

**IN THE SUPREME COURT OF BELIZE, A.D. 2010**

**ACTION NO. 373 of 2004**

**COVE LIMITED  
a Limited Liability Co.  
CLENT WHITEHEAD**

**PLAINTIFFS**

**AND**

**WIZARD TRUST LIMITED  
(Co. duly incorporated under  
Laws of St. Kitts Nevis)**

**DEFENDANT**

Hearings

2009

9<sup>th</sup> December

2010

23<sup>rd</sup> February

29<sup>th</sup> March

10<sup>th</sup> May

Mr. Michel Chebat for the Plaintiffs.  
Miss Deshawn Arzu for the Defendant.

LEGALL J.

**JUDGMENT**

**The Property**

1. The dispute between the parties in this case is in relation to a piece of

land or property situate along the beautiful Placencia Peninsula which juts impressively in the generally calm, but sometimes raging waters of the Caribbean Sea, situate in the south of Belize. The property is described in a survey plan by licensed land surveyor Lloyd S. Tingling, dated 13<sup>th</sup> May, 2003 as Lot 1 measuring 3130.772 square meters. Prior to the survey, lot 1 was included in a larger piece of land measuring over 3000 acres, owned by the plaintiffs who agreed to the survey which subdivided the larger piece of land, creating lot 1 and eight other lots.

2. On 25<sup>th</sup> June, 1997, six years before the survey, the plaintiffs and defendant entered into a written agreement of sale for the property for the price of US \$195,000. The defendant made a payment to the plaintiffs of US \$100,000 upon the execution of the agreement, and obtained possession of the property around the said date of the agreement. The defendant having obtained possession of the property constructed a house and resided there.
3. Clause 1.2 of the agreement defines the property agreed to be sold:

“The Property” means the property, which for purposes of identification only, is shown with the approximate measurements of the perimeter on the sketch or plan hereto annexed, but whose precise boundaries are to be determined by survey pursuant to clause 5:2. (Emphasis mine)

The sketch or plan was attached to the agreement. The parties, by so defining the property, intended that the exact measurements and boundaries of the property sold would be determined by a survey. It seems to me that the parties did not know the precise measurements and boundaries of the property at the date of the agreement; and therefore left those matters to be determined by the survey. Clause 5.1 of the agreement, given below, in so far as it states that “the property shall include not less than 172.5 feet of beach frontage” has to be interpreted on the basis that the parties intended under clause 1.2 above that the exact measurements and boundaries of the property were to be determined by the survey. When the survey was done, the beach frontage amounted to 166.2 feet. I do not agree that this lesser amount of beach frontage gives the defendant a cause of action against the plaintiff or a legal reason for not completing the sale or agreement, when the definition of property in clause 2.1 of the agreement is considered. In my view, the plaintiffs and defendant are bound by the findings of the survey which they agreed to.

4. **Other Clauses of the agreement**

There are other clauses of the agreement of sale which also have to be considered. The written agreement of sale was drafted and vetted by lawyers and signed by the plaintiffs and defendant. I give verbatim below some of the said clauses.

“4. **Conditions**

The obligation of the Shareholder and  
the Vendor to sell and of the

Purchaser to purchase on the terms contained in this Agreement are conditional upon the following:

- 4.1 The Purchaser being satisfied that the Vendor is in possession of the fee simple title to the Property and that the same is free from all mortgages, liens, boundary disputes, encroachments, easements, rights of way, threatened or pending litigation, and other encumbrances;
- 4.2 The completion of a survey of the perimeter of the Property as ascertained in the manner mentioned at Clause 5.1 and registration of the plan of such survey as required by law;
- 4.3 The grant by the Minister of Natural Resources of his final approval pursuant to the Land Utilization Act of the subdivision of the Vendor's lands to give effect to the transfer of the Property to the Purchaser; and
- 4.4 The grant by the Minister of Natural Resources of his licence pursuant to the Aliens Landholding Act to enable the Purchaser to acquire and hold a legal estate in the Property; and
- 4.5 The grant by the Financial Controller of such permission as is required by the Exchange Control Regulations in order that the Property shall be transferred by the Vendor to the Purchaser.

