

26-01-05

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 5 of 2004  
Grand Court Cause No. 819 of 2003

**BETWEEN:**

**MBI DIVE CORP. INC.**

**Appellant (Defendant)**

**AND:**

**CONDOCO GRAND CAYMAN RESORT LTD.**

**Respondent (Plaintiff)**

**BEFORE:** The Right Hon. E. Zacca, President  
The Hon. Mr. Justice M.R. Taylor, Justice of Appeal  
The Hon. Mr. Justice I. Forte, Justice of Appeal

**Appearances:**

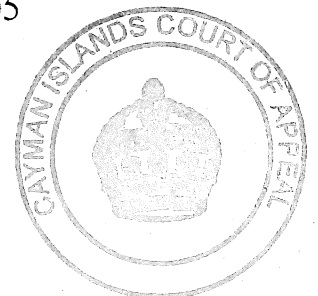
Emil George, Q.C., and Laura Hatfield instructed by Solomon Harris  
for the Appellant.

Jeremy Walton instructed by Appleby Spurling Hunter for the  
Respondent.

Heard: November 23 & 24, 2004      Released: 26<sup>th</sup> January, 2005

**JUDGMENT AND REASONS**

**TAYLOR, J.A.**



This appeal raises the question whether a purchaser under an agreement for the creation and sale of a strata lot in a condominium apartment project under

construction on Seven Mile Beach may recover the down payment made under the agreement, or damages for its breach, on the basis of delay in completion amounting to anticipatory repudiation.

The Grand Court judge granted summary judgment for the vendor, Condoco Grand Cayman Resort Ltd., on its claim for a declaration that the \$362,500 (U.S.) down payment made by the appellant purchaser, MBI Dive Corp. Inc., towards a total purchase price of \$2,900,000, had been forfeited by the purchaser's failure to make a progress payment in a similar amount due following completion of the ground floor of the building. The judge found the agreement to be one that contained no date for completion, and that the purchaser accordingly had no reasonable prospect of success on its plea that before the progress payment was demanded it had accepted an anticipatory repudiation resulting from the vendor no longer having any reasonable prospect of achieving timely completion.

The judge granted summary judgment for the vendor, allowing its claim for a declaration of forfeiture and dismissing the purchaser's counterclaim for restitution and damages, and awarded costs of both to the vendor.

(a) The Contract

The contract requires that the purchaser make a down payment of \$362,500 upon execution, on March 23, 2000, make further payments each in that amount seven days after commencement of the casting for the second floor concrete slab and seven days after completion of the roof structure respectively, and payment of the balance of \$1,812,500 on the "Completion Date".

"Completion Date" is defined in an addendum, executed at the same time as the main agreement, which replaces Clause 24(f) and contains a proviso on which the purchaser particularly relies (shown in italics below):

"Completion Date" means fourteen (14) days after the Vendor notifies the Purchaser that the following events have all occurred and/or are then currently in effect:

- (i) the Vendor has obtained all necessary permission from Planning;
- (ii) the Vendor has completed construction of the Building containing the Strata Lot;
- (iii) the Vendor has completed the registration of the Strata Plan;
- (iv) the Vendor has received the Register;
- (v) the Vendor has received the Certificate; and
- (vi) an agreement with The Ritz-Carlton Hotel Company, L.L.C. that the Resort is to be managed and operated as a Ritz-Carlton resort;

*provided (that while the projected date for completion is on or before 31 December, 2001) in the event all of the items set out in sub-clauses 24(f)(i) to (vi) inclusive have not been achieved or are not available by 31 December, 2003, then the Purchaser (by notice in writing to the Vendor given on or before 31 January 2004) may rescind this Agreement and may demand the return of all moneys theretofore paid by the Purchaser to the Vendor hereunder together with interest thereon at the rate of five per cent (5%) per annum from the respective dates the Vendor or the Vendor's Attorneys-at-Law received such sums to the date of repayment to the Purchaser. Upon the Vendor returning the said moneys to the Purchaser, the Purchaser shall accept such return in full satisfaction of all claims under or pursuant to this Agreement and this Agreement shall thereupon without more be terminated and neither party hereto shall thereafter have any further rights of action or claim of any nature against the other party hereto in respect hereof. [Emphasis added]*

