

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

**CLAIM NO. 216 of 2009**

**MAYA ISLAND RESORT PROPERTIES LTD. CLAIMANT**

**AND**

**BETTY CURRY DEFENDANT**

Hearings

2010

7<sup>th</sup> July

31<sup>st</sup> July

30<sup>th</sup> August

Mrs. Ashanti Arthurs-Martin for the Claimant.

Mr. Jose A. Cardona for the Defendant.

LEGALL J.

**JUDGMENT**

1. There is a piece of land, measuring 1.02 acres, described as Block 36 parcel 2044, Placencia North Registration section, situate along the Caribbean Sea, Maya Beach, Stann Creek, Belize (the land). Betty Curry, the defendant, is owner of the land. Situated behind Parcel 2044, is a second parcel of land also owned by the defendant.

2. Both parcels were for sale for US\$1,500,000 if sold together. But if sold individually, one was for US \$1 million, and the other parcel was for US\$600,000. The claimant was interested in purchasing the latter parcel, namely Parcel 2044, because of its strategic proximity to a place called False Caye, where the claimant was in the business of property investment and development, and which required, for that purpose, water and electricity which could be better supplied through underground pipes from the land to False Caye.
  
3. Richard Curry, the son of the defendant, signed an agreement on behalf of his mother, dated 23<sup>rd</sup> July, 2007 for the sale of the land to the claimant for the price of US\$600,000. The agreement was not prepared by a lawyer, but by a director of the claimant, Mr. Eugene Zabaneh, who prepared the one page agreement in his own handwriting, which was signed by himself representing the claimant, and signed by Richard Curry representing the defendant. The agreement states:

**“Sales & Purchase Agreement**

**23.7.07**

This sales and purchase agreement is made between the seller Betty Curry, and the purchaser, Maya Island Resort Limited. It is agreed that the seller will sell Block 36 Parcel 2044 being 1.02 acres situated in Placentia North Registration Section for a total of six hundred thousand US Dollars to the purchaser. Advance of fifty thousand dollars is paid by Belize Bank Cheque #00103 dated July 23<sup>rd</sup>, 07 in favor of Betty

Curry. Balance of Five hundred and fifty thousand dollars to be paid no later than ninety days after this payment.

Eugene Zabaneh     Richard Curry  
   for Betty Curry.”

4. In accordance with the agreement, the claimant eventually sent on 6<sup>th</sup> August, 2007, by wire transfer, the amount of US\$50,000 to the defendant’s bank account at Wells Fargo Bank in the U.S.A., which was received by the defendant. According to the agreement, the balance of the purchase price, namely the sum of US\$550,000 was to be paid no later than 90 days after “this payment” of the advance amount of US\$50,000. The above agreement failed to mention, in the event of the sale not going through, whether the advance payment of US\$50,000 was or was not refundable. Neither did the agreement state a date for the passing of title from the defendant to the claimant, though it may be implied that the date to pay the balance of the purchase price was intended to be the date to transfer the title to the claimant. In the agreement there was also no express term stating that time was of the essence.
  
5. The defendant, who had lived at Placencia in Belize for about eight years, but who goes to and from Texas U.S.A., was living along with her son, at the date of the agreement, in Texas U.S.A; but her son who signed the agreement on her behalf was in Belize at the time. On his return to Texas, he presented the agreement to the defendant who observed that the agreement did not mention that the advance payment

of US\$50,000 was not refundable, and that no specific date was stated in the agreement for the payment of the balance of the purchase price. The defendant therefore sent a document, hereinafter referred to as the draft document, to Mr. Zabaneh as follows:

**“ Purchase Price and Terms**

I Betty Curry agree to sell Maya Island Resort Properties, Ltd., Block 36 Parcel 2044 being 1.02 acres in Maya Beach, Belize, Central America. Placencia North.

I have received a wire deposit in the amount of \$50,00.00 (sic) dated August 7, 2007. This money is non-refundable.

The balance of \$550,000.00 is due and payable in fourty five (sic) (45) days from this date.

Betty Curry  
Owner  
Victoria L. Henderson  
Witness  
Date: 8.8.07”.

