

CIRCULATE
19.3.04

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 819 OF 2003

BETWEEN:



CONDOCO GRAND CAYMAN RESORTS LTD.

Plaintiff

AND

MBI DIVECORP INC.

Defendant

Transcript of Proceedings heard before
The Honourable JUSTICE HENDERSON on the
19th day of March 2004, in George Town,
Grand Cayman.



APPEARANCES:

On behalf of the Plaintiff: MR. J. WALTON

On behalf of the Defendant: MR. E. GEORGE, QC

1 CHAMBERS COMMENCED ON FRIDAY,
2 MARCH 19TH 2004 AT 2:30 P.M.

3

4 THE COURT: This is the plaintiff's
5 application for summary judgment. It seeks
6 declarations that, pursuant to the terms of an
7 agreement for the purchase and sale of a
8 condominium, it was entitled to terminate that
9 agreement and to retain a deposit paid by the
10 defendant by reason of the defendant's failure
11 to pay a second installment towards the
12 purchase price on the due date.

13 The defendant admits the meaning and
14 effect of the terms of the agreement on which
15 the plaintiff's claim is based, and that it did
16 not pay the installment. Its sole basis for
17 resisting the claim is the assertion that it
18 had previously rescinded the agreement based on
19 the anticipatory breach of that agreement by
20 the plaintiff. It says, therefore, that it was
21 no longer bound to pay installments and was
22 entitled to the return of its deposit, plus
23 interest, pursuant to the termination clause in
24 the agreement.

25 The argument before me requires a

1. construction of clause 24(f) in the agreement,
2 which was amended by an addendum. The amended
3 version of the clause reads as follows:

4 " 'Completion date' means 14 days
5 after the vendor notifies the
6 purchaser that the following
7 events have all occurred and/or
8 are then currently in effect..."

9 There follows a list of six events which I
10 will not read. The clause continues:

11 "...provided that (while the
12 projected date for completion is
13 on or before 31st December 2001)
14 in the event all of the items
15 set out in sub clauses 24(f) (i)
16 to (vi) inclusive have not been
17 achieved or are not available by
18 31st December 2003, then the
19 purchaser, by notice in writing
20 to the vendor given on or before
21 31st January 2004, may rescind
22 this agreement and may demand
23 the return of all monies
24 theretofore paid by the
25 purchaser to the vendor

1 hereunder, together with
2 interest thereon at the rate of
3 five percent per annum from the
4 respective dates the vendor or
5 the vendor's attorneys-at-law
6 received such sums to the date
7 of repayment to the purchaser.
8 Upon the vendor returning the
9 said monies to the purchaser,
10 the purchaser shall accept such
11 return in full satisfaction of
12 all claims under or pursuant to
13 this agreement, and this
14 agreement shall thereupon
15 without more be terminated, and
16 neither party hereto shall
17 thereafter have any further
18 rights of action or claim of any
19 nature against the other party
20 hereto in respect hereof."

21 In August 2002, the six events specified
22 in the clause had not yet occurred. The
23 defendant, by letter, purported to rescind the
24 agreement at that time on the ground of an
25 anticipatory breach. The defendant says it

1 formed the opinion at that time that the
2 project could not possibly be finished by the
3 completion date.

4 In taking that position, the defendant was
5 necessarily asserting that the clause I have
6 read contains a promise that the project would
7 be completed by December 31st, 2003. Failure
8 to complete by that date would, says the
9 defendant, amount to a fundamental breach.

10 I do not think the contract can be read in
11 that way.

12 The purpose of the clause is to set out a
13 formula for ascertaining the "completion date"
14 (or closing date, if you will) of the purchase
15 and sale transaction for the purpose of clause
16 19, which uses the phrase "completion date"
17 without defining it.

18 This is a case where the language of the
19 contract is clear, unambiguous, and must be
20 taken to represent the mutual intent of the
21 parties.

22 Clause 24(f), as amended, refers to a
23 "projected date for completion" which is
24 manifestly not a promise to finish the project
25 by that date. It goes on to provide a remedy

1 for the purchaser if the project has not been
2 completed by December 31st 2003. The purchaser
3 may rescind and receive the return of its
4 deposit, plus interest. The very reason for
5 the existence of this provision is the absence
6 of any promise by the vendor to complete by any
7 given date. There is no other reasonable way
8 to read this clause.

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

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

18 I award summary judgment to the plaintiff
19 in the form requested in the statement of
20 claim.

21
22 [Submission on Costs]

23
24 Costs will certainly be denied to a
25 successful party where it would be inequitable

1 to award them. The concept usually is confined
2 to such things as delay or misconduct in the
3 course of the litigation itself. I do not
4 think it would be appropriate to deny a
5 successful litigant its costs (which are, of
6 course, meant to indemnify it against the cost
7 of the legal proceeding) because it has
8 benefitted by the good fortune of being able to
9 resell the disputed property.

10 I must award this plaintiff its costs on
11 the usual party and party basis and I do so
12 now.

13
14 [Submission on Leave to Appeal]

15
16 It is only in the exceptional case that
17 the Court would deny leave to appeal in a case
18 where the point at issue is the construction of
19 a contractual term. I have certain misgivings
20 about your prospects on appeal, but I am not
21 going to deny you leave to appeal.

22

23

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Henderson, J.

Henderson, J.