**5. Obligations of Vendor and Purchaser.**

- 5.1 Immediately upon the execution of this Agreement the Shareholder and the Vendor will do and procure to be done all such acts and things as may be necessary in order that the boundaries of the Property shall be ascertained as near as may be to accord with the delineation thereof shown on the plan or map annexed hereto but so that the Property shall include not less than 172.5 feet of beach frontage and so that its western boundary shall abut upon the existing road or roadway;
- 5.2 The Shareholder and the Vendor shall forthwith at their own cost in all respects cause a survey to be undertaken and the plan thereof authenticated and registered as required by law in order to define and delineate the boundaries of the Property as ascertained in the manner aforesaid and will also make application and take all such steps as may be required in order to obtain the final approval of the Minister of Natural Resources so that the Vendor's lands may be subdivided to give effect to the transfer of the Property to the Purchaser;
- 5.3 The Shareholder and the Vendor shall cause to be paid all mortgage and other moneys required to satisfy and discharge the mortgages mentioned at Clause 7.2 and all other

encumbrances which may affect the Property;

- 5.4 The Purchaser shall forthwith at its own cost use its best endeavours promptly to obtain from the Minister of Natural Resources such licence as is required by the Aliens Landholding Act and from the Financial Controller such permission as is required by the Exchange Control Regulations 1976 in order that the Property may be transferred by the Vendor to the Purchaser;
- 5.5. Each of the parties hereto shall promptly furnish to the others proof that such obligation as he is required to perform has been duly satisfied and discharged and if within the space of six months from the date of this Agreement or such longer period as the parties may hereafter in writing agree any of the approvals permissions or licences mentioned in this Clause 5 has not been obtained notwithstanding the reasonable endeavours of the parties to obtain the same then this Agreement may be rescinded at any time after that date by either party giving notice in writing to the other and upon any such rescission all amounts theretofore paid by the Purchaser to the Shareholder or the Vendor shall be repaid by the Vendor or the Shareholder (as the case may be) to the Purchaser and the Purchaser shall forthwith give up possession of the Property to the Vendor but neither party shall have any claim against the

other in respect of costs or compensation.

7.2 The Property presently stands charged by way of equitable mortgage by virtue of the following instruments:

(a) Agreement dated the 27<sup>th</sup> day of May 1980 between the Vendor and The Punta Gorda Company Limited recorded at the General registry in Deeds Book Volume 5 of 1980 at folios 1457 to 1488; and

(b) Agreement dated the 15<sup>th</sup> day of September 1988 between the Shareholder and the Vendor and Lois Peeples and Gussie M. Baker and Carmen Holub recorded at the General Registry in Deeds Book Volume 18 of 1988 at folios 685 to 708;

both of which mortgages the Shareholder and the Vendor shall cause to be paid out and discharged in accordance with Clause 5.3.

8.1 Completion of the sale and payment of the balance of the Purchase Price shall take place at the office of the Vendor's attorneys-at-law or where he may direct on a date to be appointed in writing by the Purchaser but not later than fourteen (14) months after the date of this Agreement.

5. There seems to be some contradictions between some of the above clauses of the agreement, while others present difficulties of interpretation. For instance, clause 4.1 of the agreement, in so far as it asserts that the purchaser is satisfied that the property is free from all mortgages, contradicts clauses 5.3 and 7.2 which speak respectively of paying off mortgages which are charged on the property. Though the parties to the agreement gave oral evidence in court, they were not asked for any explanation concerning these contradictory clauses, which explanation would, presumably, have assisted the court in interpreting the clauses.
  
