

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 416 OF 2010

BETWEEN: ALEXANDER LORENZ
KAY LORENZ **PLAINTIFFS**

AND: GRAND CAYMANIAN BEACH CLUB AND RESORT LTD. **DEFENDANTS**

Appearance: Miss Kirsten Houghton of Campbells for the Plaintiffs
Mr. Hector Robinson of Mourant Ozannes for the Defendant

Date: 27th April 2011

Coram: Justice A. Smith (Acting Judge)

JUDGMENT

Before me are applications by both the Plaintiffs and the Defendant for Summary Judgment

1. The Defendant is a company owning property registered under the Registered Land Law (2004 Revision) of the Cayman Islands. It is the developer and operator of Grand Caymanian Beach Club and Resort on the North Sound. The property has been developed in two phases. Phase I is completed and in operation. Phase II involves the construction of 44 condominium strata units. This action concerns the construction and sale of 15 units in Phase II.

2. In 2008 Esperada Holdings entered into 15 agreements with the Defendant for the latter to construct and sell to the former 15 strata units in Phase II

Each of the agreements requires an initial deposit upon the signing of the agreement. The agreements in respect of 10 of the units provide for the balance of the purchase price to be paid by 4 installments and the remainder on completion.

The agreements for the other 5 units provide that after the initial payment the balance should be paid on completion.

3. Between August 2008 and August 2009 Esperada Holdings made payments amounting to US\$3,113,000.00 pursuant to the agreements.
4. On the 16th April 2010, the Plaintiffs, under 15 materially identical Deeds of Assignment and Novation, acquired the interest of Esperada Holdings in the aforesaid 15 units.
5. The Plaintiffs made payment to the Defendant amounting to US\$293,500.00 Thus the total payments made to the Defendant under the agreements is US\$3,406,500.00.
6. The 15 agreements in question are identical in most of their terms. Clause 5 which deals with 'Completion' provides:

“(a) Save as hereinafter provided, Completion shall take place on the earlier of: i) the 30th day of June 2010] or ii) within twenty-eight(28) days of such earlier date on which the Vendor has notified the Purchaser that a Certificate has been issued for the [Unit] by the Central Planning Authority of the Cayman Islands and the Vendor’s Quantity Surveyor or supervising architect has certified in writing that the Resort Amenities are substantially completed in all material aspects and are ready for use and enjoyment in respect whereof time shall be of the essence. In the event that the Vendor has not by the [30th June 2010]

(i) Completed construction of the [Unit]

(ii) Received from the Registrar of Lands notification that a Land Register has been opened for the [Unit]; and

(iii)Received a Certificate for the [Unit]

(iv)The Resort Amenities are substantially completed

then Completion shall take place twenty-eight (28) days after the Vendor has given written notice to the Purchaser that each of the items set out in above subclauses 5(a)(i) to [(iv)], inclusive (the “Completion Notice”), have been achieved or are available as the case may be, subject to clause 5(d) below.

(b) ...

(c) ...

(d) Notwithstanding sub-clause 5(a) above and subject to sub-clause 5(e) below, in the event either that the Vendor has not commenced construction of the building containing the [Unit] by the [30th June 2010], or that the items set out

in sub-clauses 5(a)(i) to [(iv)] inclusive, have not been achieved or are not available, as the case may be, by the [30th June 2010], then the Purchaser may by notice in writing to the other rescind this Agreement, whereupon the Vendor shall be liable to repay to the Purchaser all the monies paid hereunder without interest and the Purchaser shall accept the same in full satisfaction of all claims under this Agreement, and this Agreement shall thereupon be terminated and neither party shall have any further rights of action or claim of any nature against the other in respect hereof.

- (e) Notwithstanding anything to the contrary in the Agreement, if the Vendor is unable to continue the construction of the Residence by reason of a *force majeure* as defined below, the parties' obligations will be suspended until such time as construction can proceed (as to which a certificate of the Vendor's quantity surveyor or architect will be final and conclusive), and the Vendor may, at its sole decision, within sixty (60) days of the happening of an event which constitutes force majeure, terminate this Agreement and repay to the Purchaser all money paid by it without interest. In the event that the Vendor is unable or unwilling to recommence construction within 120 days of an event of force majeure, either the Vendor or the Purchaser may, by notice terminate this Agreement at their sole option and the Vendor shall within 30 days of such notice of termination repay to the Purchaser all money paid by it without interest."

7. The Plaintiffs contend that clause 5(a) of the Agreement had not been complied with in that the Defendant had failed to complete construction of the units by the 30th day of June 2010.