There is no other reference in the agreement to the date by which the project is to be completed or to any consequence that may result should there be delay by the vendor in achieving completion. The defined term "Completion Date" appears in Clause 19 of the main agreement:

19. Completion. Completion of the sale of the Strata Lot pursuant hereto is scheduled to take place on the Completion Date at 10:00 a.m. in the office of the Vendor's Attorneys-at-Law, or otherwise at such other convenient date, time and place as may subsequently be agreed in writing by or on behalf of both the Vendor and the Purchaser. At completion, in exchange for the Balance and the duly executed Power of Attorney hereinbefore provided, the Vendor shall deliver to the Purchaser (or to the Purchaser's attorney-at-law) transfers of absolute leasehold title to the Strata Lot duly executed by or on behalf of the registered proprietor or occupant thereof free from incumbrances (other than those referred to in this Agreement) but always subject to the terms and conditions of this Agreement. After the said transfers

are so delivered, it shall be the sole responsibility of the Purchaser to effect due registration thereof.

Clause 23(n) declares that time is “in all respects of the essence of this entire Agreement and each and every part thereof”.

The agreement is one for construction of a building including the strata unit on leasehold land acquired, or to be acquired, by the vendor, and sale of the strata lot to the purchaser on the defined “Completion Date” subject to a “rental pool” agreement under which it will thereafter be made available to be rented out as part of an associated hotel operation for at least 42 weeks of the year. The purchase is thus predominantly in the nature of an income-producing investment.

The basis on which the judge granted summary judgment appears from the following passage of his oral reasons for judgment:

Clause 24(f), as amended, refers to a “projected date for completion” which is manifestly not a promise to finish the project by that date. It goes on to provide a remedy for the purchaser if the project has not been completed by December 31st 2003. The purchaser may rescind and receive the return of its deposit, plus interest. The very reason for the existence of this provision is the absence of any promise by the vendor to complete by any given date. There is no other reasonable way to read this clause.

Accordingly the defendant has no reasonable prospect of success at trial.

In the result, I do not need to address the more difficult question of whether, if there was a contractual promise to complete by December 31st 2003, the defendant had in August 2002 sufficient grounds for concluding that a fundamental breach by the vendor was inevitable.

The judge rejected the defendant's contention that because the vendor had re-sold the unit at a higher price there should be no order for costs.

Neither below nor before us did the purchaser seek relief against forfeiture in equity or under any statutory provision.

**(b) The Course of Events**

When the contract was executed, in March, 2000, construction had not yet started on what was then intended to be a five-storey building, having a "projected date for completion" of December 31, 2001.

Construction in fact started in April, 2002, more than two years after execution and payment of the deposit. Before the first floor had been completed and the next \$362,500 payment had become payable, the vendor announced its intention to increase the height of the structure by two further storeys. Prior to demand being made for the progress payment, the purchaser gave notice

purporting to rescind, on the grounds, *inter alia*, that it was "very skeptical" that the structure would now be completed by December 31, 2003.

This notice was given by letter of August 27, 2002, from the purchaser's solicitors to the principal of the vendor, which stated in part as follows:

We draw your attention to sub-clause 24(f) of the Agreement. We note that pursuant to this clause our client has an express contractual right of rescission in the event the Building containing the Apartment is not completed by 31st December 2003. Our client is very skeptical that the project will be completed even by the 31st December 2003, particularly considering your recent letter to our client whereby you advised our client that you are contemplating the addition of two floors to the existing plans for five floors.

In any event, our client has decided that he has waited nearly eight months past the projected completion date and in view of the current stage of completion has decided that he is not prepared to leave his investment tied up in the project any longer. Our client is entitled according to his common law position to rescind the Agreement on the basis of the Vendor's breach i.e. the failure to complete the Apartment within the time represented, time being of the essence. Please accept this letter as notice of rescission of the Agreement by our client. Our client is now entitled to be put in the same position as if the Agreement had never been made.