6. The court, for the purpose of the interpretation of a document, has to consider that the meaning of the document is what the parties, using words therein, against the relevant background, would reasonably have been understood to mean. If the court could conclude that there were problems with the language used in the document, “the law does not require judges to attribute to the parties an intention which they plainly could not have had”: see Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society 1998, A.E.R. 98, at page 114*. Lord Hoffman continued: “Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v. Salen Rederierna AB, the Antaios 3 1984 A.E.R. 229 at 233, 1985 AC 191* at 2001:

“...If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

business common sense, it must be made to lead to business common sense.”

7. The document to be interpreted must be construed as a whole and generally no part of the document should be treated as surplus or inoperative. The above principles were also applied by the Belize Court of Appeal in *Stann Creek Development Ltd. v. Lighthouse Resort Ltd. No. 11 of 2008* (unreported).
8. On the basis of the above principles, I believe a reasonable person with the background knowledge of the parties in relation to the agreement would come to the conclusion that the intention of the plaintiffs and the defendant when they made the agreement was that the property was subject to mortgages, and that the plaintiffs did not have separate title for the specific lot 1 they agreed to sell to the defendant, though they had general title for lands, of which lot 1 was a part.
9. I also believe that a reasonable man with the background knowledge of the parties, would also come to the conclusion, after considering the agreement as a whole, that the intention of the parties, was that the appointment of the date of completion of the sale and the payment of the balance of the purchase price were to take place not later than fourteen months after the date of the agreement or within a reasonable time thereafter. I also believe that it was the intention of the parties that the plaintiffs would cause a survey of the land to be approved,

and would discharge the mortgages not later than 14 months after the date of the agreement or within a reasonable time thereafter.

10. Clause 9 of the agreement states that if within the fourteen month period referred to above, no date is fixed by the defendant/purchaser for completing the sale; the vendor/plaintiffs may by notice in writing require the defendant to complete the purchase within 7 days. A notice was sent to the defendant, through its attorney-at-law, dated 13<sup>th</sup> February, 2004, requiring the defendant to complete the purchase by paying the balance of the purchase price within seven days of the service of the notice. The defendant did not comply with the notice and did not pay the balance of the purchase price for the property. Clause 9(3) of the agreement states the consequences of not completing the sale in accordance with the notice:

“9.3 If this sale and purchase shall not be completed upon the expiry of the period mentioned in the notice mentioned at Clause 9.1 or 9.2 (as the case may be), in respect of which time shall be of the essence, the party serving the notice shall be entitled by notice in writing to terminate this agreement whereupon the purchaser shall forthwith vacate and give up possession of the property to the vendor but without prejudice to any right or remedy available for breach of contract.”

11. No notice under clause 9.3 was tendered terminating the agreement. The notice of 13th February, 2004, indicates that it was the intention of the plaintiffs to exercise their rights under clause 9.3 of the agreement. But did that intention crystalize into the act of terminating the agreement, and was any notice in writing expressly terminating the agreement given to the defendant? I do not find, in the evidence, any notice in writing terminating the agreement.

**Injunction, Claims and Counterclaims**

12. On 29<sup>th</sup> September, 2004 the plaintiffs obtained an ex parte injunction against the defendant from being on or entering or in any way dealing with the property. The plaintiffs obtained the ex parte injunction, although the defendant was in possession and occupation of the property at the time, and had constructed a house thereon, and had already paid more than half of the purchase price for the property! The injunction prevented the defendant from occupation of the property from the date of the order, and up to the date of trial the defendant had not regained occupation or possession.
13. On 15<sup>th</sup> November, 2004 the plaintiffs issued a writ and statement of claim against the defendant. The statement of claim requested the following:

“(1) A declaration that the agreement entered into between the parties herein and dated the 25<sup>th</sup> day of June, 1997 has been duly rescinded or

alternatively rescission of the said agreement.

- (2) An injunction prohibiting the defendant whether by itself, its servant or agents or others however from being upon or entering upon the plaintiff's property.
  - (3) A declaration that the deposit paid by the defendant is forfeited to the plaintiff.
  - (4) Possession of all that parcel or lot described as all that piece or parcel of land situated along the coast of Placencia Peninsula more particularly delineated in a survey by Lloyd Tingling, in register No. 15, Entry 7379 and more particularly described as Lot 1.
  - (5) Damages.
  - (6) Interest at the Supreme Court rate.
  - (7) Costs.
- Further or other relief as the court may deem fit.”

