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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

CAUSE NO. 367 OF 2004

BETWEEN: REDWOOD HOTEL INVESTMENT CORP.

PLAINTIFF - APPLICANT

AND: CONDOCO GRAND CAYMAN RESORT LTD .

DEFENDANT - RESPONDENT

**Appearances: Mr. J. Malins Q.C. instructed by Kyle Broadhurst of
Broadhurst Barristers for the Plaintiff – Applicant**

**Mr. Jeremy Walton of Appleby Spurling Hunter
For the Defendant – Respondent**

Before: The Hon. Justice Henderson

Heard: January 26, 2005



RULING

The plaintiff, Redwood Hotel Investment Corporation, asks for summary judgment on an alleged contractual obligation on the part of the defendant, Condoco Grand Cayman Resort Ltd., to convey to the plaintiff, as part of an apartment, a terrace with no covering over any part of it.

2 The parties entered into an agreement for the purchase and sale of an apartment in the
3 Ritz Carlton development on Grand Cayman Island at a time when construction had not
4 started and the final architectural drawings were not yet in place. The contract of
5 purchase and sale contains, in the parcel clause, this language:

6

7 "Therefore the purchaser has agreed to
8 purchase and the vendor has agreed to sell a
9 strata lot, being that certain condominium
10 apartment, hereinafter the apartment, in the
11 development to be known as Apartment 411,
12 containing approximately 5490 square feet
13 of livable area including the terraces, the
14 relative layout of which apartment (i.e. unit
15 plan L) is shown on Appendix B attached
16 hereto, and the relative location of which
17 apartment (i.e. the north tower) is shown on
18 Appendix C attached hereto."
19
20

21 The clause goes on to specify the purchase price. Attached as Appendix B to the
22 agreement is a one-page drawing entitled "Appendix B: Relative Layout of the
23 Apartment". The drawing is to scale and shows, in considerable detail, the load-bearing
24 walls, the cabinets, and the presumed location of furniture to be installed, as well as the
25 locations of doors and windows. The area to the front of the apartment is labeled on the
26 diagram as a "terrace." There are load-bearing walls between the terrace and the interior
27 of the apartment shown on the diagram, but on three sides the terrace is not shown as
28 having any load-bearing structures.

2 In addition, there are no columns or pillars shown anywhere on the terrace portion of the
3 diagram.

4

5 In fact, the apartment was constructed with a trellis of some substantial size on the
6 terrace. The intent was to cover the trellis with plants in such a way that most, but not
7 all, of the sunlight (and for that matter the rain) falling on the top of the trellis would be
8 prevented from penetrating.

9

10 After some time had passed, the vendor decided to increase the height of the
11 development by two storeys. As a result of that decision the design changed. What has
12 been described in argument as a "large concrete slab" now projects out from the load-
13 bearing walls at the front of the unit several feet onto the terrace. Thus, a portion (but
14 not all) of the terrace is now a covered area.

15

16 The plaintiff asserts that the documents to which I have referred provide him with a
17 contractual right to the conveyance of an apartment containing a terrace which is not
18 covered in any part or in any way.

19

20 A number of arguments have been advanced, but I need consider only two.

21

1 First, the plaintiff argues that the plain and obvious meaning of the word "terrace" is such
2 as to entitle him to an area with no covering between the floor and the sky. Second, the
3 plaintiff argues that the absence of any reference on Appendix B to concrete columns or
4 pillars in the terrace portion of the diagram amounts to a promise that they would not be
5 present.

6
7 The plaintiff is entitled to summary judgment if (but only if) there is no triable issue raised
8 by the defense. In this context, I must ask: does this plaintiff have a plain and obvious
9 contractual entitlement to a terrace consisting of an area with no overhead covering at all?

10
11 I address first the argument based on the plain dictionary meaning of the word "terrace."

12
13 The plaintiff cited two dictionary definitions. We find in Webster's Encyclopedic
14 Unabridged Dictionary of the English Language this definition of the word "terrace" (I
15 quote only the relevant parts):

16
17 The flat roof of a house. An open, often paved
18 area connected to a house or an apartment
19 house and serving as an outdoor living area;
20 deck. An open platform as projecting from the
21 outside wall of an apartment; a large balcony.
22 A row of houses on or near the top of a slope.
23

1 In Collins Concise Dictionary, Third Edition, we find a similar definition, which reads, in
2 part:

3
4 "A paved area alongside a building serving
5 partly as a garden. a balcony or patio. A flat
6 roof of a house built in A Spanish or Oriental
7 style."
8

9 Two other dictionary definitions were referred to by the defendant. In the Merriam
10 Webster Online Dictionary part of the definition of the word "terrace" reads:

- 11
12 (a) a columnated porch or promenade;
13 (b) a flat roof or open platform;
14 (c) a relatively level paved or planted area
15 adjoining a building.
16

17 Finally, the defendant referred to the Compact Edition of the Oxford English Dictionary
18 which, as one would expect, contains the most complete definition and myriad examples.

19 In part, that definition reads:

20
21 "a raised level place for walking with a vertical
22 or sloping front or sides faced with masonry,
23 turf, or the like, and sometimes having a
24 balustrade, especially a raised walk in a garden
25 or a level surface formed in front of a house on
26 naturally sloping ground or on the bank of a

1 river a gallery open on one or both sides, a
2 colonnade, a portico, a balcony on the outside
3 of a building, also a raised platform or balcony
4 in a theatre or the like."
5

6 From these definitions it will be seen that while a terrace may often be open to the sky, it
7 is not necessarily so. The definition equates a terrace with a "portico," which is defined
8 elsewhere in the Oxford English Dictionary as a covered space, and to a "balcony" which,
9 it is conceded, is often covered, and to a "porch".