6. The draft document was signed by the defendant, but was never signed or agreed to by the claimant. This draft document is not binding on the claimant and does not vary, in any way, the agreement of 23<sup>rd</sup> July, 2007 which the defendant admitted was signed on her behalf by her son. The defendant, on the basis of the agreement, which is binding on both parties, came to Belize with her son on 22<sup>nd</sup> October, 2007 to complete the sale on 23<sup>rd</sup> October, 2007, a date she

considered to be the ninetieth day, for executing the legal documents required for the transfer of the property and receiving the balance of the purchase price.

7. On arrival in Belize, the defendant said she had difficulty in locating Mr. Zabaneh. On the other hand, Mr. Zabaneh claimed he knew that the defendant was in Belize, but he used his best endeavours to contact the defendant and her son, but was unsuccessful in doing so, before he eventually met them at the airport on 26<sup>th</sup> October, 2007. He said he had the money and was willing to complete the sale.
  
8. The defendant, having not made contact with Mr. Zabaneh, went on 26<sup>th</sup> October, 2007 to the Phillip Goldson International Airport to return to the U.S.A. Mr. Zabaneh, as shown above, made contact with the defendant and her son at the airport. There is disagreement between the parties as to some of what was said at the airport; but there is general agreement that Mr. Zabaneh wanted the defendant and her son to leave the airport and go with him for purposes of completing the sale, and he offered to pay to reschedule their flight “so that the sale could be completed.” The defendant and her son say that Mr. Zabaneh wanted them to go to his office to sign papers for the transfer of the property to the claimant, but made no mention of the payment of the balance of the purchase price. The defendant said she refused to do any such thing in the absence of her lawyer, but said she told Mr. Zabaneh to contact her lawyer Ms. Antoinette Moore, known to him, “about signing a new agreement for the sale of the property.”

9. Mr. Zabaneh swore that the defendant refused at the airport to go with him to complete the sale because she wanted the “claimant to execute a new sale agreement.” The defendant and her son left the airport and went back to the U.S.A. without completing the sale. On 10<sup>th</sup> March, 2009 the claimant filed a statement of claim against the defendant, amended by order of the court dated 7<sup>th</sup> July, 2010, making the following claims:

1. Specific performance of the Agreement.
2. An injunction restraining the defendant from selling leasing, transferring ownership changing the property.
3. In the alternative, damages for breach of contract.
4. Further or other relief.
5. Costs.

10. The defendant alleged that there was an oral agreement that the US\$50,000 advance payment was non refundable and that the claimant breached the contract by not meeting the closing date of 23<sup>rd</sup> October, 2007, and not paying the balance of the purchase price. The defendant alleged that the claimant repudiated the agreement. The defendant also alleged that she spent sums of money to improve the property since the date of the agreement. The defendant therefore filed a counterclaim against the claimant for:

- “1. Forfeiture of the deposit and damages for breach of contract.

2. Special damages as follows:	
(a) Airfare for --- to Belize	US\$955.90
(b) Hotel accommodation	US\$276.66
(c) Car Rental	US\$352.00
(d) Food Fuel and Incidentals	US\$500.00
(e) Loss of income	<u>US\$625.00</u>
Total	US\$6,020.18

11. In defence to the claim, the defendant submitted that the claimant committed a fundamental breach of the contract because the claimant failed to pay the balance of the purchase price of US\$550,000 no later than 90 days after the payment of the US\$50,000 as mentioned in the agreement. According to the agreement, the sum of US\$50,000 was paid by cheque on 23<sup>rd</sup> July 2007. The agreement stated that the said balance was to be paid “no later than ninety days after this payment.” Ninety days after that payment, according to my calculation, would be on 21<sup>st</sup> October 2007.

12. It is a question of interpretation of the agreement to determine the date of the expiration of the ninety days period which would be the date he balance of the purchase price, was intended to be paid. For convenience, I repeat the relevant part of the agreement:

“Advance of fifty thousand dollars is paid by Bank cheque #001013 dated July, 23<sup>rd</sup>, 2007 in favour of Betty Curry. Balance of five hundred and fifty thousand dollars to be paid no later than ninety days after this payment.” (emphasis mine)