14. By a defence filed on 21<sup>st</sup> December, 2004, the defendant made certain admissions. The defendant admitted that there was an agreement of sale; that a survey was conducted on the land; that the defendant had been in possession of the land and constructed a house on the land; that the plaintiffs served a notice to complete the sale; that the defendant did not complete the sale and did not pay the balance of the purchase price of US \$95,000; and that the defendant had an obligation under the agreement to obtain a licence pursuant to

the Aliens Landholding Act Chapter 179, and permission from the Financial Comptroller to own the property.

15. But the defendant argued in defence that it did not complete the sale and pay the balance of the purchase price because the plaintiffs failed to obtain an approved survey plan and to discharge the mortgages listed clause 7(2) of the agreement mentioned above. The defence is that the defendant was prevented by the plaintiffs from completing the sale because the mortgages were not discharged and the survey plan of the land was not done, within the 14 month period mentioned in clause 8.1 or within a reasonable time after. In relation to the licence under the Aliens Landholding Act, and permission from the Financial Comptroller, the evidence, as we shall see below, is that it may not have been a problem to acquire them. Both the defendant and the plaintiffs have failed to furnish proof that they had duly satisfied the obligations under clause 5.5 above.
  
16. The defendant says that he was always ready and willing to pay off the balance of the purchase price and complete the sale, but the plaintiffs prevented the completion of the sale because of the failure to discharge the mortgage obligations under Clause 7.2 of the agreement and failure to obtain the survey required by clause 5.2 above. The defendant counterclaimed against the plaintiffs for:

“(1) A declaration that the agreement entered into between the parties is valid and subsisting;

- (2) Specific performance of the agreement;
- (3) An order that the plaintiff do transfer all of its rights, titles and interests in the property free of encumbrances upon the payment by the defendant to the plaintiffs of the balance of the purchase price or part thereof that may be found due to the plaintiffs under the agreement;
- (4) An injunction prohibiting the plaintiffs whether by themselves their servant or agent from selling, transferring, or otherwise dealing with property until the determination of the trial of this action;
- (5) Alternatively damages;
- (6) Interests at such rate and for such period as this Honourable Court deems just;
- (7) Costs and attorneys costs;
- (8) Such further and/or other relief as this Honourable Court deems just.”.

### **Sale to Third Party**

17. The plaintiff, Clent Whitehead said that the plaintiffs sold the property and building thereon around September, 2008 to a third party for, according to him, \$250,000 Belize dollars. On being asked to whom was the property sold, this witness claimed that he could not recall. Since the property was sold to a third party, and since there is no evidence before me as to whether the third party, whoever he or they are, was or were a purchaser for value with or without notice, the court is not in a position to properly grant the counterclaims at 2, 3 and 4 above. For the same reasons the court could not properly grant

to the plaintiffs clause 4 of the statement of claim – possession of the property.

18. The defendant, though having knowledge before the trial began that the property was sold to a third party, did not apply before trial, to make the third party, a party to the claim. The defendant made this application after it had closed its case. The plaintiffs objected to the application. I upheld the objection. The defendant was guilty of unreasonable delay in making the application; and to grant the application would have resulted in further delay in this matter which was filed in 2004, contrary to the overriding objectives of the Rules which require an expeditious trial.