10
11 Those dictionary definitions accord with my own general understanding of the current
12 usage of the word. I am entitled to take judicial notice of common English usage. In my
13 experience, the word "terrace" has a relatively broad and general meaning. It frequently
14 refers to an area which is not covered in any way, but not infrequently it refers to an area
15 either partly or even wholly covered. The essential characteristic of a terrace, like a patio,
16 a balcony, or a porch, is that it is open on one or more of its sides to the elements.

17
18 That short discourse on the meaning of the word "terrace" dictates the result on the first
19 issue. I am entirely satisfied that there is a triable issue with respect to the semantic
20 arguments which have been advanced.

1 The plaintiff also relies, as I have said, on what Appendix B shows or, more accurately,
2 fails to show. There are now two hefty cement columns in place on the terrace. I infer
3 from the evidence that each is approximately two feet square.

4

5 Can Appendix B have been intended by the parties to this contract as a contractual
6 promise to build an apartment with the precise layout shown? That very question has
7 been addressed by our Court of Appeal, albeit in a different context. At an earlier stage in
8 the rather lengthy and somewhat acrimonious relationship between these parties, the
9 vendor proposed to convey an apartment which was approximately 1000 square feet less,
10 than the 5490 square feet specified in the agreement. The plaintiff sued. The matter
11 reached the Court of Appeal. In granting an order for specific performance to the plaintiff,
12 the Court of Appeal said this about Appendix B (which that court referred to, on some
13 occasions, as Annex B):

14

15 "The relevant phrase in the instant contract
16 describing the function of the Annex B plan is
17 'the relative layout of which apartment ... is
18 shown in Appendix B'. Having regard to this
19 wording, the judge was, in our view, entirely
20 correct to find that its purpose was merely to
21 demonstrate the internal configuration of the
22 apartment and that it was never intended to
23 demonstrate the exact dimensions or to fix the
24 overall square footage of the condominium."
25

1 Given the different issue and evidence in the case before me, I do not think I am bound to
2 accept that conclusion without examining it. However, I am in respectful agreement with
3 what the Court of Appeal has said on the subject. Appendix B is specified in the parcel
4 clause as being attached for the purpose of showing the relative layout of the apartment.
5 That phrase is repeated on the Appendix itself. I think one can infer, from the face of the
6 contract and its Appendix that the purpose of the plan is to distinguish the sort of layout
7 that was being conveyed to this purchaser from other layouts in the same development
8 which would be available at different prices. It is the relative layout that the plan is
9 intended to demonstrate and not the actual or precise configuration which will be
10 constructed.

11

12 Lewison, on *The Interpretation of Contracts*, says this at page 349:

13

14 "A plan showing a layout of property not yet
15 built will not usually amount to a warranty that
16 the property will be built as shown on the
17 plan."
18

19 The author then cites two authorities for that proposition. There will no doubt be
20 exceptions and hence his use of the word "usually".

21

22 The present contract contains extensive modification rights reserved to the vendor,
23 including the right to make minor modifications and the right to make major modifications

1 as long as they do not have a material detrimental effect on the purchaser. From those
2 clauses it is, again, relatively easy to infer that the purpose of Appendix B was not to fix
3 the precise configuration of what was yet to be built, but rather to demonstrate the sort of
4 layout that the purchaser had a right to expect.

5
6 Here there is at least a good arguable case that the vendor is not bound to convey an
7 apartment which conforms in every respect to the plan described as Appendix B. Their
8 obligation was to convey an apartment with a relative layout of the sort shown there. It is
9 at least arguable that the vendor's obligation goes no further.

10
11 The absence of the concrete pillars, in this context, is of little significance. They are not
12 the sort of structure which would inevitably be placed on a plan designed to show the
13 relative layout of the interior of the apartment. It is at least arguable that the parties
14 would have known and understood and intended that at the time they entered into the
15 contract.

16
17 For these reasons the application for summary judgment is dismissed.

18
19 [... Submissions regarding costs]

20

21

2

RULING ON COSTS

3 The question of whether this purchaser has a contractual entitlement to a terrace which is
4 free of any covering is a question of construing the contract and the Appendix. It is a
5 question of mixed law and fact, but there is little in the way of fact that bears on it. I
6 think the defense is in adequate form to give to the plaintiff notice of what the issues will
7 be. I do not think the plaintiff has suffered any prejudice or additional expense arising
8 from the form of the pleading.

9

10 Costs must follow the event. I award the defendant its costs.

11

RULING

12

13 The plaintiff has also applied in Cause 721 of 01 for, as the summons puts it, "a direction
14 from the court that the defendant construct the apartment with a terrace as set out in
15 Appendix B of the agreement, that being a terrace without any obstructions or roofing
16 above it or with any support columns, beams or other structures upon it."

17

18 The order sought is said to be an entitlement pursuant to the order of the Court of Appeal,
19 dated the 29th November 2002, in which the Court of Appeal ordered that the parties had
20 liberty to apply for such further or other directions as may be necessary "in this matter."

1 The words "this matter" refer to the dispute about square footage which resulted in the
2 Court of Appeal granting an order for specific performance.

3
4 In my view, the liberty to apply contained in their order of November 29th, 2002, was for
5 the purpose of making such ancillary orders as might be necessary to carry out the overall
6 intent and purpose of the Court's original order. I would have no hesitation in granting an
7 ancillary or supplementary order if the subject matter had something to do with square
8 footage. The present dispute, however, is entirely different. I do not think it would be
9 appropriate, in the procedural sense, for me to grant directions in Cause 721 of 01 which
10 have a bearing only on the question of whether a covering may be erected over part of
11 the terrace.

13 That application also is dismissed.

14
15 Dated this 10th day of February, 2005

16
17 *Henderson, J.*

18
19 Henderson J.
20 Judge of the Grand Court
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