13. In interpreting an agreement or contract, the general rule is that words ought to be given their ordinary and natural meaning and that the intention of the parties must be considered. The court must consider “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: see Mason J in *Annette Phyllis Sewell v. Joseph Allain and Stephanie Allain No Sluhcv 528 of 2005, Eastern Caribbean Supreme Court (unreported)*; quoting *Chitty on Contracts, 29<sup>th</sup> edition, paragraph 12-043*.
14. At the time of the agreement, what date did the parties intend the balance of the purchase price was to be paid. In my view, it had to be paid no later than ninety days after the date of the cheque mentioned in the agreement, and not ninety days after the date the advance payment was actually received by the defendant.
15. Since the claimant failed to pay the balance of the purchase price and complete the sale by that date, October 21<sup>st</sup>, or 23<sup>rd</sup> 2007 as claimed by the parties, the claimant, according to the submission of the defendant, was in fundamental breach of the contract, a breach that went to the core or root of the contract and which entitled the defendant to treat the breach as a repudiation of the whole contract. The agreement does not expressly state that time was of the essence; but the defendant submitted that time was of the essence because “it was agreed that the balance of five hundred and fifty thousand dollars to be paid no later than ninety days.”

16. The defendant relies in support of this submission on the Privy Council decision of *Union Eagle Ltd. v. Golden Achievement Ltd.* **1997 2 A.E.R.** In this case, a purchaser entered into a written agreement dated 1<sup>st</sup> August 1991 to buy a flat on Hong Kong Island from the seller for Hk\$4.2 million. The purchaser paid a deposit to the seller of Hk\$420,000. Completion of the sale was to take place on or before 30<sup>th</sup> September, 1991 at or before 5:00 p.m. on that day. According to an express provision of the agreement, time was to be in every respect of the essence of the agreement. Clause 12 of the agreement said that if the purchaser failed to comply with any terms of the agreement, the deposit shall be absolutely forfeited to the vendor who may rescind the agreement.
  
17. The purchaser failed to complete the sale by 5:00 p.m. on 30<sup>th</sup> September 1991 by arriving ten minutes late, at 5:10 p.m. on the said date. The vendor declared that the contract was rescinded and forfeited the deposit under Clause 12 of the Agreement. The purchaser could not believe that such a venial or slight lapse of ten minutes should entitle the vendor to rescind the contract and forfeit the deposit; and therefore brought proceedings against the vendor for specific performance. The court, at first instance, dismissed the purchaser's claim. On appeal to the Court of appeal, the appeal was dismissed. On appeal to the Privy Council, Lord Hoffmann dismissing the appeal said at page 216-217:

“The chief question in the case is whether

the court has and should have exercised an equitable power to absolve the purchaser from the contractual consequences of having been late and to decree specific performance.”

18. The Privy Council considered that the purpose of the right to rescind a contract is, upon a breach of an essential term of the contract, to restore to the vendor his freedom to deal with his land as he pleases. It was for this reason that the courts have been willing to grant relief by way of specific performance against breach of an essential condition as to time: see *Union Eagle Ltd. above per Lord Hoffman at p. 219*. In *Steedman v. Drinkle* 1916 1 AC 275, at p. 279. **Viscount Haldane**, in a statement highly relevant to this case said:

“Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain.”

19. It seems from the authorities above, that in a case where there is rescission of a contract or agreement for the sale of land for failure

to comply with an essential condition as to time, equity will not intervene and grant specific performance of the contract. In *Eagle Union Ltd.* time was expressly stated to be the essence of the agreement. Time was an essential condition of the agreement. In this case before me, time was not expressed as the essence of the agreement; and I think this distinguishes this case from *Union Eagle Ltd.*

20. The defendant felt that since the claimant had not paid the balance of the purchase price by the 23<sup>rd</sup> October, 2007 the agreement was terminated and therefore there was need for a new contract.
21. In *Graham v. Pitkin 1992 1 W.L.R. 403*, a submission was made that the vendor was entitled to treat the contract for the sale of land as having been repudiated by unreasonable delay of about three months on the part of a purchaser. This was rejected by the court on the ground that time was not of the essence of a contract for sale of land in the absence of an express term in the contract to that effect or in the absence of a valid notice to the purchaser to complete the sale. In cases where there is no express term in the contract for the sale of land that time is of the essence, a vendor is entitled to make time of the essence by serving a valid notice on the purchaser requiring completion of the sale within a reasonable time, and if the purchaser fails to complete in accordance with the notice, the vendor can treat the failure as a repudiation of the contract entitling him to rescission of the contract: see *United Scientific Holdings Ltd. v. Burnley Borough Council 1978 AC 904, at p. 846* per Lord Simon of

Glasdale. Where there is no express term of the contract that time is of the essence and there is no valid notice to complete, “a purchaser is entitled to specific performance unless his conduct has been such as to render it inequitable for specific performance to be granted”: see *Graham v. Pitkin* above at page 406, per Lord Templeman.