### **The Evidence**

19. One attorney acted for both plaintiffs and defendant with respect to the agreement to sell of the property. Several letters were written by the defendant to the attorney and to the plaintiff Whitehead between December 1999 to June 2002 showing a willingness on the part of the defendant to pay the balance of the purchase price and to complete the sale, once the plaintiffs were in a position to convey a clear title to the defendant by providing the survey plan and discharging the mortgages. In one letter dated 13<sup>th</sup> February, 2001 to the plaintiff Whitehead, the defendant wrote:

“Now as soon as your and our attorney can give us the necessary documentation for clear title on the land and an agreeable, (on both parties), survey to be registered with

the government, we will then wire the balance owed.” (emphasis mine)

20. The defendant, it seems, consulted another attorney-at-law who wrote a letter to the plaintiffs attorneys dated 4<sup>th</sup> September, 2002 expressing the willingness of the defendant to pay the balance of the purchase price once the survey plan was approved. I have no evidence of any reply to this letter; but on 20<sup>th</sup> January, 2003, the defendant wrote another letter to the attorney-at-law he consulted, complaining that no information was received pertaining to the purchase of the land since September, 2002 and expressing an interest in paying off the debts so that the defendant could own the land.
  
21. Once again there seems to be no reply to this letter. Instead there is another letter dated 29<sup>th</sup> April, 2003 from another lawyer to the defendant stating, among other things, that the survey was to be completed soon. But by fax dated 22<sup>nd</sup> April, 2004 addressed to Tom Knox who was residing at the property at that time, and Rod McIntyre the representative of the defendant and who resided in the U.S. and Belize, attorney-at-law Magali Marin Young wrote:

“Our investigation reveals that the Cove Limited has procured final sub-division approval since last year and have been in a position to transfer legal title to Lot 1 since last year. We have ascertained that the Cove’s title derives from good root of title and that all recorded encumbrances have been removed and thus they are in a position

to transfer legal title free and clear of recorded encumbrances.”

22. According to the defendant, as shown from the evidence, and the correspondence disclosed and mentioned above, the reason for the defendant not completing the sale was because of the plaintiffs failure to obtain the survey plan for the land, and the discharge of the mortgages. But from the fax of Magali Marin Young, information was sent to the defendant on April 22, 2004 that the survey plan had been approved and the mortgages discharged since 2003. It would seem from the above fax that the defendant was informed, about seven years after the date of the agreement, that the plaintiffs were in a position to convey a clear title to the defendant. But the defendant gave evidence that no information concerning the approval of the plan and discharge of the mortgages was sent to him.
  
23. But the defendant also said he received the letter from Mrs. Marin Young in April, 2007. There is another letter dated 3<sup>rd</sup> March, 2004 addressed to the defendant from an attorney-at-law, the last paragraph of which stated that appropriate discharges were to be found at the land title unit of the General Registry. But there is no evidence that this letter was actually brought to the attention of defendant. I am of the view that the defendant did receive the letter from Mrs. Magali Marin Young and did know from the date of the letter – April, 2004 – that the survey was approved and the mortgages were discharged.

24. The defendant admitted that he did not comply with paragraphs 4.4 and 4.5 of the agreement quoted above, dealing with the alien landholding licence and permission from the Financial Comptroller. He said that his attorney, who acted for both parties promised to do the matters referred to in the said paragraphs. It seems that compliance with these paragraphs would not have been a problem for the defendant, as his attorney said in a letter to him dated 4<sup>th</sup> July, 1997. The lawyer wrote that the construction of the house on the property would probably have qualified for the Minister's licence under the Aliens Landholding Act, and that the permission of the Financial Comptroller was routinely granted.
25. There was also non-compliance with the agreement by the plaintiffs. The plaintiff Whitehead admitted that 14 months after the date of the agreement he was not in a position to complete the sale. He admitted that he failed to comply with paragraph 8.2 of the agreement of sale which required him to deliver to the purchaser a conveyance, survey plan and copies of receipts that all outstanding land taxes were paid within the 14 months period. He said that he did take steps between 1997 to 2001 to find a proper surveyor to prepare the survey plan. He admitted that it was until 13<sup>th</sup> May, 2003, about six years after the date of the agreement, and more than four and a half years after the expiration of the 14 months completion of sale period mentioned in clause 8.1, did he obtain and register the survey plan. He agreed that the defendant had to wait about six years for the survey to be done.

