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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 323 OF 1993

BETWEEN

S. JARED PROPERTIES LTD
(IN LIQUIDATION)

PLAINTIFF

AND:

THE PERSONAL REPRESENTATIVE OF
NATHANIEL SIMPKINS III

FIRST DEFENDANT

CARMEN Z. SIMKPINS

SECOND DEFENDANT

BRUCE CAMPBELL & COMPANY
(A FIRM)

THIRD DEFENDANT

For the plaintiff: Mrs. S. Corbett
For the first and second defendants: Mr. M. Parkinson
For the third defendant: Mr. A. McLaughlin

BEFORE HARRE CJ.

JUDGMENT

Among the reliefs which the plaintiff seeks are the following which
the court has ordered shall be a subject of a trial of preliminary
issues -

- "1. A declaration that clause 4 of an Agreement for Sale between
the first and second defendants as sellers and Great Beach
Ltd. as purchaser dated 12th January 1981 is in the nature of
a penalty clause.

2. An order that the first and second defendants do forthwith pay the sum of US\$357,500 (or such other sum as this court determines) retained by the first and second defendants pursuant to clause 4 of the Agreement for Sale dated 12th January 1981."

In fact the agreement was dated the 12th February 1981, not 12th January, but nothing turns on that.

The clause 4 to which those claims refer reads as follows -

"In the event of the purchaser's default in making any of the payments in clause 2 hereof the whole balance of the purchase price shall immediately become due and the Vendors may without prejudice to any available remedy serve written notice on the purchaser requiring the Purchaser to complete the purchase contemplated by this Agreement within twenty eight (28) days after service of such notice and in the event that purchaser shall fail to complete this Agreement within twenty eight (28) days after the service of such notice as aforesaid (in respect of which time shall be of the essence) the Vendors shall be entitled without prejudice to any other available remedy to forfeit and keep absolutely the payment of the deposit and all other payments paid under clause 2 hereof whereupon this Agreement shall be automatically terminated and rendered null and void."

Clause 2 of the Agreement provided that the purchase price should be paid by a deposit and part payment of US\$65,000 upon the execution of the agreement with the balance of US\$585,000 to be paid by four instalments of US\$146,250 at six monthly intervals from the 31st July 1981 to 31st January 1983.

The event contemplated by clause 4 of the Agreement occurred. After paying the first two instalments there was a failure to pay the third and fourth. Nathaniel Simpkins III (deceased) and the second

defendant who was his wife served notice to complete which was not complied with. The Agreement terminated and they retained the deposit and all other payments made have been paid.

There is no doubt that the plaintiff is in breach of the contract. I can deal briefly with the initial payment of \$65,000 "by way of deposit and part payment" which was 10% of the purchase price. It was clearly in accordance with the long established usage as an indication that the purchaser was in earnest and can be validly forfeited. See Workers Trust and Merchant Bank Ltd. v. Dojap Investment (1993) 2 ALL. E.R. 370.

That is an exception to the general rule against penalty clauses in contracts which are to not a genuine pre-estimate of the loss which the innocent party will suffer by reason of the breach.

As a matter of construction I have no doubt that the description of the payment as "by way of deposit and part payment" means simply that if the sale goes off by reason of the purchaser's default the sum will be forfeited, but if it goes through it will be counted as part of the purchase price. Howe & anor v. Smith (1881-5) AER 201.

The difficulties in the case arise in connection with the two further payments of \$146,750 each which were made before the vendors exercised their rights under the clause 4 of the agreement for sale. The plaintiff says that the forfeiture of the payments was unlawful because clause 4 is in the nature of a penalty clause.

The question to be determined is whether clause 4 is a clause of a kind where although common law would provide no relief, equity can intervene.

Consideration of the law must begin with Stockloser v. Johnson (1954)

1 Q.B. 476. The facts of that case and a view of it expressed by Lord

Browne Wilkinson in the Privy Council case PC Worker Trust Bank v.