8. By a letter dated 2nd July 2010 and delivered to the registered office of the Defendant on the 6th July 2010 the Plaintiffs served the Defendant with a Rescission Notice. This notice is in the following terms:

Notice of Rescission

“I am instructed by Alexander Lorenz and Kay Lorenz, the contracting purchasers of the Properties pursuant to the various Deeds of Assignment and Novation dated the 16th day of April 2010 between Esperada Holdings (“Esperada”), Alexander Lorenz and Kay Lorenz (the “Purchasers”) and Grand Caymanian Beach Club & Resort Ltd. (the “Vendor”).

Pursuant to clause 5(d) of each of the Purchase Agreements entered into between the Vendor and Esperada as amended pursuant to the First Deed of Amendment between the Vendor and Esperada on the 13th August 2009 and the Second Deed of Amendment between the Vendor and Esperada executed in April 2010 (collectively, in respect of all of the Properties, the “Agreements”), my clients are entitled to serve written notice

upon you to rescind the Agreements if the Vendor fails to achieve the items set out in subclause 5(a)(i) to (iii), inclusively, of the Agreements by the 30th day of June 2010.

I am advised by the Purchasers that the Vendor has not achieved the items set out in subclause 5(a)(i) to (iii), inclusively, of the Agreements.

Please consider this the requisite written notice that my clients hereby rescind the Agreements and, accordingly, we hereby demand repayment to my clients of all the monies paid under the Agreements in the aggregate amount of US\$3,406,500.00.”

9. On 8th November 2010 the Plaintiffs filed a Writ in the Grand Court against the Defendant claiming:

- “(1) A declaration that each of the Purchase Agreements has been validly rescinded by the Plaintiffs;
- (2) US\$3,406,500 alternatively damages in like amount;
- (3) Interest pursuant to s.34 (1) of the Judicature Law (2007 Revision) to be assessed;
- (4) Such further or other relief as this honorable court thinks fit;
- (5) Costs.

10. On the 16th December 2010 the Defendant filed a Defence and Counterclaim. In its Defence the Defendant admits that the completion of the Purchase Agreements did not

take place by the 30th June 2010 but says that this was as a direct consequence of the delay which resulted from variation requests made by the Plaintiffs during the period of construction. As a result of this delay, the Defendant claims that it was no longer under an obligation to complete by 30th June 2010 but that instead it was under an obligation to complete within a reasonable time, in respect of which time was not of the essence unless a subsequent notice making time of the essence was served.

11. Alternatively, the Defendant states that if the purported Notice of Rescission served by the Plaintiffs is valid, the Plaintiffs, with full knowledge of the facts which gave them the alleged right to rescind the Purchase Agreements, have waived their right of rescission and have affirmed the continued existence and validity of the Purchase Agreements, by lodging a Caution under the Registered Land Law against the Land Register for each of the units.

12. In its counterclaim the Defendant claims that a Notice to Complete in respect of each of the 15 units was served on the Plaintiffs on 17th September 2010 in accordance with Clause 5. Each notice states inter alia that:

- (a) construction of each unit has been completed;
- (b) the Defendant has received from the Registrar of Lands notification that a Land Register has been opened for each unit;
- (c) the Defendant has received from the Central Planning Authority a Final Certificate of Fitness for Occupancy for each unit and;

(d) the Resort Amenities as defined in the respective Purchase Agreements are substantially completed.

13. Further, the Defendant claims that by letters dated 8th October 2010 and 11th October 2010 from the Defendant's and Plaintiffs' attorneys-at-law respectively, the parties agreed to extend the date under the Notice of Completion by which the Plaintiffs should make all outstanding payments on account of each unit following which the Defendant would issue to the Plaintiffs a duly executed transfer of absolute title to each unit.

14. On 16th November 2010 the Defendant served on the Plaintiffs 15 Notices of Default and demanded that within 14 days from the date of service of such Notices, the Plaintiffs complete each Purchase Agreement by paying all outstanding sums under each Purchase Agreement.

15. The Defendant alleges that the Plaintiffs, by their failure to comply with the Notices of Default, are in breach of the Purchase Agreements and claims:

(1) Specific performance of each of the Agreements in accordance with its terms.

(2) Damages in addition to or in lieu of specific performance.