26. The plaintiffs admitted that the mortgages with respect to the property were discharged after the 14 months period stated in Clause 8.1 of the agreement had elapsed. The mortgages were discharged sometime in 2003 about six years after the date of the agreement. The plaintiff Whitehead further admitted that the defendant wired the funds to his account for the construction of the house on the property, but that the funds amounted to US \$200,000.

### **Fundamental Breach**

27. It is clear that there were breaches of the agreement by both sides. The defendant's breaches, shown above, came about in my view, because of breaches by the plaintiffs in failing to discharge the mortgages and providing an approved survey plan within the 14 month period mentioned in clause 8.1 of the agreement or within a reasonable time thereafter. By the time the email from Magali Marin Young came to the attention of the defendant – April 2004 – that the survey plan and mortgages were approved and discharged respectively, about 6 years had elapsed, since the signing of the agreement, and I am of the view, that that period of years does not amount to accomplishing the discharge of the mortgages and acquiring an approved plan, within a reasonable time after the agreement.
28. Accepting that the defendant did get information from Mrs. Marin Young in April 2004 that the survey was approved and that mortgages were discharged; and accepting that the defendant did receive a notice dated February, 2004 to complete the sale, I am of the view, that at

these dates the plaintiffs had already committed a fundamental breach of the contract by failing to provide an approved survey and discharging the mortgages within a reasonable time. To take about six years after the date of the agreement to provide an approved survey plan of the property sold, and to discharge the mortgages, matters of which are of fundamental importance with respect to the sale of land, was not only an unreasonable period of time, but I believe that if the parties had directed their minds at the time of the agreement to the possibility of the survey and the discharge of the mortgages taking about six years after the agreement to be accomplished, they would have, in unison, exclaimed: “If that happens, the contract is at an end!”

29. A fundamental breach of contract is a breach of contract by one party, such as to go to the root or core of the contract, which entitles the other party to treat such breach as a repudiation of the whole contract. The innocent party to the contract may accept the fundamental breach as a repudiation of the contract, and treat the whole contract as at an end and sue for damages: see *Suisse Atlantique Soceite d Armement Maritime SA v. NV Rotterdamsche Kolen Central* 1967 1 AC 361 at p 421 and *Locke v. Bellingdon Ltd. and others* No. 2 65 W.I.R. page 19, at p 42.
30. A breach of contract may be treated as a discharge of the contract if the effect of the breach is to render it purposeless for the innocent party to proceed further with the performance of the contract, as, firstly, where a party indicates either expressly or impliedly that he

does not intend to complete his side of the contract, or where, having regard to the contract as a whole, the obligation which is broken is of vital importance: see *Thompson v. Corroon and Another* 42 W.I.R. page 157 at p 172. Lord Lowry in *Thompson* also said:

“To bring the first principle into operation, the intention of a party, not to proceed further with a contract need not be expressly stated. It may be inferred from his acts or omissions. But repudiation of a contract is a serious matter, not to be lightly found or inferred and the question whether the inference is justified is one of fact dependent upon the nature of the default and the circumstances in which it was made.”

31. It is clear that not all breaches of contract amount to a fundamental breach resulting in a discharge of the contract. But where there is a breach which is sufficiently serious to amount to a discharge of the contract, the party not in default, in addition for suing for damages, may refuse to perform the obligations under the contract. Breaches of contract may be trivial, minor, grave or serious. Lord Scarman in *Bunge Corporation v. Tradax Export SA* 1981 1 W.L.R. 711, at p 717 states the approach of the court when considering the different types of breach of contract:

“The first question is always, therefore, whether, upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. If the stipulation is one,

which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate, and the court (or an arbitrator) will, in the event of dispute, have the task of deciding whether the breach that has arisen is such as the parties would have said, had they been asked at the time they made their contract: “it goes without saying that, if that happens, the contract is at an end.”

