

J. Smellie

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 55/95

11-08-95

BETWEEN : C. DAWSON WHITTAKER PLAINTIFF
 AND : LEONARD GEORGE ROBINSON DEFENDANT

Mr. Steven Roy for the plaintiff.
Mr. Peter Broadhurst for the defendant.

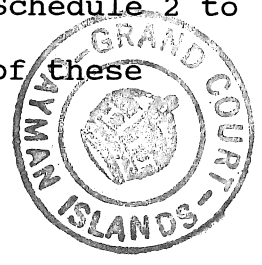
JUDGMENT

SCHOFIELD J.

On the 13th March 1995 the plaintiff obtained an order of this Court that the defendant deliver up to him possession of property comprising a house and land registered as Block 27C Parcel 493 North Sound Estates, Grand Cayman, (hereinafter referred to as "the property"). The matter is now before me for assessment of damages.

On the 7th September 1992 the parties entered into an agreement whereby the plaintiff agreed to sell the property together with certain domestic appliances to the defendant. The total purchase price was \$129,000 and the defendant was to pay that amount under the terms of paragraph 3 of Schedule 1 to the agreement and Schedule 2 to the agreement. Set out below are the relevant portions of these schedules:

"Schedule 1



PAYMENTS

3. "Initial deposit to hold property of CI\$1,000.00 to be paid immediately - receipt acknowledged.

Further down payment of CI\$4,000.00 to be paid on or before the date of October 16, 1992 and a further deposit of CI\$8,000.00 to be paid on or before October 31, 1993 (plus interest of CI\$840.00).

Balance if purchase price - namely - CI\$116,000.00 to be repaid as per schedule 2 attached, and forming part of this agreement."

"SCHEDULE 2

The balance of the purchase, namely CI\$116,000 will be financed by the Vendor as a mortgage to be amortized over 20 years at the rate of 10.5 % -repayable in full 4 years from the date of purchase.

The monthly amount to be repaid including principal and interest shall be CI\$1,200.00, as per amortization schedule attached and forming part of this agreement.

The first payment shall become due and payable on the First day of November, 1992 and shall then become due and payable on the first day of each and every month."

It seems that the purpose of this scheme of payments is to enable a purchaser of limited means, who is unable to obtain a conventional mortgage from a banking institution, to make repayments to the builder who is selling the property for a four year period. By the time the four years is up he is expected to have found financing for the



balance and will then pay the full amount outstanding on the purchase price to the builder, who is in this case the plaintiff.

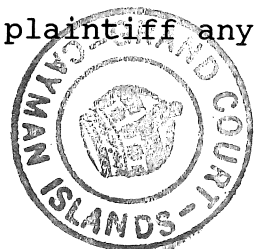
The defendant paid the initial deposit of \$1000 and the further "down payment" of \$4000 in accordance with the terms of the agreement. He has not paid the further deposit of \$8000 due on or before 31st October 1993 or the interest of \$840 calculated thereon in the agreement. Furthermore, whilst he made a number of monthly payments in accordance with Schedule 2 to the agreement, he defaulted in payment for 10 months from 1st June 1994 to 1st March 1995 which put him in arrears to the amount of \$12,000. The plaintiff claims as damages these three amounts of \$8000, 840 and \$12,000 (totalling \$20840) plus an amount of interest which he has calculated at 8 3/8 % on each sum, making his total claim \$25,810.53. It is to be noted that clause 20 of the agreement reads:

" 20. LATE PAYMENTS

Any late payments are subject to a per diem charge of interest to be added to balance owing and deducted from total payment until it is completely paid."

Clause 10 of the agreement deals with the plaintiff's right on default of payment by the defendant of any instalment under the agreement.

I have been referred to no other clause which gives the plaintiff any right other than contained hereunder.



10. VENDORS RIGHT TO TERMINATE

At any time after the date fixed hereunder for payment of any installment or the final balance of the purchase price, the vendor shall be entitled at the vendor's option and without prejudice to any other remedy, to serve written notice on the purchaser to make payment of the said installment or the said final balance as the case may be within fourteen days after the date of service of such notice and in the event that the purchaser shall fail to make payment of such installment or the final balance of the purchase price as the case may be within the said fourteen days the Vendor may elect, without prejudice to any other remedy, to keep absolutely the deposit, together with any interest that may have accrued and all part payments together with interest thereon as liquidated damages in lieu of rent and in the event of such election, the Agreement shall be forthwith terminated and neither party shall have any further rights of action or claim of any nature against the other in respect thereof.

This clause gave the plaintiff, the vendor, an entitlement upon the defendant's default to pursue any remedy open to him up to and until after service of written notice and entitled him to elect to pursue any such remedy on the failure of the defendant to make payment under the terms of the notice. However once he elected to keep the deposit and part payments already paid as liquidated damages, and to thereupon terminate the agreement he lost all further rights of action and claim.



against the defendant. That he exercised that election is the way his case is put in the statement of claim and by his attorney on the hearing of this summons. The plaintiff exercised this election and has terminated the agreement. He is not then entitled to pursue this further claim for further damages.

Whilst this may be an unusual agreement to enter into in this kind of transaction it is ,I am satisfied what the parties intended and agreed to by the terms of clause 10. It is not unconscionable in effect in that the plaintiff has recovered the property, have kept all payments already made under the agreement and gets the benefit of any increase in the value of the property from the date of the agreement.

I therefore dismiss this application for assessment of damages and the costs on the summons will go to the defendant.

Dated this 11th day of August , 1995.



A handwritten signature in dark ink, appearing to read "D. Schofield", is written over the printed name.

D. Schofield

Judge