We therefore request your confirmation that the Vendor intends to return our clients' deposit in the sum of US\$362,500 together with interest at the rate of 5% per annum whereupon our client will deliver up all right title and interest in the Apartment.

Following further correspondence between solicitors the vendor re-sold the property at a higher price and started this action.

The purchaser says that the position it took in August, 2002, has been vindicated by events. The project was not in fact completed by December 31, 2003, nor by the time of the Grand Court hearing, in March, 2004. In September, 2004, construction was suspended as a result of Hurricane Ivan.

**(c) The Issues on Appeal**

The purchaser says that the date of December 31, 2003, stipulated in the proviso to Clause 24(f), is the latest date for completion, either expressly or by implication, or else a "reasonable date" for completion which should be adopted by the Court in the absence of any express or implied date.

Counsel for the purchaser contends that the notion of a contract for the improvement and sale of real property under which the purchaser is required to make a substantial down payment and subsequent interim payments but the vendor has no obligation to complete by any particular date would be so wanting in commercial sense, particularly in a contract in which time is of the essence, that the Court should look for a more reasonable construction.

The respondent vendor replies: (i) that the judge was correct in holding that the contract imposes no obligation to complete by any particular date; (ii) that the

December 31, 2003, date has relevance solely for the purpose of a time-limited contractual right to rescind of which the purchaser can take advantage only during the time stated for its exercise; (iii) that this is solely a contractual right to rescind, and as such cannot be exercised in anticipation; (iv) in any event, that the letter by which the appellant claims to have accepted anticipatory repudiation, and to have invoked a common law right of rescission, does not have that effect; and (v) that the circumstances prevailing in August, 2002 have not been shown to be such as would, in any event, justify the conclusion that anything had been done or was not done by the vendor that could amount to anticipatory repudiation.

The purchaser does not ask for judgment dismissing the vendor's claim or allowing its own counterclaim, but only that the vendor's judgment be set aside and the action remitted for trial, for the reason that the defence and counterclaim have been shown to have a reasonable chance of success.

**(d) Date for Completion**

In a contract for the improvement and conveyance of land some deadline for completion must be regarded as a normal ingredient, particularly where substantial initial and interim payments are called for.

The key words of the proviso contained in the Clause 24(f) definition of "Completion Date" say that if all six listed matters, including completion of the building containing the strata lot, have not been achieved by December 31, 2003, "*then the Purchaser (by notice in writing to the Vendor given on or before 31 January 2004) may rescind this agreement and may demand the return of all moneys theretofore paid by the Purchaser*" together with interest at five per-cent per annum. It goes on to provide that return of money with interest shall be accepted by the purchaser in full satisfaction, and neither party shall then have any further claim. If, in exercising the right to rescind within the stated time, the purchaser demands repayment with the stipulated interest, this may thus result in either greater or lesser relief than would otherwise be available.

The proviso is silent as to the legal position of the parties after January 31, 2004. Its words might perhaps mean that after that date the purchaser no longer has any right to rescind, or merely that after that date the purchaser no longer has the option of calling for repayment with the stipulated interest, in return for forgoing any other claim that it might have.

The appellant contends that the contract should be construed *contra proferentem*. There is no evidence, however, that it amounts to a "contract of adhesion", and to ask whether the clause in question is one "for the benefit of the

vendor” is to ask part of the very question of construction in respect of which the principle is invoked. In the age of word processing, moreover, an appearance that a contract is “printed” is unhelpful. There is no evidence that the purchaser acted without advice in executing the agreement, nor that the vendor’s principals lack business experience. The words of Clause 24(f) must, in our view, be given commercial sense in the context of the surrounding facts and the principles applicable to construction of agreements for the sale of land.

Some importance must be given to the reference to the “projected date for completion” as December 31, 2001, found (in parenthesis) in the opening passage of the proviso and immediately followed by the designation of December 31, 2003, as the date at which rescission will be available should the vendor not by then be in a position to complete. The passage suggests that December 31, 2003, rather than December 31, 2001, is to become the contractual “longstop” date for completion. The statement that rescission will be available to the purchaser if completion has not been achieved by that date reflects what would normally be the position in law when timely completion is not achieved under a contract for sale of land in which time is declared to be of the essence.