22. In the present case before me, time was not expressly made of the essence of the contract and there was no valid notice by the vendor or defendant requiring completion of the sale within a reasonable time. In this case, the delay of the claimant to pay the balance of the purchase price and complete the sale was about three to four days. The claimant offered the defendant to complete the sale and even offered to pay for a rescheduled flight, but this was rejected. I believe the claimant that he had the money and was willing to complete the sale. Two days before the offer, on the 24<sup>th</sup> October 2007, the claimant informed the defendant as to which attorney would be handling the completion of the sale on its behalf. He had promised to call the defendant back to set up an appointment, but did not do so. He said he tried to make contact by phone, but without success. He said he heard that the defendant was travelling back to the U.S.A. on 26<sup>th</sup> October, 2007 and so he went to the airport and made the offer to reschedule the flight and complete the sale. I accept this evidence of the claimant. This conduct on the part of the claimant shows, in my view, that the claimant intended to complete the sale.

23. In a contract where time was not made of the essence, and there was a delay of days, I do not find, on the facts of the case, that the conduct of the claimant was such as to render it inequitable for specific performance to be granted or which would entitle the defendant to rescind the contract. The defendant did not want to complete the sale on the 26<sup>th</sup> October 2007 because she wanted a new agreement prepared to include terms not mentioned in the signed agreement between the parties. For the above reasons, I do not accept the submission that time was of the essence of the contract and that the claimant was in fundamental breach of the contract.
24. Where the time stipulated in the contract is treated by a Court of Equity as a non-essential term of the contract, the court is entitled to grant the remedy of specific performance, even though there was a failure to meet a non-essential term as to the date of completion of the contract, if it can do justice between the parties, and if there is nothing in the express stipulation between the parties, the nature of the property, or the surrounding circumstances “which would make it inequitable to interfere with or modify the legal right”: see *Tilley v. Thomas (1867) LR 3 CR61* per Lord Cairns quoted by Lord Atkinson in *Stickney v. Keeble (191) /AC 385*.

### **The Counterclaim**

25. It is clear though, and I think it is accepted by both sides, that at the completion date – the end of the 90 days period – the claimant did not pay to the defendant the balance of the purchase price which was

in breach of that term of the contract, though not a fundamental breach or breach of an essential term of the contract. The defendant, as we saw above, counterclaimed against the claimant for damages for breach of contract and for special damages. Learned counsel for the defendant conceded that the items of special damages, though pleaded, were not proved. There were documents disclosed, but the defendant gave no evidence with respect to the documents to prove the special damages.

26. In relation to the claim for breach of contract, the defendant herself did not comply with the agreement because she arrived in Belize on 22<sup>nd</sup> October, 2007 to complete the sale. Moreover, the defendant refused, in my view wrongly, to complete the sale on 26<sup>th</sup> October, 2007, because she wanted a new agreement. For the above reasons, I would not award damages on the counterclaim.

27. **Conclusion**

In the binding agreement between the parties, time was not of the essence of the agreement, and therefore a failure of about three days to pay the balance of the purchase price did not amount to a fundamental breach of the contract. The conduct of the claimant was not such as to render it inequitable for specific performance to be granted. And I accept the claimant's evidence that he has the money to complete the sale. The defendant refused wrongly to complete the sale on 26<sup>th</sup> October, 2007 and an order for damages on the counterclaim would not be granted.

28. For the above reasons, I therefore make the following orders:

- (1) An order of specific performance is granted directing the defendant and the claimant to specifically perform the agreement entered between them on 23<sup>rd</sup> July, 2007 for the sale and purchase of property situate at Block 36, Parcel 2044 measuring 1.02 acres in the Placencia North Registration Section, Belize on or before 28<sup>th</sup> February, 2011.
- (2) The alternative claim by the claimant for damages for breach of contract is refused.
- (3) Subject to (1) above, an injunction is granted restraining the defendant, servants or agents from selling, leasing, transferring, charging or mortgaging the property situate at Block 36, Parcel 2044 measuring 1.02 acres, in Placencia North Registration Section, Belize.
- (4) The counterclaim is dismissed.
- (5) Defendant shall pay costs to the claimant, to be agreed or taxed.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
30<sup>th</sup> August, 2010