Dojap Investments Ltd. (1993) 2 ALL. E.R. appear from the following passage at page 375 - 6 -

"In that case there was a contract for the sale of quarry machinery to the plaintiff, the purchase price to be paid by instalments. The contract provided that in the event of a default in payment of the instalments, the vendor could retake the machinery and all instalments of the price previously paid should be forfeit. Pursuant to the contract, the plaintiff took possession and used the machinery but defaulted in payment of an instalment. The defendant forfeited the instalments already paid. In the action, the plaintiff sought to recover the instalments, alleging that their forfeiture was a penalty. The Court of Appeal unanimously held that the forfeiture did not constitute a penalty on the facts of that case but went to express conflicting views, obiter, as to whether, if the forfeiture had been a penalty, the court had jurisdiction to order repayment. Somervell and Denning LJ expressed the view that there was such jurisdiction. Romer LJ held that there was no general right in equity to mend the parties' bargain and that, even where there was jurisdiction to relieve from forfeiture, that could only be exercised by allowing a late completion to a party who was in default in performance but willing and able to carry out the terms of the contract belatedly."

Dicta of Lord Denning in Stockloser v. Johnson were applied by the Cayman Islands Court of Appeal in Beach Club Enterprises Ltd v.

Horizon Management Ltd 1980-83 CILR 223 per Carey JA at page 246 -

"There is a clear distinction between penalty cases, strictly so called, and forfeiture cases, such as the instant case. Lord Denning, M.R. in Stockloser v. Johnson (23) said this (1954) 1 Q.B. at 448-489):

"...[W]hen one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in Commissioner of Public Works v. Hills ... The claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression: see the valuable judgments of Somervell and Hodson L.JJ. in Cooden Engineering Co. v. Stanford..."

In the present case, however, the seller is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause - a forfeiture clause, if you please - permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer is to recover it, he must, I think, have recourse to somewhat different principles from those applicable to penalties, strictly so called."

What those different principles should be was the subject of sharply dissenting views appears in England. As indicated in the passage from the passage from Worker Trust and Merchant Bank Ltd v. Dojap Ltd which I have already read, they were expressed obiter. The more liberal majority view in the analysis by Denning LJ of the earlier case of Steedman v. Drinkle (1916) AC 275 -

"The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J.

has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money. Inasmuch as the only case in which this jurisdiction has been exercised is Steedman v. Drinkle, I have examined the record and would draw attention to the circumstances of that case. The agreement was in effect a hire-purchase agreement of land. The purchase-money was payable by instalments over six years, completion to be at the end of the six years, and meanwhile the purchasers were to be let into possession of the land as tenants with the instalments ranking as rent. In case of default the vendor was at liberty to cancel the contract and retain the payments which had been made. The purchasers paid the first instalment and went into possession, but they failed to pay the second instalment which was due at the end of the first year. The value of land had risen greatly during that year and the vendor seized upon the purchaser's default as giving him the opportunity to rescind the contract. Without previous warning, the vendor gave notice cancelling the contract. The purchasers at once tendered the amount due but the vendor refused to accept it. The purchasers issued a writ for specific performance and meanwhile remained in possession of the land taking the crops off it. They failed to get specific performance in the first court, then succeeded in the Court of Appeal, but failed again in the Privy Council on the ground that time was expressly of the essence of the contract. Nevertheless, the Privy Council relieved the purchasers from forfeiture of the sums already paid. The purchasers would no doubt have to give credit for the crops they had taken from the land during the three years or more that they had been in possession, but subject to that credit they would get their money back.

In the later case of Mussen v. Van Diemen's Land Co. Farwell J. said that the whole basis of the decision in Steedman v. Drinkle was that the purchasers were ready and willing to perform the contract; but I think that that is much too narrow an explanation. Readiness and willingness is essential in specific performance, and in relief from forfeiture of leases, but not in relief from forfeiture of sums paid. The basis of the decision in Steedman v. Drinkle was, I think, that the vendor had somewhat sharply exercised his right to

rescind the contract and retake the land, and it was unconscionable for him also to forfeit the sums already paid. Equity could not specifically enforce the contract, but it could and would relieve against the forfeiture."

