30-04-04

# IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 39 of 2003
(Grand Court Cause No. 785 of 2002)

**BETWEEN**

**MICRO INDUSTRIES LTD.**

Appellant/Respondent

**AND**

**CONDOCO GRAND CAYMAN RESORT LTD.**

Respondent/Applicant

**BEFORE:** **The Rt. Hon. Mr. Justice E. Zacca, President**
**The Hon. Mr. Justice G. Collett, J.A.**
**The Hon. Mr. Justice M. Taylor, J.A.**

In the presence of Julian Malins Q.C. instructed by Kyle Broadhurst of Broadhurst DaCosta for the Plaintiff/Appellant and John Jarvis Q.C. instructed by Jeremy Walton of Appleby Spurling Hunter for the Defendant/Respondent.

Heard: 13th April, 2004 Released: April 30, 2004


COLLETT J.A.

JUDGEMENT and REASONS

This Appeal is brought by the unsuccessful Plaintiff in Grand Court Cause No. 785 of 2002 against the Judgment of Harrison J. in Chambers, delivered on 13th October, 2003; whereby the learned Judge acceded to the application of the Defendant/Respondent to strike out these proceedings as having no prospect of success. The Plaintiff had sought in those proceedings to obtain an injunction against the Defendant, preventing it from increasing the height of an Apartment block from five to

seven stories or alternatively, specific performance to require the provision to him of a condominium unit on the sixth rather than the fourth floor of that block.

The issues in this Appeal arise out of a contract of purchase and sale of condominium unit no. 411 in the North Tower of the Ritz Carlton development on Seven Mile Beach, in Grand Cayman, which was entered into on 7th February, 2000 between the parties in writing. The operative words of that contract were as follows –

> "Therefore, the Purchaser has agreed to purchase and the vendor has agreed to sell the strata lot being that certain condominium Apartment..... in the Development to be known as Apartment number 11, containing approximately 5490 square feet of livable area, including the terrace(s) the relative layout of which Apartment..... is shown on Appendix 'B' attached hereto and the relative location of which Apartment (i.e., the North Tower) is shown on Appendix 'C' attached hereto, for the purchase price of.....(US$2,875,000,000)....."

It is apparent that the wording of this operative clause of itself does not disclose which of the floors of the North Tower was to contain the Apartment to be sold but reference to the Appendix 'C' referred to in it shows that it was to be "Level 4". It is common ground that, at the date of entering into the contract, the grant of Planning permission to the Defendants was for a North Tower of five stories only. Furthermore, at that date the relevant Planning legislation in force envisaged a maximum elevation of only five stories for a development such as the Ritz Carlton Resort. The common expectation at that time, before any construction had commenced, was that Apartment 411 would be built on the penultimate floor of the North Tower.

However, in the events which have occurred between the signing of the contract and completion of the North Tower, the law has been altered to permit a maximum development of seven stories rather than five and, pursuant to that alteration, the Defendant has successfully applied for fresh planning permission to extend the height of the North Tower to seven stories in all. Construction is now in progress.

The reaction of the Plaintiff to this alteration of plan was to demand that, instead of a condominium of the fourth, it should be given the corresponding one on the new sixth floor, insisting that the contract, properly construed, was for sale of a condominium on the penultimate floor of the tower however high rather than for one on a floor three below the top. It is contended on his behalf and presumably can be established by evidence that an Apartment upon the penultimate floor is, by reason of its prestigious position in the building, of greater value than an identical Apartment further down. Alternatively, the Plaintiff sought an abandonment by the Respondent of the plan to increase the height of the tower to seven stories, so as to maintain the penultimate status of the apartment he had purchased.

The question at issue is, therefore, one of the proper construction of a written contract. The learned Grand Court Judge, having considered the matter, came to the conclusion that this contract envisaged the purchase and sale of a condominium on the fourth floor of the North Tower and not of one on the penultimate floor at that building, whichever floor that should be. In doing so he made reference to clause 23(f) of Appendix A which contains specific conditions incorporated into the contract. This reads: -

> ' This agreement embodies the entire understanding of the parties hereto and supersedes all prior negotiations understandings and/or agreements between them (whether oral or written) with respect to the subject matter hereof.'

Counsel for the appellant sought to invoke a definition of 'Resort Condominium' contained in Appendix A which defines that term as meaning 'the five floors of the South Wing and the two top floors of the North Wing'. He submitted that the proper inference to be drawn from this provision is that the Plaintiff's condominium must have been intended to be built on one of those two top floors.

The flaw in this line of argument is that the Apartment which the Plaintiff agreed to buy is nowhere described in the contract as a 'Resort Condominium' and indeed that phrase does not appear at all in the respective contract. The only printed clause in which that term might have appeared, namely paragraph 3 of Appendix A, was deliberately struck out. Counsel contended that, since the only other category of Apartment in the North Tower was a 'PIP' Apartment for use as hotel accommodation, No

411 must be regarded as a 'Resort Condominium' within the definition, even though not described as such. That implication receives no support from any other provision of the contract and in our judgment it does not necessarily follow that it should be so defined. If it had been intended to import that definition it would have been easy to have incorporated it but the parties neglected to do so.

Another point relied upon by Mr. Malins for the Appellant was paragraph 23(i) of Appendix A which is in the following terms: -

> " The Vendor covenants with the Purchaser that the Development and the Strata Lot shall be constructed in a sound and workmanlike manner and substantially in accordance with the elevations and plans approved by Planning"

This, he submitted, must refer to the elevations and plans which had been approved by Planning at the date of entering into of the contract. However, that paragraph proceeds to reserve to the Vendor the right to make variations and modifications to the specifications of construction subject to certain conditions, a right which appears inconsistent with that proposed interpretation. It further appears to me that the true purpose of the words relied on is to protect the purchaser from the risk of a breach of planning permission in the construction of the condominium he has contracted to buy; which in turn suggests that the reference to " approved" in the paragraph is to the planning approval in force at the date of building rather than at the date of signing of the contract.

Appendix A to the contract also contains a number of sub-paragraphs to paragraph 7, which bind the purchaser to acknowledge the right of the Defendant to make various changes in the scope of the development of the Resort, to proceed by way of successive phases and to alter the Plans without thereby committing any breach of contract and purport to bind the Plaintiff not to object. The purpose of the non-objection provisions appears to be to head off any objection which the Plaintiff might seek to raise to any alteration of planning approval for the changes involved. It would be a mistake to regard these provisions as conferring upon the Defendant a power to make and implement such changes in the Development which it would otherwise lack. A landowner armed with requisite planning permission is generally entitled to proceed with alterations to any development which is in progress on his land. The only sanction available to the Plaintiff in this case would be to establish that this course involved a

breach of contract on the Defendant's part which would sound is damages and might in certain circumstances give rise to equitable remedies also.

However, once it is established that any changes or alterations which the Defendant wishes to make in the Resort development do not prevent it from conveying to the Plaintiff that which it has contracted to convey, the Defendant does not require to rely upon the provisions of paragraph 7 of Appendix A to justify its actions. In the present case unless the contract can be construed so as to require the conveyance of an Apartment on the penultimate floor of the North Tower rather than upon its 4th floor, then no breach of the contract can be involved in the conveyance of the latter.

For the reasons discussed above we conclude, as did the learned Judge below, that this contract was for purchase and sale of Unit 411 on the 4th floor of the North Tower regardless of its relative height in the vertical structure of that building. The Plaintiff is entitled to that and to no more and it follows that the action has no prospect of success.

We therefore dismiss this appeal with costs to the Respondent.

**Zacca, P.**

**Collett, J.A.**

**Taylor, J.A.**