(3) Interest on the sums found due by the Plaintiffs to the Defendant under the respective Purchase Agreements from 1st December 2010 to the date of payment as follows:

- (a) In respect of Units 2112, 2115, 2213, 2215 and 2312 at the rate of 12% per annum calculated on a daily basis.
- (b) In respect of Units 2100, 2103, 2104, 2105, 2200, 2202, 2204, 2205, 2304 and 2305 at the rate of 6% per annum calculated daily.
- (4) Alternatively interest pursuant to section 34 of the Judicature Law (2007 Revision) at such rate and for such period as to the Court seems just.
- (5) All the Defendant's reasonable legal costs and expenses on an indemnity basis incurred in connection with the enforcement of the Purchase Agreements including the costs of these proceedings, or alternatively costs in the Courts discretion.
- (6) Such further, alternative or consequential relief as to the Court seems just.

16. The Plaintiffs in reply deny the Defendant's allegation that their requests for variation resulted in the Defendant's failure to complete by the 30th June 2010. The Plaintiffs claim that the Notices of Rescission are valid and once duly served cannot be waived and the Purchase Agreements cannot be affirmed thereafter.

17. In their defence to the counterclaim the Plaintiffs deny the validity of the Defendant's Notices of Default, and state that they were ineffective because:

- (a) The Purchase Agreements had been terminated.
- (b) The Notices to Complete on which they were founded were themselves invalid.
- (c) The Notices were not validly served in accordance with the provisions of the Assignments.

18. On 25th January 2011 the Plaintiffs filed a Summons seeking summary judgment pursuant to GCR Order 14 rule (1).

19. On 22nd February the Defendant also filed a summons seeking summary judgment on its counterclaim.

Summary Judgment

20. Order 14 rule 1 (O14, r.1) of the Grand Court Rules (GCR) provides:

“1. (1) Where in an action to which this rule applies a statement of claim has been served on a Defendant and that Defendant has given notice of intention to defend the action, the Plaintiff may, on the ground that the Defendant has no defence to a claim included in the writ, or to a particular part of such a claim or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the Defendant.”

21. O. 14, r. 3 (1) empowers the Court to give summary judgment pursuant to O. 14, r. 1 unless the Defendant satisfies the Court that there is “an issue or question in dispute which ought to be tried”.

22. O. 14, r. 5 provides for an application by a Defendant for summary judgment on a counterclaim served on a Plaintiff on the ground that the Plaintiff has no defence to the counterclaim. The provisions of this rule applicable to an application under rule 1 apply to an application under rule 5 with the necessary modifications.

The Plaintiffs' Application

23. Miss Kirsten Houghton contends that the contractual right to rescind arose because the conditions set out in clause 5 (a) of the Purchase Agreement had not been satisfied prior to 30th June 2010. In particular, the buildings were not complete, the land registers had not been opened and certificates of occupancy had not been issued. The Purchase Agreements contain a clause that time is of the essence (Clause 22), an "Entire Agreement Clause" (Clause 18), and a provision that amendments to the agreements may only be made in writing (Clause 33).

24. Miss Houghton submits that, although it is true that the Defendant agreed to "build" the strata units for the Plaintiffs, the Purchase Agreements are not "construction contracts" in the sense contended for by the Defendant. The Plaintiffs, she says, had no power or right to control any aspect of the construction or finishing of the strata units. Clauses 10 and 11, she contends, made it clear that only the Defendant has power to make variations to the plans and specifications. Thus, she argues, even if the Plaintiffs had requested a change in the paint colour, the decision to make the change would be the Defendant's. The prevention principle, she submits, cannot avail the Defendant. The

Defendant, she says, failed to complete on 30th June 2010 and the Plaintiffs were entitled under Clause 5 (d) to rescind the agreements and to recover the moneys paid to the Defendant. The Defendant, she submits, has no arguable defence to the Plaintiffs' claim.

25. Mr. Hector Robinson for the Defendant contends that by the operation of the prevention principle the Plaintiffs had no contractual right to rescind the agreements when they served their notice on 6th July 2010. In this regard he refers to the Defendant's evidence that during the course of the construction the Plaintiffs requested a change in the interior colour of the 15 units, which in turn meant that the Defendant had to change the interior colour of all 44 units within Phase II of the development. The Defendant further claims that the Plaintiffs delayed excessively in choosing their preferred colour. He argues that the request for a change in colour, the delay by the Plaintiffs in choosing the colour and the additional time required to order additional paint delayed several other "construction elements" and prevented the Defendant from completing by 30th June 2010. And in the circumstances by virtue of the "prevention principle" the 30th June 2010 completion date "had fallen away and was replaced by an obligation to complete within a reasonable time".

