equally does not contain in so many words one of the usual indicia of a hire purchase agreement, that is an 'option' to purchase. However, it seems to me that the very potential shortfall in relation to total purchase price in his actual payments at the end of the year that I have pointed out in the previous paragraph, is in fact indicative of an option to purchase, in the sense that the appellant would then clearly be entitled, if he wished, to take steps to secure and pay the additional $68,000.00. In other words, he would at that point have an option to purchase the helicopter.

[28] It therefore seems to me that Muria J was quite correct in his conclusion that, "having read the entire Agreement…the Lease-purchase Agreement in question is basically a hire-purchase arrangement with an option to purchase given to the Lessee" (see para. 14 of his judgment).

[29] The other matters raised by Mr Elrington, as to the service of the notices of default and termination and the appellant's attempts to make further payments, albeit late, for the first named respondent's account at the bank in Indiana, are in my view purely questions of fact. I would therefore consider that, on general and well known principle, this court ought not to interfere with the trial judge findings, unless they can be shown to be wholly aberrant (**Watt or Thomas v Thomas [1947] AC 484**). That not having been achieved by Mr. Elrington, I therefore do not see a basis to disturb the judge's findings.

[30] But there still remains, in my view, the question whether Muria J's order for forfeiture of the deposit of $100,000.00 was a proper order in all the circumstances. Although the judge expressed the clear view, in a passage to which I have already referred (see para. [14] above), that in the event of a default by the lessee, "all monies previously paid are forfeited", it is not clear

that in so saying he was addressing his mind to this particular aspect of the matter, or to instalments paid by way of the 'hire' aspect of the arrangement during the life of the agreement. But be that as it may (and again, conscious of the court's limitations in the context of this appeal), it seems to me that, taking all things into account, Mr Lumor's submission on this point should be accepted. I would therefore conclude that Muria J's order for forfeiture of the deposit of $100,000.00 was a proper one for him to make in all the circumstances and that this court ought not to disturb it.

[31] These are therefore my reasons for concurring in the decision of this court which was announced on 25 March 2011.

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MORRISON JA