32. In determining whether the conduct of any party to the agreement amounts or not to a fundamental breach of the contract, the court asks itself the question: What importance have the parties expressly ascribed to the consequences of the breach, and in the absence of expressed agreement, what consequences ought to be attached to the breach, having regard to the contract as a whole: see Lord Wilberforce in *Bunge Corporation* above. The court must examine the language of the written agreement and the circumstances of the case to determine whether there was a fundamental breach by any party to the agreement, or whether there were minor, trivial or any breaches not going to the root or core of the contract. Whether a breach is fundamental or not depends on the construction of the contract and on all the facts and circumstances of the case.
33. Applying the above legal principles to the facts and circumstances of this case, it seems to me, that the failure of the plaintiffs to provide an approved survey for the property, and their failure to discharge the

mortgages so as to show a clear title for the property within the fourteen month period stipulated by paragraph 8.1 of the agreement or within a reasonable time thereafter, amounted to a fundamental breach of the agreement. It took the plaintiffs about six years after the date of the agreement to provide the survey plan for the property and to discharge the mortgages; and by that time, I am of the view, that the plaintiffs had already committed a fundamental breach of the contract.

34. The authorities above clearly show that where there is a fundamental breach by one party, this entitles the other party to treat such breach as a repudiation of the whole contract. I think that looking at all the evidence in this case, including the willingness shown by the letters from the defendant to complete the sale, and the subsequent cessation of those letters from him, having not received a positive response before March 2004; by not challenging the injunction; by claiming in the alternative, damages against the plaintiffs in the counterclaim served on the plaintiffs; and by ending communication with the plaintiffs concerning payment of the balance of the purchase price, are evidence of implied acceptance of the repudiation.

35. I believe, from the evidence and the several letters and emails by the defendant referred to above, that the defendant was in a position to pay the balance of the purchase price. I believe on a balance of probabilities that if the survey plan and the discharge of the mortgages giving a clear title were in place within the 14 month period or within a reasonable time thereafter, the defendant would have paid the balance of the purchase price, obtained the landholding licence and

permission from the Financial Comptroller, and fixed a completion date for the contract. I believe that the sale did not go through because of the aforesaid faults of the plaintiffs who have failed to satisfy the court, on a balance of probabilities, that the defendant was liable for breach of contract.

36. For the above reasons I hold, that the plaintiffs committed a fundamental breach of the contract. The defendant is therefore entitled to damages for the said breach of contract.

### **Damages**

37. In assessing damages for breach of contract, the general rule is that damages are compensation to the innocent party for the damage, loss or injury he had suffered because of the breach by the other party. The innocent party, as far as money can do it, is to be placed in the same position as if the contract had been performed: see *Golden Straight Corp v. Nippon Yusen Kubishika Kaisha* 2007 2 A.C. 353. Gains made by the innocent party, such as benefits obtained from partial performance of the contract, by the other party, must be set off against his losses arising from the breach. The innocent party ought also to take reasonable steps to mitigate his losses. In *British Westing House Electric Co. Ltd. v. Underground Electric Rhys* 1912 A.C. 673 at page 689, Viscount Haldane gives the broad principles with respect to damages and mitigation:

“I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply, what he contracted to get is to be placed, as far as money can do it, in as good situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent in the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

38. The logical basis for the rule to mitigate would seem to be that the person who has broken the contract is not to be exposed to additional costs by reason of the plaintiffs not doing what they ought to have done as reasonable men in the circumstances of the case.
  
39. On the facts of this case, the defendant paid upon execution of the agreement the sum of US \$100,000 to the plaintiffs. The defendant claimed that its furniture were damaged because of the removal of the furniture from the house constructed on the land. The defendant said that the furniture were put in a garage and suffered damage to the extent of US \$50,000. Moreover, the defendant said that about US \$450,000 were spent to construct the house. The plaintiff Whitehead testified that a contractor was contracted to construct the house, but when the contractor quitted, he took over the construction of the house. This plaintiff admitted that the defendant provided funds for

the construction of the house and that the said funds were wired to his account. But the plaintiff said that the amount the defendant wired to his account for the construction was US \$200,000.