In our view the proviso means that December 31, 2003, is the latest date by which all requirements for completion of the transaction, including physical

completion of the strata lot, are to be met, so that if these requirements have not all been met by that date the purchaser may rescind. Provided notice is given on or before January 31, 2004, the purchaser may demand return of all payments made with five per-cent interest. The nature, or extent, of the purchaser's rights after that date need not for the present purposes be further explored.

The vendor takes the further position that any right of rescission is a contractual one and for that reason cannot be invoked "in anticipation", citing *Chitty on Contracts*, 28th ed., at paragraph 25-030:

Where it is alleged that one party has, by his own act or default, disabled himself from performing his contractual obligations at some future time and the contract also contains an express provision giving to the innocent party the right to terminate the contract in certain circumstances, care must be taken to establish the basis upon which the innocent party seeks to terminate the contract.

Where the basis for the decision to terminate is the express right to determine the contract, the requirements of the clause containing the right to terminate must be complied with. On the other hand, where reliance is placed on the inability of the party to perform his obligations under the contract at some future time, it must be demonstrated that the inability to perform relates to some essential aspect of the obligations of the party in breach.

To be entitled to terminate, the innocent party must establish that he had a right to terminate on one or other ground. Where he can establish neither ground, he cannot justify his decision to terminate by combining the two grounds so as to apply the doctrine of anticipatory breach to the contractual right to terminate. It is not possible to anticipate a contractual right to terminate. Either the conditions necessary to exercise the right have been satisfied or they have not.

This statement is based on the decision of the House of Lords in *Afovos Shipping Co. SA v. Romano Paqnan et al.* [1983] 1 W.L.R. 195. That case involved failure to pay on the due date an instalment of the hire charges payable under a charterparty. The agreement contained an “anti-technicality” clause that required the owner to give the charterer 48 hours notice of default, after which, if payment had still not been made, the hire would terminate. The House of Lords held that notice could be given only after the day for payment had fully expired. The inability of the charterer to make payment after banking hours on the due date did not mean that the period for payment could be foreshortened by giving 48-hour notice so soon as the banks had closed.

Failure in that case to make payment on the due date, prior to the giving of the 48-hour notice, was not regarded as a fundamental breach of contract, and for there to be a right of anticipatory repudiation, the anticipated non-performance had to satisfy the criteria for fundamental breach. Lord Diplock says (at p. 203) that where a party to a contract, whether by failure to take timeous action or any other default, puts it out of his power to perform a particular primary obligation, the right of the other party to elect to treat this as a repudiation of the contract by conduct depends on whether the resulting non-performance would amount to a fundamental breach, and that the delay in payment in that case did not.

The case before us is different. Here failure to complete by the latest date for completion would necessarily amount to a fundamental breach, time having in this case been declared of the essence.

We understand the rule to be that a contractual right to rescind in circumstances where rescission would not normally be available--that is to say, where no sufficiently important breach is involved--may be exercised only after those circumstances have actually arisen that are contractually required for its exercise, and cannot be exercised "in anticipation". We do not understand the right to rescind for anticipatory repudiation to be lost, in a case where the breach anticipated is of a fundamental term, simply because the contract expressly provides for rescission in that event. Here the contract does no more than state what would, in any event, be a consequence in law of the breach of the relevant term. The proviso to Clause 24(f) establishes December 31, 2003, as the latest date for completion and, in saying that the purchaser may rescind if it is not met, the contract says what must necessarily follow in law in the case of an agreement of which timely completion is a fundamental term.

The clause says nothing that would deny the purchaser any remedy available in the event that it became apparent in advance that completion would not be achieved before the contractual completion date.