26. It is not in dispute that the Plaintiffs' summons for summary judgment comes within the provisions of O. 14 r. 1 and 2. It is also not in dispute that prima facie the Plaintiffs have a valid claim. The issue is whether the Defendant has a bona fide defence or is able to

raise an issue or question against the claim which ought to be tried. Commenting on provisions similar to O. 14, Jessel MR said in *Anglo Italian Bank v Wells (1878) 38 L.T. 197 at 201*: “When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the Defendant it is his duty to give judgment for the Plaintiff”.

27. In the instant case counsel for the Defendant contends that the Defendant’s affidavit and documentary evidence demonstrate not only that the Defendant has a fair and reasonable probability that it has a bona fide defence but that the Plaintiffs’ claim which is based entirely on the Defendant’s failure to complete on 30th June 2010, has no realistic prospect of succeeding because of the Plaintiffs’ acts of prevention.

28. It is the Defendant’s claim that:

(a) Shortly after the Plaintiffs took assignment of the 15 units, they expressed strong dissatisfaction with the Defendant’s choice of paint colours of the interior of the units and requested that the colour be changed. According to Mr. Reginald Delapenha, the managing director of the Defendant, he recalled Mrs. Lorenz saying “I do not like these colours. I would like to select a new colour for my 15 units”.

(b) The Defendant agreed to change the colours and to allow the 2nd Plaintiff (Mrs. Lorenz) to make her choice of paint colour since she was purchasing a significant number of units.

(c) Granting the Plaintiffs' request would entail changing the colour not only of the 15 units but of all the other units in Phase II that were already primed as all the 44 units were to be painted in the same colour. Further, there were a number of things such as tiling, installation of some of the electrical elements, the installation of kitchen and bathroom cabinets, installation of grills for the air conditioning on the ceiling and for air handlers on the walls which could not be done until the interior walls had been painted.

(d) On 3rd May 2010 Mrs. Depaenha sent an email to Mrs. Lorenz urging her to make her choice quickly. The email reads:

“...Please choose the colour asap since everything (has) to stop now for this change and it will take at least two weeks to (ship) down the colour from Miami and that this process would take at least two weeks”.

(e) There was significant delay on the part of the Plaintiffs in selecting their choice of colours. The Defendant's consultant wrote the Plaintiffs on 25 May and 15 June 2010 stating inter alia that the delay in choosing the colour had resulted in significant “down time” on the entire project. In the letter of 25th May the Defendant's consultant stated:

“...Even though we believe that, it is our judicial

responsibility to accept any changes that customers see fit to suggest, the delay of the colour selection has somewhat set us back for about two weeks time period. That is exactly the time period it did take us to receive the final selection from you. In addition, when one takes into consideration the ordering of the new paint from the United States duration of about a week for us to receive those paints, it is fair to say that we did lose about three weeks of down time.”

The Defendant’s consultant went on to state that the Defendant was doing its best to finish on time and continued:

“Having said that, we believe it is equally imperative to communicate this information to you so that when the need arises where the three week period might be needed to fulfill our obligation in completing your units for closing, you would not be surprised with the outcome”.

(f) The first shipment of replacement paint arrived in Cayman on 24th May 2010. Mr.

Delapenha in his affidavit sworn on the 21st March 2011 stated that:

“37. The time from the Plaintiffs’ initial change request on 26th April to when the first shipment of paint was delivered to the site on 25th May was in fact just over 4 weeks. During this time the entire project was delayed to await the painting of the units.”

He added that the project was completed towards the end of July to early August.

29. Mrs. Lorenz denied requesting a change of paint colours. She admitted that she disliked the initial colours and that there was a discussion concerning the matter. However she swore that she “said something like please use the colour whatever you want, you are the owner so you decide”.

She said she “got the impression that Mrs. Delaphenha was in charge of the design but she did not know what she was doing and was desperate for help and reassurance as to the interior design ideas”. Mrs. Delaphenha, she said, told her that “she had changed the colours from the ones the designer had chosen because she did not like them”.

30. It is the submission of Miss Houghton that even if the Plaintiffs had requested the change in paint colours such a request cannot form the basis for the operation of the prevention principle since the Plaintiffs had no power or right to interfere with the building process.

The starting point, counsel submits, is to look at the true nature of the contract. Contracts for the sale and purchase of lands are to be treated differently from construction and sale contracts. The contracts in question are for sale and purchase. The doctrine of prevention, she argues, is limited to construction contracts. In such contracts the employer has the right to require the contractor to make changes.

31. Counsel for the Plaintiffs referred to Clause 10 of the Purchase Agreement which gives the vendor the sole right to make variation with certain limitations. Clause 11 she pointed out deals with the vendor's right to vary or modify the plans provided that the written consent of the purchaser is obtained for major variations. Where time is made of the essence and the contract specifically states that the vendor may alter the specifications it does not give any corresponding powers to the purchaser.