40. The defendant said that he caused a house to be constructed on the property and he, with others, prepared an itemized Expenses Report showing alleged expenses of \$927,723.51. The report itemized the alleged expenses. This is what the defendant said in cross-examination with respect to the Report:

“I prepared the expenses report with other. I have receipts to support the items of expenditure. The receipts are not before the court. They were not requested.”

41. It was submitted, on behalf of the plaintiffs, that the defendant was not entitled to the sum claimed for construction of the house because receipts for the expenditure were not presented to the court; and secondly, section 6(3) of the agreement stated that the defendant would not be entitled to compensation for improvement or construction works on the property. Clause 6(3) of the agreement states:

“6.3 The Purchaser’s licence to occupy the Property shall end on the happening of the earlier of:  
(a) the completion date; or  
(b) the termination of this agreement;

and in the event of termination of this agreement the purchaser shall give up occupation of the property and shall not be entitled to any sum by way of compensation for any improvements or construction works carried on and left on the property.”

As shown above there was no termination of the agreement under clause 9.3, and in my view, clause 6.3 does not therefore apply.

42. It is true that receipts evidencing the amount claimed for construction cost were not before the court, even though the defendant said in paragraph 15 of his witness statement that he exhibited copies of the receipts. Only the expenses report was exhibited, but no receipts.
43. A photograph of the house constructed was tendered in evidence. The burden is on the defendant, in support of the counterclaim for the construction cost, to prove on a balance of probabilities, the amount for the construction of the house. In the absence of any receipts to prove the amount, I am not satisfied that the defendant has established the standard of proof required – that is on a balance of probabilities – to prove the amount of \$927,723.51 claimed for the construction of the house.

But the plaintiff Whitehead admitted that the defendant company wired US \$200,000 to his account for the construction of the house. I accept the plaintiff's evidence in this regard.

44. I have to bear in mind that the defendant was in possession and occupation of the property from 1997 to 1999 during the construction of the house and was in occupation thereon from 1999 to September, 2004, when the injunction was granted. The defendant was in possession of the property for about seven years, so that he received benefits due to part performance of the contract by the plaintiffs. The defendant, in my view, ought to pay for the use of the property for that period.
45. The problem the court faces is to estimate the amount to be paid, there being little evidence presented on this specific point. But doing the best I could, bearing in mind the size and location of the property, I estimate that the defendant should pay US\$500. per month for the period of seven years for the use and benefit of the property. This would amount to US\$500. multiplied by 84 months, equal US \$42,000. When US\$42,000 is deducted from US\$200,000 a balance of US \$158.000 remains.
46. The defendant is therefore entitled to the US \$100,000 he paid when he signed the agreement, and the amount of US \$158.000 as damages for breach of contract. The defendant said that furniture were damaged and stolen. The furniture were valued at approximately US \$50,000. Since the items of furniture damaged and those that were

stolen were not identified or described in the evidence, I do not make any award for the loss of damage to the furniture.

47. I therefore make the following orders:

1. The claims in the statement of claim are dismissed.
2. Counterclaims 1, 2, 3, and 4 are dismissed.
3. The plaintiffs shall pay damages to the defendant in the sum of US \$158,000 or its equivalent in Belize dollars for breach of contract.
4. Plaintiffs shall pay to the defendant the sum of US \$100,000 or its equivalent in Belize dollars being the sum paid to the plaintiffs by the defendant upon execution of the contract.
5. An injunction is granted restraining the defendant, its servants or agents from entering, residing, occupying or in any way dealing with the property with building thereon situate at lot 1 along the Sea Coast, Placencia Village, Stann Creek, Belize.
6. The plaintiffs shall pay interest on the sums mentioned at 3 and 4 above at the rate of 6% per annum commencing from 1<sup>st</sup> September, 2008 until both sums are fully paid.

7. Plaintiffs to pay costs to the defendant, to be agreed or taxed.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
10th May, 2010