(e) Notice of Acceptance

Since the letter of August 27, 2002, by which the purchaser sought to rescind, seeks to invoke the contractual relief contemplated by Clause 24(f) -- that is to say, a refund of payments made with five per-cent interest -- the vendor takes the position that it does not suffice to constitute acceptance of anticipatory repudiation of a fundamental obligation at common law.

The letter refers to “an express contractual right of rescission in the event the Building containing the Apartment is not completed by 31st December, 2003”, and in its final paragraph claims repayment of the deposit with interest at five per-cent. It claims also the purchaser’s “common law right to rescind the Agreement on the basis of the Vendor’s breach, i.e.: the failure to complete the Apartment within the time represented, time being of the essence”, but this seems to be in reference to an assertion that the vendor represented that the building would be completed on or before the “projected” completion date of December 31, 2001, a representation for which the purchaser no longer contends. Taken as a whole, it can be said that the letter seeks to exercise a right to rescind based on acceptance of repudiation by delay. It does not expressly state that the repudiation sought to be accepted is an anticipatory repudiation arising from inability in fact to complete by December 31, 2003, nor that the relief sought as a consequence is that available at common law,

as opposed to that available under Clause 24(f), to which it refers. It says that the purchaser has no confidence in the ability of the vendor to complete by December 31, 2003, rather than that the vendor has in fact rendered itself incapable of achieving completion that date.

No special words are required to accept a repudiation, this being something that may, indeed, be accomplished by conduct alone.

In *Universal Cargo Carriers Corporation v. Citati* [1957] 2 Q.B. 401 (at p. 443), Mr. Justice Devlin (as he then was) took it to be settled law that “a rescission for repudiation, if given for a wrong reason, or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason”, and that a party who has rescinded for the wrong reason may later justify his action by facts that come to light thereafter demonstrating the inability of the other party to perform its obligations.

We are of the view that the letter of August 27, 2003, was sufficient to permit the purchaser to claim rescission for anticipatory repudiation by reason of inability of the vendor to complete by December 31, 2003.

(f) **Evidence of Repudiation**

We have found: (i) that the contract establishes December 31, 2003, as the latest date for completion; (ii) that non-completion at that date would constitute breach of a fundamental term and thus the basis for rescission at common law, and not a contractual basis for rescission only; (iii) that rescission is accordingly available to the purchaser in respect of anticipatory repudiation by the vendor of its obligation to complete by that date and its acceptance by the purchaser, and (iv) that the letter of August 27, 2002, constituted such acceptance.

The question that remains is whether the evidence in the summary judgment proceedings sufficed to establish that the purchaser had a reasonable chance of establishing that the vendor had by that date delayed so long as no longer to have any real chance of completion by December 31, 2003.

Despite earlier confusion regarding the case that the purchaser sought to advance, the material was in our view sufficient to establish that, by its delay in commencement of construction and late reconfiguration of the structure by the addition of two floors, the vendor may well by August, 2002, have effectively disabled itself from completing in time. Since it had taken four months to complete the "shell" of the first floor, the vendor's chances of completing six more

floors and the roof within the following 16 months must have been less than certain, and there would then be extensive work to be done on finishing the interior. The fact that the work was not in the event completed by December 31, 2003, nor at the time of the hearing below, was relevant to the question whether there was in August, 2002, any possibility that this could be achieved: see *Universal Cargo Carriers v. Citali* (above) (at p. 440).

This final question was one that could not be determined on the summary judgment application. It was enough, for the present purpose, that the purchaser's case could not be said to be lacking in any merit.

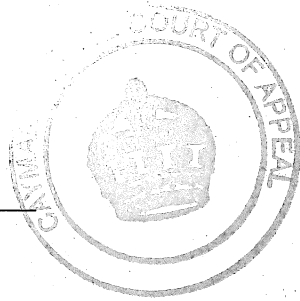
(g) **Disposition**

We are accordingly of the view that the summary judgment should be set aside, the appellant given unconditional leave to advance its defence and

counterclaim, and the action remitted to the Grand Court for trial, the appellant having its costs here and below, to be taxed if not agreed.

---

E. Zacca, P.



---

M.R. Taylor, J.A.

---

I. Forte, J.A.