26/4/02

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 434 of 2001

BETWEEN:

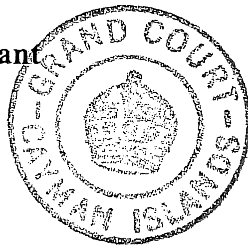
GOLFCO LTD.

Plaintiff

- and -

ANGEL BORDEN

Defendant



BEFORE: The Honourable Mr. Justice Kellock

George Giglioli of Giglioli & Co. for the plaintiff.
Clyde Allen of Woodward Terry & Co. for the defendant.

Heard: April 3, 2002

REASONS FOR JUDGMENT

On January 21, 2002 I released my reasons for judgment dismissing the plaintiff's action and granting leave to the defendant to proceed with her counterclaim. The circumstances are set forth in those reasons.

The plaintiff ("Golfco") now seeks leave to appeal to the Court of Appeal from the dismissal of its action. By reason of the Court of Appeal Rules (2001 Revision) a judgment made pursuant to order 14 is deemed to be interlocutory and accordingly leave to appeal is required, such leave to be

sought within 14 days of the filing of the judgment or order sought to be appealed from. Mr. Allen initially took the position that the application for leave to appeal had been launched out of time and accordingly should be dismissed for that reason. However it appeared on the argument of the appeal that no formal judgment had been taken out and of course there is a material difference between a judgment and reasons for judgment. As a result, I invited the parties to make further submissions in writing on that point. By letter dated April 15, 2002, addressed to Mr. Giglioli, Mr. Allen advised Mr. Giglioli that he had decided not to proceed with that point. Consequently I will entertain the application for leave to appeal on the basis that it was made in time (see the ruling made by the Chief Justice in *Panier S.A. v. Burns*, unreported, December 5, 2001, Cause # 205 of 2001).

I must therefore consider the merits of the application for leave. The key issue in this case is the interpretation to be placed on paragraph 11 (1) of the contract of purchase and sale. For convenience I will set out the relevant paragraph:

> 11 (1) If the Purchaser fails to complete in accordance with Clause 4 or if the Purchaser is in breach of any other term of this Agreement the Vendor may at any time and without prejudice to any other remedy

> which it may have, serve notice on the Purchaser of (sic) his attorneys-at-law to pay the balance of the price within 28 days after the date of service of that notice and if the Purchaser fails to pay the balance of the price within those 28 days (in respect of which time shall be of the essence) the Vendor may without prejudice to any other remedy which it may have keep the Deposit and any further instalments paid to that date absolutely as liquidated damages together with any interest that may have accrued or been earned on it and if it does so this Agreement shall forthwith end and neither party shall have any further rights of action or claim of any nature against the other in respect of it.

The plaintiff's case was and is that Golfco was entitle to invoke this clause, terminate the contract and the defendant's right to acquire title to the property, keep the deposit and the instalments of the purchase price the defendant had paid prior to the effective date of the termination of the contract, and in addition, seek judgment against the defendant for the amount of all instalments which had fallen due prior to the effective date of termination but which had not been paid as of that date. In other words, the plaintiff seeks to interpret paragraph 11 (1) of the contract as if the words "or payable" appeared following the word "paid".

The plaintiff's case is that I should have held that paragraph 11 (1) should be so interpreted. In support of this contention Mr. Giglioli argued that paragraph 11 (1) was intended to deprive the plaintiff of the right to pursue

other sorts of claims, e.g. a claim for loss of bargain. This was the only example of "other claims" Mr. Giglioli put forward. I asked Mr. Giglioli during the oral argument whether this submission amounted to the proposition that the words "any further rights of action or claim of any nature..." was to be limited to rights of action or claims which had not crystallised as at the date of the termination of the contract. Mr. Giglioli agreed that paragraph 11 (1), on the basis of his submission, was intended to bar the plaintiff from pursuing causes of action which had not matured, that is to say, causes of action based on elements, one or more of which did not then exist. A claim for loss of bargain would fall into that classification because unless and until the property was resold at a loss all of the elements of that cause of action would not exist. Mr. Giglioli went on to argue that it would be unfair to a purchaser to be deprived of the right to judgment for unpaid instalments because the purchaser had a contractual obligation to make those payments and had failed to honour that obligation leaving the vendor with title to a property that would have to be resold for a lesser price than the price the defendant (purchaser) had agreed to pay.

I pointed out that paragraph 11(1) was a provision which could only be effective if the vendor elected to invoke it and that the vendor was in a

position to determine, before electing to invoke it, whether or not it would be in its interest so to do. Paragraph 11(1) could be invoked if the purchaser had paid all but one of the instalments called for by the contract and the property had increased in value since the date the contract was made.

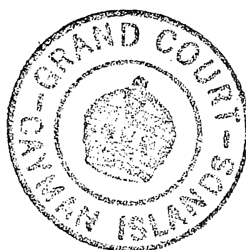
In my view Golfco has only itself to blame if its election to invoke the provisions of paragraph 11(1) was not to its advantage. I do not accept the proposition that once the purchaser had failed to pay an instalment of the purchase price and Golfco became entitled to invoke the provisions of paragraph 11(1), Golfco was entitled to wait for further defaults before electing to terminate the contract. That would mean that once the purchaser had failed to pay an instalment (so that Golfco had a right to terminate the contract and prevent the purchaser from ever acquiring title to the property), Golfco was entitled to "lie in the weeds" so to speak and thereby impose further liabilities on the purchaser who then had no right to ever acquire title to the property she had agreed to purchase.

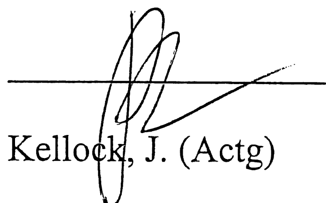
In deciding whether or not to grant leave to appeal I am guided by the direction provided by Lord Woolf MR (as he then was), reported in [1999] 1 All ER 186. Paragraph 8 of the Practice Direction reads as follows:

> "The Court which has just reached a decision is often in the best position to judge whether the case is or is not one where there should be an appeal. It should not leave the decision to the Court of Appeal. Courts of first instance can help to minimise the delay and expense which an appeal involves. Where the parties are present for delivery of the judgment, it should be routine for the judge below to ask whether either party wants leave to appeal and to deal with the matter then and there. However, if the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave".

As a result, the application for leave to appeal will be dismissed with costs to be taxed if not agreed and payable by the plaintiff to the defendant forthwith after the quantum thereof is determined.

Dated this 26th day of April 2002.





Kellock, J. (Actg)

Judge of the Grand Court