The contrary view of Romer LJ - that recovery of money was limited to the case where the other party had not yet rescinded seems to have been based on the rule that before, but not after, rescission by a seller a buyer who is ready and willing to perform can claim specific performance. His view was that after rescission relief would only be given if there were some special circumstances such as fraud, sharp practice or other unconscionable conduct and that before rescission a buyer would only get relief if willing and able to complete. In the words of Somervell LJ, the only relief would be further time. Somervell LJ expressed his agreement with Denning LJ that the jurisdiction was wider on the basis that Re Dagenham (Thames) Dock Co. (1873) LR 8 Ch 1022, Steedman v. Drinkle (1916) AC 275 and Mussen v. Van Diemens Land Co. (1938) 1 Ch 253 indicate a wider jurisdiction, but one which would require it to be shown that the retention of the instalment was unconscionable in all the circumstances.

Subsequent cases have not confirmed the majority view in Stockloser v. Johnson, either in England or Cayman. In the English case of Galbraith v. Mitchenhall Estates Ltd (1965) 2 Q.B. 473 Sachs J followed the view of Romer LJ after concluding that when Stockloser's case came under discussion in the Court of Appeal in Campbell Discount Co. Ltd v. Bridge (1961) 2 All. E.R. 97 it was that view which was supported by Harman and Davies LJJ and also, as he understood, it by Holroyd Pearce

The following are the words of Sachs J.

"Where the opposing views have been so trenchantly, so lucidly and so fully expressed in the judgments of an appellate court by those for whom one has real respect, it would be presumption on my part to seek to add anything to the reasoning given, or to look into further authorities. It appears to my mind that the proper course for a court of first instance to adopt is to follow the line which appears most to accord with established authority. I have come to the conclusion that I ought to follow the view expressed in the judgment of Romer L.J., for the reasons which he there gave.

I would, moreover, respectfully take the opportunity to mention his citation of a judgment of Farewell J [(1954) 1 Q.B. 476, 502] Romer LJ after referring to the dictum that there is no "equity... in favour of a purchaser who has failed to complete his contract"
"through no fault of the vendor," goes on to add this: "for
"my part I share the reluctance which Farwell J. expressed to
"sponsor such an equity; it seems to me that in the long run it
"is much better that people who freely negotiate and conclude
"a contract of sale should be held to their bargain rather than
"that the judges should intervene by substituting, each according
"to his own individual sense of fairness, terms which are contrary
"to those which the parties have agreed upon for themselves."

Subsequently, in Windsor Securities Ltd. v. Loreldal Ltd & anor reported in the Times on 9th September 1975 Oliver J adopted obiter a similar view. In the words of the report -

"If his Lordship had to choose between the views expressed in the several cases referred to, he would think it preferable, particularly in the

Vacation Court to adopt the more conservative view expressed by Lord Justice Romer in Stockloser v. Johnson."

I am of the same view. However, I do not decide the case on that basis. The initial purchaser and its assignee, the plaintiff, took a gamble. They were property speculators. That did not enter into possession but after defaulting on the third instalment in 1982 they sought a six months extension to complete. In 1993 a further extension was granted for a reasonable time subject to payment of interest on the outstanding sum. That extension ran to September 1987 when the notice to complete under clause 4 of the agreement was served. In the meantime attempts were being made on the plaintiff's behalf to sell the property at a considerable profit. The original asking price was US\$3,350,000 and no offer ever approached that. The plaintiff was never in a position to offer to pay the purchase price in full after receiving notice to complete. The breach entitling the defendant to rescind occurred nearly thirteen years ago and this action was only commenced on the eve of the expiry of the limitation period after rescission.

As Denning LJ said in Stockloser v Johnson at p 492 -

"Again delay may be very material. Thus in Mussen's case the court was much influenced by the fact that the purchase had allowed nearly six years to elapse before claiming restitution."

Even on the different facts of the present case I regard it as a relevant factor that the defendants are being called upon at this late

stage to disgorge many which for years they have regarded, in accordance with the terms of a bargain freely entered into between equals, as their own and which they retained after giving every indulgence to the plaintiff.

Even on the wider view of the law expressed by the majority in Stockloser v. Johnson the plaintiff fails on the trial of the preliminary issues and its claim therein is dismissed.



G. E. Harre

Dated 2nd November 1995

G.E. Harre

Chief Justice