32. It seems to me that the fact that the Agreement gives the Defendant the sole right to make variations does not mean that the Defendant is contractually obliged to refuse any request for variation made by the Plaintiffs. As Mr. Robinson contends, the effect of Clause 11 is that it is within the right of the Defendant to refuse the request. And the fact that the Defendant did not refuse the request would not, by itself, exclude the prevention principle.

33. As regards the application of the prevention principle I cannot think of any valid reason why it should be limited to contracts for construction as distinct from contracts for sale and purchase. In any event, the Agreements involve both the construction of and the sale of strata units as was the situation in *MBI Dive Corporation Incorporated v. Condoco Grand Cayman Resort Ltd.* [2004-5] C.I.L.R. 254.

In *Hancock v. Brazier* [1966] 1WLR 1317 at 1324 E, Diplock LJ said:

“But when the contract is of a dual nature, as is the case with building contracts of this kind – and they are very common – namely, a contract to do two things, one to convey the land and the other to build a house, it is in my view quite clear that there can have been no intention on the part of the parties that the contract to build a house should disappear because the contract to convey the land is merged in the actual conveyance of it.”

34. The operation of the prevention principle was referred to in *Multiplex Constructions (U.K.) Ltd. v. Honeywell Control Systems Ltd. (No. 2)* [2007] EWHC 447. At paragraphs 47, 48 and 49, Jackson, J said:

“47 ...The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.

48 ...In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act of omission prevented the contractor from

completing by that date. Instead, time becomes at large and the obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.

49 ...It is in order to avoid the operation of the Prevention principle that many construction contracts and sub-contracts include provisions for extension of time thus it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract.”

35 At paragraph 54 *ibid.* Jackson J quoted the following passage from the judgment of Lord Denning MR in *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* [1973] 1WLR 601 at 607 F:

“(1) It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it might be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within

the stipulated time then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non completion in that time”.

36. It seems to me that, if reasonable requests were made by the Plaintiffs and if they were reasonably complied with by the Defendant, such requests may constitute acts of “prevention” within the meaning of the prevention principle as was enunciated by Jackson J in the Multiplex case.

37. In my view, the Defendant’s evidence as set out in paragraph 28 above shows that it has a reasonable defence in that there is a triable issue as to whether the requests were in fact made and, if made, whether they in fact prevented the Defendant from completing within the prescribed time. I would, accordingly, dismiss the Plaintiffs’ summons for summary judgment and grant the Defendant unconditional leave to defend.

38. The Defendant’s Application for Summary Judgment

The Defendant seeks an order that:

“(1) The Plaintiffs’ claim be dismissed and summary judgment entered for the Defendant on the ground that the Plaintiffs’ claim has no prospect of success;

(2) There shall be summary judgment for the Defendant on the Defendant's counterclaim in the terms of the draft minute of judgment attached."

39. The affidavits of the Plaintiffs clearly show, as Miss Houghton said, that the underlying facts concerning the paint colour issue are in dispute. The Court cannot, on that score, find that the Plaintiffs' claim has no prospect of success.

40. Mr. Robinson for the Defendant also contends that even if the Plaintiffs had the right to rescind under the contract, they lost the right by virtue of the fact that, with full knowledge of the facts, they waived their right of rescission and affirmed the continued existence and validity of the Purchase Agreements. Counsel bases this contention on the fact that subsequent to the date on which the Plaintiffs' alleged right of rescission arose the Plaintiffs lodged a Caution under the Registered Land Law against the Land Register for each of the Units. Counsel points out that in each of the Cautions the Plaintiffs assert an interest in the property comprised in the respective Units as "contracting purchasers" under the Purchase Agreement.

41. Miss Houghton's answer to this is that if the Notice of Rescission was validly served, the Defendant's argument cannot be tenable as the contract would be discharged from the date of the Notice namely 2nd July 2010. She contends that once a contract has been rescinded it cannot be revived by any act of affirmation. In this regard reference is made to Chitty on Contracts 13th Edition Vol. 1 at p. 1462 paragraph 22-026.

42. Both parties refer to a plethora of authorities in support of their respective submissions.

There can be no doubt, in my judgment, that the issues raise difficult questions of law and call for mature and reasoned consideration of disputed facts. I am firmly of the view that these issues are not susceptible to summary determination under O. 14.

43. Accordingly the Defendant's application for summary judgment is also dismissed.

There will be no order for costs.

Delivered this 22nd June 2011-07-01

Smith J
Judge of the Grand Court (Acting)